

The Culture-Responsibility Relationship in the Criminal Law of England and
Wales

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Abstract

This thesis seeks to answer the question *how should the criminal law of England and Wales respond to the relationship between culture and legal responsibility?* It undertakes a socio-legal and interdisciplinary analysis of the relationship between culture and legal responsibility within the parameters of (i) the foundations, practice and policy of the criminal law of and criminal justice system in England and Wales; and (ii) understandings of multiculturalism as social reality, policy and philosophy within the socio-political system of the United Kingdom in the twenty first century. The analysis therefore draws on theory, practice and policy to develop a renewed and specifically nuanced 'culture-responsibility relationship', distinguishable from the 'cultural defence', and its importance for contemporary justice is established. Evidence is presented to confirm that the criminal law and criminal justice system of England and Wales manifest an absence of consistent and coherent engagement with culture and with the culture-responsibility relationship. Multicultural policy in turn manifests an absence of engagement with the criminal law. These omissions need to be addressed. A practical and policy-facing framework for the place of the culture-responsibility relationship in the criminal law and criminal justice system of England and Wales is therefore suggested. This reflects the current limits of the law and is intended as a starting point for ongoing dialogue.

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CHAPTER 1

CONTEXT AND OVERVIEW

*'Culture - like religion and nation and race - provides a source of identity for contemporary human beings. And like all three it can become a form of confinement, conceptual mistakes underwriting moral ones.'*¹

1.1 Introduction

The research question at the heart of the thesis asks '*how should the criminal law of England and Wales respond to the relationship between culture and individual legal responsibility?*' The question arises from the hypothesis that there is an absence of consistent and coherent engagement between the concepts of culture and legal responsibility in the practice of our criminal law and at policy level. There is, arguably, a relationship or at least the perception of a relationship between culture and responsibility and throughout the thesis this will be called the 'culture-responsibility relationship'. The existence of this relationship needs to be firmly recognised, its essence understood and its importance for contemporary criminal justice established. The thesis can be seen as a case study that problematises the culture-responsibility relationship within the wider socio-legal context of the failure of the criminal law to embrace the presence of cultural diversity both historically and in the early years of the twenty first century and within the still

¹ Kwame Anthony Appiah, 'There is no Such Thing as Western Civilisation' *The Guardian* (London, 9 Nov 2016) <<https://www.theguardian.com/world/2016/nov/09/western-civilisation-appiah-reith-lecture>> accessed 28th September 2018.

Appiah Writing in *The Guardian* on 9th November 2016 following the 2016 Reith Lectures on 'Mistaken Identities'. This piece is based on the 4th lecture on 'Culture'.

wider political realm of addressing the tension that cultural diversity brings to a liberal democracy under the Rule of Law.

With a view to achieving the fullest possible understanding of the culture-responsibility relationship within this wider domain, this thesis looks to a number of sources. As well as law, political theory on multiculturalism, social, political and legal theory concerned with justice and the disciplines of anthropology, sociology, philosophy and criminology are all drawn upon. This is not a new approach and there is a small body of academic literature that addresses the difficult intersection of criminal law and cultural diversity in this way. This thesis takes existing work a step further, developing a nuanced and specific understanding of the culture-responsibility relationship and undertaking a systematic review of the practice and policy of the criminal law and criminal justice system in England and Wales and of multiculturalism in the United Kingdom with a view to suggesting a framework for the ongoing development of that newly refined relationship. The thesis therefore adopts a socio-legal and truly interdisciplinary approach to the research question and means that the practice based and policy-facing framework suggested in Chapter 5 is theoretically grounded and roundly considered.²

Law and culture are inseparable but a cultural hegemony has been presumed and, as Cotterrell points out, in the past culture seemed 'irrelevant' or

² There has been a movement in recent years towards interdisciplinary academic research. This stems in law from the 'Law and Society' movement '...a scholarly enterprise that explains legal or social phenomena in social terms.' Lawrence M. Friedman, 'The Law and Society Movement' (1986) 38(3) *Stanford Law Review* 763,763. Feminist methodology is also drawn upon because of the gendered implications of the culture-responsibility relationship, discussed in section 2.4.

'unproblematic' in legal thinking.³ Multiculturalism has certainly made culture relevant and arguably problematic and this difficulty has manifested itself most controversially in the concept of the 'cultural defence'. Foblets and Renteln assert that courts worldwide have entertained arguments based on cultural factors for centuries, but it is generally accepted that there is no recognized defence based on 'culture' in the criminal law of England and Wales.⁴ Consider then these three cases across place and time. Firstly, Mr Purefoy, 'a man of perfect honour and humanity', tried for causing the death of an opponent during a duel in 1794. Baron Hotham directed the jury, gathered from the duelling class, to reconcile the facts to their conscience and acquit '...though the verdict may trench upon rules of rigid law, yet the verdict will be lovely in the sight of God and Man.'⁵ Why? Duels were seen in society as a matter of 'honour' and thus outside the law of murder.⁶ This was so despite the clear statement of law by Judge Foster in 1762 that '...deliberate duelling, if death ensueth, is in the eye of the law murder, for duels are normally founded in deep revenge.'⁷ Despite over 400 deaths in duelling from 1785-1845 Banks reports that between 1815 and 1845 there were only 11 duelling trials resulting in 7 acquittals, 2 manslaughter convictions (based on provocation) and 2 murder convictions (but with the capital penalty reduced to 12 months in prison in each case). Colonel Campbell was the only British duellist convicted of murder and given the death penalty in the

³ Roger Cotterrell, 'The Struggle for Law: Some Dilemmas of Cultural Legality' (2009) 40 (4) *Journal of Law and Society* 373, 407.

⁴ Marie-Claire Foblets and Alison Renteln Dundes (eds), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Oxford, Hart Publishing, 2009). In *Baronet v Allain* two French men were accused of duelling and refused bail in the way that English men would have been refused bail. Their culture was not relevant in any way to the bail decision or to questions of guilt. *Baronet v Allain* [1852] 169 ER 633.

⁵ Baron Hotham as quoted in Stephen Banks, 'Very Little Law in the Case: Contests of Honour and the Subversion of the English Criminal Courts, 1780-1845' (2008) 19 (3) *King's Law Journal* 575, 586.

⁶ Adrian Gray, *Crime and Criminals of Victorian England* (Stroud, History Press 2011).

⁷ Sir Michael Foster, *Crown Court Cases and Crown Law* (London 1762) 296 as quoted in Banks (n 5) 577.

nineteenth century but that is because he behaved with 'dishonour' in breaking the rules of the duel.⁸ It seems that the duel had its own laws and its own 'culture' and that acting according to that 'culture' provided a sort of 'cultural defence' even to the crime of murder. This could be construed as an early example of the 'sub-culture'.⁹

Secondly, the Pinto Case.¹⁰ Three defendants, Angolan immigrants who were members of a protestant evangelical church and who held a belief in African cosmology, were convicted of child cruelty (or of aiding and abetting child cruelty) when a 'malevolent spirit' was exorcised from a child at their request. At trial, the defence called a 'cultural profiling expert' from Kings College London but her evidence was not accepted, the judge saying it looked like a 'cultural horoscope'. On appeal against sentence the appellants argued that because the child was possessed by spirits they were not '...as culpable as somebody who perpetrates cruelty deliberately and out of malice, inflicting violence gratuitously.' The Court of Appeal accepted that two of the appellants did hold the 'deluded belief' that the child was possessed but said that it was '...necessary to make it clear that such belief provides no mitigation and ...does little to reduce the culpability of the offenders'.¹¹ However, each of the defendants had their sentences reduced because this was not the 'worst case scenario' of child cruelty.

⁸ Banks 594.

⁹ Sub-cultures are considered in criminology as 'exaggerations, accentuations or editings of cultural themes prevalent in the wider society' and the criminologist is concerned with subcultures that condone delinquent acts . P Rock, in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (4th edn, Oxford, Oxford University Press 2007) 31 and are discussed further in Chapter 2.

¹⁰ *R v Sebastian Pinto and others* [2006] EWCA Crim 749.

¹¹ *ibid* 753.

Thirdly the 'Pitcairn Case' where 55 charges of rape, indecent assault and incest involving girls as young as 12 were brought against 7 men living on the island of Pitcairn.¹² Following the conviction of 6 of the defendants in the Pitcairn Supreme Court and appeal to the Pitcairn Court of Appeal against conviction, the Privy Council were asked to make a decision on sovereignty (and found that the laws of England did extend to Pitcairn).¹³ It was also asked to comment on the suggestion that Pitcairn 'may in some way be an anarchic or lawless society' but found that the 1956 Sexual Offences Act had been promulgated, that Pitcairn was a developed society where '...there was never any contention that the appellants...did not or could not have reasonably known that the allegations against them constituted serious criminal offending.'¹⁴ This was so despite suggestions identified by the Foreign and Commonwealth Office that '... the line of offending that had been revealed was a cultural trait' and despite the question throughout each stage of the trial '...as to whether Pitcairn's cultural particularity and unique isolation were sufficiently recognized.'¹⁵ In the Pitcairn Supreme Court the pre-trial hearing noted '...what makes this pre-trial hearing so distinctive is not only the constitutional importance of the issues...but the context in which the potential parties live. Pitcairn hosts a tightly-knit community of inhabitants who, due to population size and the Island's remoteness, rely heavily on each other in all of the ways that matter.'¹⁶ In other words, the cultural dimension of the

¹² The men were convicted in the Pitcairn Islands Supreme Court (*Queen v 7 Named Accused* PNSC 1:SC 04-04-19(19 April 2004)) and The Public Defender challenged the jurisdiction of the UK in the Pitcairn Court of Appeal (*Queen v 7 Named Accused* [2004] PNCA 1-7 2004 (5 August 2004)) who referred the matter to the Privy Council.

¹³ *Christian and Ors v The Queen* [2006] UKPC 47.

¹⁴ *ibid* 118.

¹⁵ The Foreign and Commonwealth Office correspondence is referred to by Lord Hope of Craighead in the Privy Council judgment. *Christian and Ors v The Queen* [2006] UKPC 47 [50]. The cases are analysed in detail by C O'Connell, 'A Million Mutinies Now: Why Claims of Cultural Uniqueness Cannot be used to Justify Violations of Basic Human Rights' in Dawn Oliver (ed), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (Oxford, Oxford University Press 2009) 137.

¹⁶ *Queen v 7 Named Accused* PNSC 1:SC 04-04-19(19 April 2004) Introduction [5].

trial divided opinion with some attacking the prosecutions as cultural imperialism and others seeing a need for the sovereign authority to intervene to ‘...redress barbaric behaviour in the name of human rights, the protection of children and gender inequality.’¹⁷ In 2014 similar allegations were made (and dismissed) against residents of St Helena.¹⁸

Although centuries or worlds apart (and of course the outcomes in each of these cases are a product of their historical situation and may have been decided differently in different times) culture is intrinsically present in each of these judgments. The disparate outcomes reveal not only an inconsistent approach towards culture but a more understanding approach where that culture resonates with or is part of the culture of the majority so that explicit engagement with the ideas of the ‘minority’ is only identifiable in the cultural division between ‘us’ and ‘the other’. Nineteenth century British aristocratic duelling is constructed as an ‘honourable’ practice worlds away from the ‘honour’ based violence we condemn today perhaps because it is much more difficult to understand the honour of ‘the other’ and the culture of the alien has no place in our own social and legal understandings. This raises huge questions for fairness and in turn for justice. In each decision we see a failure to acknowledge a link between culture and responsibility, but it is there, beneath the surface in the duelling case where it is recognized as a justification for killing, in the courtroom in the malevolent spirit case where it is acknowledged but dismissed as irrelevant and in the public domain in the sexual abuse case where it is disregarded as abhorrent. Lacey

¹⁷ O’Cinneide, (n15) 134.

¹⁸ These allegations were raised late 2012 and initially investigated by the Lucy Faithful Foundation and then reviewed by Northumbria Police and an Independent Inquiry headed by Sasha Wass QC was established on 20 November 2014 by the Foreign Secretary and reported in December 2015. <https://www.gov.uk/.../the-wass-inquiry-report-into-allegations-surrounding-child-safe> accessed 6th June 2018.

acknowledges this latent existence of culture in the courtroom in, for example, rape trials where ‘...the defendants beliefs about women’s sexuality, and about appropriate inference from behaviour, surely count as deriving from his ‘way of life’.’¹⁹ Thus sometimes without even being aware of it, courts have to contend not only with their own cultural standpoint but with the culturally embedded beliefs of defendants, even where they do not manifest as ‘other’. The disparate approaches to culture identified in these decisions is troubling. But the failure of the courts to outwardly acknowledge culture and its possible relationship with responsibility is more worrying. And the relationship between law and culture can be confusing. In March 2013 the Law Society published a Practice Note aimed at high street solicitors on producing wills under Sharia law. This led to the headline ‘Sharia Law is adopted by Legal Chiefs’, an outrage about the relentless march of Islamic law and culture into British society and calls for a Select Committee to look at the extent of Sharia law in Britain.²⁰ Yet there has always been clarity around the place of Islamic law, with An-Nacim stating that Islamic law cannot be the state law of any state and that ‘...the religious authority of Islamic law for Muslims exists outside the framework of state’ and that ‘...compliance with

¹⁹ Nicola Lacey, ‘Community, Culture, and Criminalization’ in Will Kymlicka, Claes Lernestedt and Matt Matravers (eds) *Criminal Law and Cultural Diversity* (Oxford, Oxford University Press 2014) 49.

²⁰ *The Telegraph* 22nd March 2014 ran this headline.

<https://www.telegraph.co.uk/news/religion/10716844/Islamic-law-is-adopted-by-British-legal-chiefs.html>

Accessed 1st October 2018.

The call for a Select Committee was led by the National Secular Society and the One Law For All campaign. In May 2016 the Home Office did announce an independent review of the application of Sharia law. This was led by Mona Siddiqui and the committee reported in February 2018. The review found that there are between 30 and 85 Sharia Councils in England and Wales that rule on matters of family law. Their decisions can be discriminatory to women. The committee recommended that religious marriages need to be undertaken alongside civil marriages and that over time the use of Sharia councils be reduced. This ties into concerns over legal pluralism. See

<https://www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review>

accessed 1st October 2018.

Islamic law cannot be legal justification for violating state law.²¹ These concerns alone go some way towards justifying this analysis of the culture-responsibility relationship. They begin to highlight some of the challenges inherent within this complex relationship. Most of all they begin to demonstrate a fear of the concept of culture, something that we will return to throughout the thesis.

This Chapter continues in section 1.2 by setting out the broad context within which the research question is situated and clearly setting out the aims and objectives of the thesis. Section 1.3 introduces the literature associated with the culture-responsibility relationship and explains why a formal literature review is not the best approach to scoping the field. Section 1.4 sets out the methodology and research methods used and section 1.5 sets out a summary of the arguments and themes running through the thesis.

²¹ Abdullahi Ahmed An-Nacim, 'The Compatibility Dialect: Mediating the Co-Existence of Islamic Law and State' (2010) *Modern Law Review* 73 1.

1.2 Aims and Objectives of Thesis

Successive United Kingdom governments have not formally adopted or declared a policy of 'multiculturalism' yet the term 'multicultural' can be used to describe our contemporary society which comprises an '...ethnically diverse population brought together by post-colonial migration' and of course by a variety of other population movements over a long period of time including most recently migration from the European Union and by those seeking refugee status or political asylum from across the world.²² A diverse population brings with it a diverse array of cultural beliefs and practices. The intersection between these divergent cultural values is not straightforward and where values and ideas clash, as they often do, how should a western liberal democracy navigate its way through the demands of a multicultural population on the one hand and the preservation of an existing social order under the rule of law on the other? Political theorists have been considering the tensions inherent in balancing these competing interests for a long time and this pressing question is attracting attention at the highest levels of policy making. UNESCO has included the study of multicultural societies in its MOST Programme because '...multiculturalism embodies the idea of reconciling respect for diversity with concern for societal cohesion and the promotion of universally shared values and norms.'²³ However, the question is pertinent too in the field of criminal law and criminal justice where new approaches to notions such as rights and equality challenge our settled understandings of the concepts of fairness and justice. Yet, as Kymlicka,

²² Anne Phillips, *Multiculturalism Without Culture* (Princeton, Princeton University Press 2007) 4. Chapter 4, section 4.2 of this thesis gives a summary of the history of immigration to the UK since around 1800.

²³ MOST is the 'Management of Social Transformation' Programme, a UNESCO programme that promotes social research and focuses on building bridges between research policy and practice <http://www.unesco.org/new/en/social-and-human-sciences/themes/most-programme/> accessed 11th July 2018.

Lernestedt and Matravers point out, ‘...there is one particularly important domain of public life where the challenge of cultural diversity has been underexplored, namely the criminal law.’²⁴

To date there have been a few examples of endeavours within the criminal law and criminal justice system to respond to or at least to recognise these tensions. These are discussed in detail in Chapter 3. Specific ‘cultural offences’ have been created and administrative adjustments have been made in the shape of allowances for largely uncontroversial cultural practices.²⁵ In the field of law reform passing reference has been made to multiculturalism, for example when the Law Commission considered mixed motives such as honour killing in excluding ‘a considered desire for revenge’ as a qualifying trigger in the reform of the law on provocation.²⁶ The criminal courts too have not shied away entirely from the influence of multiculturalism as evidenced by a limited judicial exploration of the interaction between law and culture. As early as 1973 the House of Lords (in a case involving conspiracy to corrupt morals) stated that ‘...the jury should be invited, where appropriate, to remember that they live in a plural society with a tradition of toleration towards minorities and that this

²⁴ Will Kymlicka, Claes Lernestedt and Matt Matravers (eds) *Criminal Law and Cultural Diversity* (Oxford, Oxford University Press 2014) 1.

²⁵ There has been legislation aimed at prohibiting female genital mutilation (The Female Genital Mutilation Act 2003) and forced marriage (Antisocial Behaviour Crime and Policing Act 2014). These are discussed in detail in Chapter 3 below. Exceptions and exemptions are discussed in depth in Will Kymlicka, *The Rights of Minority Cultures* (Oxford, Oxford University Press 1995). An example of such an administrative adjustment is the relaxation of the requirement that helmets should be worn by construction workers on site for Sikhs (S11 Employment Act 1989). However, liability for accidents on site will be limited to that which would have applied had the individual been wearing a helmet. Obviously the decision about what to criminalise is relevant to the limits of criminal responsibility and this is discussed in section 3.2 in the context of the purpose of the criminal law. The focus of specific cultural offences is forward looking responsibility whereas the focus of this thesis is on the backwards looking attribution of responsibility at trial or in sentencing.

²⁶ Law Commission, *Partial Defences to Murder* (Final Report 6th August 2004) <http://lawcommission.justice.gov.uk/docs/lc290_Partial_Defences_to_Murder.pdf> accessed 10th July 2018.

atmosphere of toleration is itself part of public decency.²⁷ It could be argued that these measures represent a satisfactory response to the demands of a multicultural society and that the role of the criminal law is indeed to be reflective and responsive to individual situations as they arise.²⁸ If these endeavours are adequate then why look further?

An alternative viewpoint, and one offered here, is that these measures amount to no more than *ad hoc*, temporary and reactive solutions to discrete and distinct problems, addressing only the narrowly defined pressing issues of the day. Perhaps this is because, following a Critical Legal Studies rationale, there is a fundamental problem with the law which, in addition to serving the interests of the powerful, is blinkered to wider contextual issues and merely glosses over complexity in an attempt to provide a 'quick fix solution.'²⁹ In a Marxist critique of the legal system Miliband identifies legal conflicts as 'problems' that have to be 'solved' on the basis '...that conflict does not or need not run very deep.'³⁰ Of course, Miliband is referring to the deeper conflict of domination and subjection underlying these seemingly superficial legal conflicts and the laws failure to address it. This failure can be likened to the shortcomings evidenced today in the approach to the deeper conflict generated by cultural diversity in the twenty first century. Whilst the measures taken at the interface of law and cultural diversity may appear to 'do the job' in the short term such piecemeal approaches merely scratch the surface, providing solutions that do not adequately reflect the

²⁷ *Knulier v DPP* [1973] AC 435 at 439.

²⁸ For example, the law criminalising forced marriage (S104 Antisocial Behaviour Crime and Policing Act 2014) represented a dramatic change in the Government's previous position following a high profile media campaign focusing on the social issues of forced marriage.

²⁹ This critique is offered by Kelman. Mark Kelman, (1987) *A Guide to Critical Legal Studies* (Harvard University Press 1987) 242.

³⁰ Ralph Miliband, *Marxism and Politics* (Delhi, Aakar Books 2011).

complexities of the meaning of 'multiculturalism' and its implications and indeed the meaning of 'culture' itself and here once again we can hypothesise that the criminal law and criminal justice system harbour a fear of culture. What we need is '...a law appropriate for a society of permanent cultural diversity.'³¹ We need a new approach.

At its most complete this approach would encompass a whole scale review of the competing issues identifiable at the intersection between the criminal law of England and Wales and cultural diversity and subject them to a thorough scrutiny that looks beyond the law itself with a view to achieving what Norrie refers to as a 'depth ontology.'³² From this understanding we could seek to formulate a thoroughly considered framework grounded in theory and informed by empirically gathered evidence from the voices of all across society. We are in what political philosophers call a 'post-recognition era' where we need to move on from the politics of recognition to acknowledge the difficulties of balancing the dual demands of accommodation and stability and to call on our resources including 'the pacifying power of the law' to seek and find justice in a culturally diverse world.³³ This analysis of the culture-responsibility relationship, in searching for an answer to the research question and in suggesting the ensuing framework for a way forward, is perhaps a step in bringing this ambitious project to fruition, the beginning of an answer to Shabani's widely framed question '...how can the

³¹ Cotterrell (n3) 374.

³² Alan Norrie, *Law and the Beautiful Soul* (London, Glasshouse Press 2005) 11, at 12 Norrie argues that '...legal forms appear as the surface phenomena which are explained by underlying social relations' and it is only through understanding these relations that we can truly understand law.

³³ This is referred to in Kant's 1795 essay *Perpetual Peace: A Philosophical Essay* in James Bohman, Matthias Lutz-Bachmann (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge MA, MIT Press 1997).

practices of law making help us to confront the challenges of stability and solidarity in a post recognition era?’³⁴

It is also a ‘new approach’ to the development of the criminal law in a multicultural age in the following ways. As seen above, it moves the culture-responsibility relationship beyond the black letter of the law and into the socio-legal and draws together relevant ideas from a number of complementary disciplines but, more importantly, it calls for a tightly bound analysis and policy facing development of the culture-responsibility relationship in the following two ways:

- It places at its heart the *relationship* between culture and responsibility and the potential application of that relationship in *individual* cases (Chapter 2).
- It seeks to understand and develop that relationship within two distinct and defined parameters, namely the theory, practice and policy of the criminal law and criminal justice system of England and Wales (Chapter 3), the social reality and policy of multiculturalism in the United Kingdom in the early years of the twenty first century (Chapter 4).
- It makes practical recommendations for the place of the culture-responsibility relationship in the criminal justice system, a forward looking framework to be seen as a starting point for dialogue about the ongoing development of that relationship (Chapter 5).

This specifically nuanced culture-responsibility relationship thus becomes a strong and academically plausible concept, insulated as far as it possibly can be from the challenges from the theoretical field which seem to come to light when culture and responsibility are mentioned in the same breath (addressed in section 2.4) and bolstered by ideas of justice. It is particularly important that the culture-responsibility relationship be analysed and moved forward under an umbrella of legal and political theory which seeks to deepen our understanding of how justice

³⁴ The reference to a ‘post-recognition era’ is identified and described by Shabani. Omid A Payrow Shabani (ed), *Multiculturalism and Law: A Critical Debate* (Cardiff, University of Wales Press 2007) 1.

may be best achieved in this multicultural era. Cotterrell asks ‘...what general challenges are posed for legal theory...by multiculturalism in complex western societies today?’³⁵ His question can be turned on its head to ask ‘how can legal (and political) theory help complex western societies in facing the challenges of multiculturalism?’ Either way, the thesis provides the opportunity for theory to interact more closely with ideas of culture and responsibility and the relationship between them. As Cotterrell points out, culture influences regulation in many legal fields but legal theory has not caught up with social reality because ‘...modern juristic legal theories have usually conceptualised laws regulated population as an undifferentiated social field made up of citizens or subjects assumed to be treated equally by law.’³⁶ But ‘justice’ needs to look further than to the demands of multiculturalism and in particular we need to be mindful of feminist concerns.

A first step towards justice is to establish an essential distinction between the culture-responsibility relationship and the concept of the ‘cultural defence’. The ‘cultural defence’ emerged in academic literature in the late 1980’s, allegedly from a Harvard law student’s essay.³⁷ By the mid 1990’s a body of largely feminist work had emerged highlighting the potential for injustice where accommodation is made on the basis of culture. The concept of the ‘cultural defence’ still has supporters but it has detractors too and arguments against it (discussed in section 2.4) remain in the ether influencing attitudes and perhaps helping to

³⁵ Roger Cotterrell, ‘The Struggle for Law: Some Dilemmas of Cultural Legality’ (2009) 40 (4) *Journal of Law and Society* 373, 374.

³⁶ *ibid* 378.

³⁷ ‘Cultural Defense in the Criminal Law’ (1986) 99 (6) *Harvard Law Review* 1293. These notes are said to be written by an unnamed Harvard undergraduate who is thought to be the first to have used the term the ‘cultural defence’. The source of the origin of the ‘cultural-defence’ in academic literature is identified by Levine. Kay L Levine, ‘Negotiating the Boundaries of Crime and Culture: A Socio-Legal Perspective on Cultural Defense Strategies’ (2003) 28 (1) *Law & Social Inquiry* 39.

reinforce a negativity towards the culture-responsibility relationship. Part of the problem with the 'cultural defence' is that of time. It emerged when understandings of multiculturalism looked very different to the way they do today. The social reality of twenty first century multiculturalism in the United Kingdom is examined in section 4.2. Throughout the literature on the 'cultural defence' we see references to defendants as 'members' of groups and to 'cultural practices' and degrees of acculturation. But for our purposes whilst culture is, for the sake of argument '...a shared vocabulary of tradition and convention', it is only, as we will see in Chapter 2, the contribution of that shared meaning to personal identity in individual cases that can be considered in relation to 'defence'. Another part is place. In legal discourse the 'cultural defence' relies on a handful of largely US sensationalist and well documented cases that undermine the subtleties of the culture-responsibility relationship and is grounded largely in the idea of cultural rights and even cultural protection without really considering the individual defendant and the potential effect of culture upon him.³⁸ In other words, the 'cultural defence' does not enhance the quest for what Lernestedt calls 'true blameworthiness'.³⁹

The main difficulty, however, with the 'cultural defence' is that of definition. What is meant by 'defence'? The terms 'defence' and 'evidence' are used

³⁸ These are, for example

- *People v Dong Lu Chen* (1989) No. 87-7774(N.Y. Supreme Court) where Chen killed his wife after learning of her adultery, his defence being that he was driven by culture to behave in this way.
- *People v Kong Moua* (1985) No. 315972 (Fresno County Superior Court) where Moua pleaded culture as an excuse for the kidnap and rape of his bride in the form of the Laotian practice of *zij poj niam* or 'marriage by capture'.
- *People v Tou Moua* (1985) No. 328106 (Fresno County Superior Court).
- *People v Fumiko Kimura* (1985) No. A-091133 (Santa Monica Superior Court) a case involving parent-child suicide where a Japanese mother attempted to drown herself and her two daughters because of the shame of adultery in Japanese culture.

³⁹ Kymlicka, Lernestedt and Matravers (n 24) 26.

interchangeably within the literature with the former including anything on a spectrum from complete acquittal to mitigation in sentencing. Definition has become confused with purpose too, with, for example, Renteln claiming that ‘...a cultural defence is necessary to ensure that cultural evidence is considered by the courts.’⁴⁰ Even where commentators take a more legalistic approach in suggesting definition this may not always bear the scrutiny of clear legal thinking.⁴¹ And so the culture-responsibility relationship must be divorced from the ‘cultural defence’.⁴² Despite the lack of definition and disagreement around purpose, those addressing this issue of culture in the criminal law call for all actors within the legal system to consider cultural information with greater sophistication and to recognise ‘...the need to set standards for incorporating cultural information in judicial proceedings.’⁴³ This, of course, is absolutely endorsed here.

Returning to the first of the three ways in which this thesis represents a new approach, we need to explore further the idea of *relationship*.

Relationship in Individual Cases: The most important word in the thesis is *relationship* because it is argued from the outset that culture can only have a bearing on legal responsibility where a relationship between that responsibility and culture is established. Whilst legal theorists have offered general theories of responsibility in abundance none seem to have picked up on the possibility of a

⁴⁰ Alison Dundes Renteln, *The Culture Defense* (Oxford, Oxford University Press 2005) 102.

⁴¹ Woodman, for example, defines ‘defence’ as including grounds of mitigation.

Gordon R Woodman ‘The Culture Defence in English Common Law: The Potential for Development’ in Foblets and Renteln (n 4) 9.

⁴² At this stage of course a definition (or more realistically a clear explanation) of the culture-responsibility relationship has not been offered either but this will be addressed in section 2.4.

⁴³ Jamie Rowen, ‘Reviewed Work(s): Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense by Marie-Claire Foblets and Alison Dundes Renteln’ (2010) 44 (2) Law & Society Review 411.

relationship between culture and responsibility.⁴⁴ Tadros, writing in 2013, obliquely recognises this omission and comes close to engaging with multiculturalism in stating:

‘One noteworthy feature of much of the recent work done in the philosophy of criminal justice is that relatively little special attention has been given to the idea that citizens in a liberal political regime will have divergent moral conceptions many of which it will be reasonable to believe...one important question for political theorists is how those with divergent views can be expected to live together in a way that is stable and respectful of each other.’⁴⁵

And yet, Tadros himself does not pursue such ‘divergent moral conceptions’ in the context of culture or indeed go on to engage with culture in any guise. Political philosophers, on the other hand, have considered the relationship between culture and responsibility but generally at a more abstracted group level leading Kymlicka to demand that they ‘...should contemplate the individual more carefully.’⁴⁶ And *individual* too is an extremely important word in the thesis. There is an argument that the endeavours of the criminal law to respond to or recognise the tensions in our multicultural world have traditionally revolved around ‘groups’ (although in England and Wales this has been perhaps more of a theoretically driven aspiration than a reality because as we will see in Chapter 3 there has been minimal engagement between the criminal law in this jurisdiction and

⁴⁴ The following textbooks, all broadly on the topic of legal responsibility and all written within the last 11 years, were chosen randomly and checked for references to culture and multiculturalism and not one of them addressed these issues:

Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford, Oxford University Press 2016).

Antony Duff, (2007) *Answering for Crime: Responsibility in the Criminal Law* (Oxford, Hart Publishing 2007).

Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford, Oxford University Press 2010).

Victor Tadros, *Criminal Responsibility* (Oxford, Oxford University Press 2007).

⁴⁵ Tadros, V. (2013) ‘Introduction: Political Philosophy and Criminal Justice’ *Criminal Law and Philosophy* 7(2) 179-184 179.

⁴⁶ Kymlicka, Lernerstedt and Matravers (n 24) 6.

culture). Kymlicka, in earlier work, argues that there is an obligation on states to provide 'cultural freedom' for groups because toleration alone is 'benign neglect' and this freedom comes through states providing special compensation for 'minority cultural groups'.⁴⁷ Kymlicka has refined his work to accept that at times cultural rights may infringe upon individual autonomy and concedes that as ideas about what culture is have developed the earlier body of thought on multiculturalism, embedded in the idea of the group, can be challenged.⁴⁸ This thesis is therefore clear from the outset that the culture-responsibility relationship is merely a possibility, a paradigm to be considered and applied if and where appropriate in each unique and individual case. It is not a right; it is not of universal application although it is universally available. And it is very much something that needs to work inside the criminal law of England and Wales, an important factor that should allay fears of legal pluralism, something that we will return to in section 2.4.⁴⁹ In this way it is a challenge but arguably, as Lacey says, it is '...analytically indistinguishable from that of how the criminal law should respond to the problem of any situational differences' and therefore not something to be feared but a tool for justice in a multicultural world in deserving cases.⁵⁰

⁴⁷ Will Kymlicka, *Liberalism, Community and Culture* (Oxford, Oxford University Press 1989)187.

⁴⁸ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon 1995) 95.

As well as the emphasis on groups there is an emphasis on rights and in Chapter 4 we will see the emphasis in both multicultural policy and philosophy on the concept of rights. But rights have a corollary and that is responsibility.

⁴⁹ The term legal pluralism here is used in the context of national state laws. However, in a way our legal system is pluralistic in accommodating international law, EU Law, devolved government and its laws. Pluralism can be widely construed too outside of the legal domain and we will return to the ideas of cultural pluralism and moral pluralism in Chapter 4.

⁵⁰ Lacey, N. 'Community, Culture and Criminalization' Chapter 3 in Kymlicka, Lernerstedt, and Matravers, (n24) 52.

Two Distinct and Defined Parameters: Secondly, the new approach situates the culture-responsibility relationship within two distinct and defined parameters and the selection of these needs explanation. Much of the literature surrounding the 'cultural defence' is generic rather than jurisdiction specific. However, if a system of law is to respond adequately to the demands of a multicultural population and engage meaningfully with the concept of culture then any suggested framework for a way forward needs to be offered within the constraints of that specific legal system. The criminal law of England and Wales has features that are deeply entrenched and, being (arguably) naturally averse to change and reform we need to consider how far these standards can be expected to shift. How far, for example can the standard of 'reasonableness' move? Norrie writes of *The Mysterious Case of the Reasonable Glue Sniffer* advancing the idea that moral contextualism (which could encompass culture) is a more meaningful place from which to assess 'reasonableness' than orthodox subjectivism, yet it is perhaps difficult to imagine a wholesale re-evaluation of one of the standards that has underpinned our criminal law for centuries.⁵¹ We therefore need to consider the culture-responsibility relationship within the confines of the foundations of the criminal law of England and Wales (remaining aware of the restrictions that such principles, values and systemic factors impose yet being open minded to challenging them, to pushing the boundaries) and the living practice and policy of the criminal law and criminal justice system.

As regards the specificities of multiculturalism and cultural diversity within the United Kingdom's socio-political system, this is ever changing but is a result of

⁵¹ *The Reasonable Glue Sniffer* is based on *R v Morhall* [1995] 4 All ER 658 and found in Norrie (n 32) 111.

twentieth and twenty first century migration and an ensuing immigrant and now migrant population. Our response must reflect this. Things look very different in jurisdictions with an indigenous minority population or in a post-colonial state where redress is sought or offered for the injustices of the past. Our response must be socially and politically specific, taking account too of the difficulties identified in section 2.4 as being inherent within the culture-responsibility relationship, in particular the dangers of essentialising and its implications for agency and free will, competing claims of universalism and cultural or moral relativism and claims of the prioritisation of one cultural group over women or over another cultural group.

A Forward Looking Framework: Thirdly, it seeks to provide a forward looking framework for a new approach to the culture-responsibility relationship grounded in practice, policy and theory. A normative schema is being sought but the framework is not constructed as a formal and rigid solution to the problem of culture and criminal responsibility. Instead, having defined the objectives of the law in seeking a just way forward and identified and examined the issues at stake, the framework is conceived as a working document and a starting point for dialogue between interested parties. Looking to Dworkin's ideas of law as *communitas* and the search for the 'best meaning' of law, Cotterrell advocates we search for the 'best mutual understandings' of how society should be governed and argues that such understandings can be derived from 'cross cultural dialogue' because '...law's essential purpose in addressing the conditions of multiculturalism is to facilitate communication.'⁵² This is a departure from the more generally understood and accepted purpose of the criminal law (discussed

⁵² Cotterrell (n3) 374.

Here Cotterrell draws too on Fuller's ideas of law as communication.

in section 3.2) but certainly communication should be a first step in formulating the law's approach to multiculturalism. Such discussion ties law into political theory, introducing law to the idea of a 'dialogical approach' in a post recognition era perhaps best described by Tully:

'The first step in transforming the way we think about law-making and difference has been from the presumption that there can be monological solutions, handed down from a theorist, court or policy community, to the approach that any resolution has to be worked out as far as possible by means of dialogues among those in the field who are subject to the contested norm of mutual recognition.'⁵³

Travers argues that socio-legal research is '...a subfield of social policy mainly concerned with influencing or serving government policy in the provision of legal services.'⁵⁴ Whilst this narrow definition of the socio-legal is not adopted here it is important to remember that the proposed new framework, grounded in the domain of the socio-legal, may in time become a useful working document and may alleviate criticisms made for example by Herring who recognises that scholars are brilliant 'deconstructors' but asks '...what is to replace the rubble they have created?'⁵⁵ The framework aims to be both practical in suggesting a workable approach to the culture-responsibility relationship and theoretical in symbiotically drawing on and contributing to the development of a legal theory that always places the demands of justice at its very centre. It makes a distinct contribution to the field.

⁵³ Tully, J.(2007) in Shabani (n34) 27.

⁵⁴ Max Travers, *Qualitative Research Through Case Studies* (London, Sage Publications 2001) 26.

⁵⁵ Jonathan Herring, *Criminal Law: Text, Cases and Material* (Oxford, Oxford University Press, 6th edn 2014) 53'.

Much of the thought surrounding this difficult relationship between individual legal responsibility and culture is constrained by binary paradigms which call for simplistic choices to be made in framing answers to this most difficult of questions *how should the criminal law of England and Wales respond to the relationship between culture and individual legal responsibility?* For example, if we allow culture into the courtroom then how does that affect gender equality? If we concede that culture has a deterministic effect on behaviour then what does that say about individual agency? In a broader sense these paradigms call for two dimensional choices to be made, between for example multiculturalism and social and national cohesion or between essentialism and the recognition of difference or between multiculturalism and feminism. It is an overriding objective of this thesis that, having stripped away the layers to arrive at the pared down question of how an individual accused of a crime in England and Wales can expect culture to be allowed to impact on the disposition of his case, the answer should unfold in a reflexive and multidimensional way so that suggestions for a new approach to the question are rounded and all embracing. This approach should avoid Norrie's criticism that legal discourse is '...essentially contradictory... or antinomial in its form' so that '...neither side of the argument really or fully captures what is at stake.'⁵⁶ Furthermore, the objective complies with Von Jhering's interpretation of law as a 'struggle', a struggle for a law that is living and vibrant and that links people emotionally and morally to culture.⁵⁷ The arguments presented fill a gap in academic discourse and the conclusions reached can offer a practical and policy facing way forward because the work can

⁵⁶ Norrie (n 32) 1.

⁵⁷ Cotterrell bases his 2008 article 'The Struggle for Law: Some Dilemmas of Cultural Legality' on Von Jhering's 1915 work *Der Kampf Ums Recht (The Struggle for Law)* in which the author argues that the struggle for law is not to control it but to invigorate it. However, Von Jhering was writing at a time of cultural unity and law's struggle is more challenging in multicultural times. Cotterrell (n 3).

'...create clearings, openings, new possibilities for communication, connection and creative invention where opposition or studied indifference prevailed.'⁵⁸

To summarise, the aim of this thesis is to undertake a socio-legal and interdisciplinary analysis of the *relationship* between culture and legal responsibility focusing on the individual (not the group) and responsibility (not rights) within the parameters of (i) the foundations, practice and policy of the criminal law of and criminal justice system in England and Wales; and (ii) understandings of multiculturalism within the socio-political system of the United Kingdom in the twenty first century. The analysis remains mindful at all times of the concept of justice and is intended to provide us with a renewed specifically nuanced understanding of the relationship between culture and responsibility and to establish the importance of that relationship for contemporary justice. It will advance the hypothesis that the criminal law and criminal justice system of England and Wales manifest an absence of consistent and coherent engagement with culture and with the culture-responsibility relationship, based on an innate reluctance to embrace, or even a fear of, the concept of culture. This inconsistency, incoherence and fear needs to be addressed through the construction of a framework which, although just a starting point for on-going dialogue, recommends a way for the criminal law of England and Wales to engage meaningfully with the culture- responsibility relationship.

⁵⁸ W Connolly, 'Europe: A Minor Tradition' Chapter 5 in David Scott and Charles Hirschkind (eds), *Powers of the Secular Modern: Talal Asad and his Interlocutors* (Stanford, Stanford University Press 2006) 75.

1.3 Methodology and Research Methods⁵⁹

The thesis adopts an essentially doctrinal approach in analysing legal concepts and principles. This is partly in accordance with what Kuhn identifies as ‘research paradigms’, shared worldviews within a discipline that determine suitable methodologies.⁶⁰ Yet here there is a necessity for a doctrinal methodology because the analysis of legislation, traditional defences, decided cases and sentencing decisions undertaken in section 3.3 not only serves to support part of the hypothesis (that there is an absence of consistent and coherent engagement between the concepts of culture and responsibility in the practice of the criminal law) but the conclusions from that analysis form the backbone to the thesis (and an original contribution to the field) in providing a strong evidentially informed basis from which to justify further exploration of the culture-responsibility relationship with a view to understanding its essence.⁶¹ As Sanchez-Graells states, a doctrinal approach makes an analysis ‘...technically sound from a legal perspective.’⁶²

⁵⁹ Two books on legal research methods were published ten years apart in 2007 and 2017. Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007); Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (London, 2nd edn, Routledge 2017). Both are collections of essays on different approaches to legal research. Both state in their introductions that legal researchers are generally unclear about what is a research method and what is a methodology and that throughout the books these terms are used in different ways by the different researchers. Here the term ‘methodology’ is understood as a broad conceptual framework within which the research question is situated and answered. Clearly more than one methodology can be employed and in this thesis these are, broadly, doctrinal, socio-legal, interdisciplinary and feminist. By contrast the term ‘research methods’ is understood here as meaning the way in which specific parts of the research have been carried out.

⁶⁰ Thomas S Kuhn, *The Structure of Scientific Revolutions* (Chicago, University of Chicago Press 1970).

⁶¹ Matravers asserts that ‘...any serious reflection on the cultural defence must be embedded in a more general account of criminal justice’ and this is the aim here (although obviously replacing the term ‘cultural defence’ with the culture-responsibility relationship). (Matravers, M. ‘Responsibility, Morality and Culture’ Chapter 5 in Kymlicka, Lernerstedt and Matravers (n 24) 89.)

⁶² Albert Sanchez-Graells, ‘Economic Analysis of Law or Economically Informed Legal Research’ Chapter 8 in Watkins and Burton (n 59) 73.

In recent years doctrinal legal scholarship has expanded its horizons to include both problem based and reform orientated approaches. It can also be said to encompass content analysis (and this research method is adopted in reviewing both the approach of the criminal law and the criminal justice system to culture (sections 3.3 and 3.4) and multicultural policy (section 4.3)). Generally content analysis can range from 'impressionistic interpretations' to highly systematic analyses of text based data. Here, where a determined search for the interaction between culture and the practices/policies referred to is pursued, the analysis is closer to the impressionistic end of spectrum. A deductive approach is taken in attempting to prove the hypothesis. One final thought on the doctrinal methodology used is that it may amount to what Minow identifies as 'doctrinal restatement' because the culture-responsibility relationship, initially understood here as a problem in need of reform, will become in a sense a creation of this thesis, newly understood or restated as a result of its scrutiny in the light of theory, practice and policy.⁶³

Non-doctrinal socio-legal, interdisciplinary and feminist methodologies are also natural partners for the subject matter of the thesis. It may be tautological to emphasize the socio-legal nature of the thesis for despite the myriad definitions of 'culture' it is always conceptualised within the 'social'. However, it is useful to point out that the analysis, comprising more than a black letter scrutiny of the current approach of the criminal law to issues involving cultural diversity, revolves around '...an interface with a context within which law exists.'⁶⁴ As well as the culture-responsibility relationship being *de facto* socio-legal, the work itself is

⁶³ Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 J Legal Educ 65, 65.

⁶⁴ Sally Wheeler and Phil Thomas, 'Socio-Legal Studies' in David Hayton, *Law's Future* (Oxford, Hart Publishing 2000) 271.

socio-legal in looking at how practice and policy interact with that relationship. Multiculturalism is a social phenomenon and it is the reality of the functioning of the criminal law in a multicultural society that must be considered. As Norrie argues '...in understanding a phenomenon such as law we need to move beyond it, to the social structures and relations which underpin it and which it mediates.'⁶⁵ The term socio-legal is to be interpreted as being a field of research in its own right, situated within the broader area of social research and being given a wide meaning to reflect the emphasis on the relationship between law and society and to represent a balance to a narrow doctrinal approach. More specifically the thesis involves research into the social, justifiable according to Bryman because '...there is an aspect of our understanding of what goes on that is to some extent unresolved.'⁶⁶

The thesis also takes advantage of the opportunity to explore the development of the criminal law of England and Wales within the political realm drawing on political theory and other disciplines. In this way the thesis is interdisciplinary for how can the criminal law consider the culture-responsibility relationship without looking outside its own boundaries? Sanchez-Graells argues that it is wrong to ignore the economic implications of legal research but agrees that '...it is equally faulty not to incorporate the insights derived from political science and other social sciences such as sociology or anthropology or even beyond, from evolutionary theory and psychology.'⁶⁷ Hutchinson recognises the limitations of purely doctrinal research and the increased impact of an interdisciplinary methodology in reforming the law stating that '...while the doctrinal core of legal scholarship

⁶⁵ Norrie (n 32) 11.

⁶⁶ Alan Bryman *Social Research Methods* (5th edn, Oxford, Oxford University Press 2016) 5.

⁶⁷ Albert Sanchez-Graells, 'Economic Analysis of Law or Economically Informed Legal Research' Chapter 8 in Watkins and Burton (n 59) 73.

survives intact, legal scholars are, to some extent, endeavouring to accommodate...social science evidence and methods and theoretical analysis within the research framework in order to provide additional ballast to the recommendations for reform.⁶⁸ Here, the foray into disciplines other than law is not prescriptive but is reflexively driven, with one path of enquiry leading to another. Exploration in the disciplines of anthropology, sociology, religion, philosophy and criminology enhance understanding but it is within political philosophy that progress in this area is traditionally most evident and Kymlicka, Lernestedt and Matravers argue that further progress requires ‘...political philosophers to better understand the specificities of criminal law and for criminal law scholars to better understand philosophical debates on culture and agency.’⁶⁹ Recourse to these subject areas makes the project truly interdisciplinary and the body of relevant literature potentially huge.⁷⁰

As seen in section 1.2, the 1990’s saw the emergence of a body of feminist work that warned against multicultural accommodation in the interests of gender justice. The multiculturalism/feminist paradigm is explored further in section 2.4 but it is clear that research in this area should be informed by feminist theory and methodology. Braidotti emphasises that feminist theory is constantly changing but that men’s interests are disproportionately represented in social research and therefore a feminist methodology is necessary in seeking to redress the

⁶⁸ Methods in Reforming the Law’ (2015) 3 *Erasmus Law Review* 130
<http://www.erasmuslawreview.nl/tijdschrift/ELR/2015/3/ELR-D-15-003_006>
accessed 23rd September 2018.

⁶⁹ Kymlicka, Lernestedt and Matravers (n 24) 13.

⁷⁰ ‘Interdisciplinary’ here is construed widely and in a common sense way. Perhaps the purpose of interdisciplinary research is best described by Roberts in that ‘...it broadens the terms of its theoretical and conceptual framework which guides the direction of the studies.’ Roberts, P. (2017) ‘Interdisciplinarity’ Chapter 4 in McConville and Chui (n 59) 103.

balance.⁷¹ As Bartlett says, feminist enquiry uses three main techniques, feminist practical reasoning, consciousness raising and ‘asking the woman question.’⁷² Although Munro states that ‘...there is no such thing as a united feminist jurisprudence, nor a universally shared feminist legal method’ she recognises that the law in context movement is a prominent theme in feminist legal scholarship and as part of the social context of this research the ‘woman question’ is present throughout the thesis.⁷³

At the outset a broad qualitatively based research strategy was envisaged as a good fit for the research question in this thesis, an inductively based research methodology based on Weber’s notion of *verstehen* which seeks to understand rather than to explain social phenomena within the social sciences.⁷⁴ In attempting to marry theory and practice it was hoped that ‘dialogue’ could be used through the media of qualitative interviews and focus groups with participants drawn from those working in the administration of justice in a multicultural world and those representing diverse cultural beliefs and traditions across society, to gain understanding of the attitude of ‘interested parties’ to the concept of the culture-responsibility relationship. It soon became apparent that this was an unworkable aspiration. The depth and breadth of the field and the complexity of the culture-responsibility relationship itself meant that dialogue would be

⁷¹R Braidotti, ‘Feminist Philosophies’ in Mary Egleton (ed), *A Concise Companion to Feminist Theory* (Oxford, Blackwell 2003) 211.

⁷² Katherine Bartlett, ‘Feminist Legal Methods’ (1990) 103(4) *Harvard Law Review* 830, 830.

⁷³ Vanessa E Munro, *The Master’s Tools?* Chapter 9 in Watkins and Burton (n 57) 194.

‘Law in Context’ is, broadly, a movement to broaden the study of law emerging from the University of Cambridge in the 1907’s and thus has much in common with the Socio-Legal studies movement that originated at the University of Oxford at the around that time and their earlier American counterpart the Law in Society Movement.

<<https://www.cambridge.org/core/series/law-in-context/387EA14AA111E65AB0120DA893AFAFCBA>>

accessed 28th September 2018.

⁷⁴ M Weber (1947) *The Theory of Social and Economic Organization* (New York, Free Press 1947) 88 referred to in Bryman (n 66) 29.

meaningless without a specific point of reference from which to begin a discussion. The framework suggested in Chapter 5 now provides that specific point of reference, a starting point from which it is hoped in a later project to undertake an empirically based exploration of the recommendations made in this thesis. However, the research strategy still remains broadly ontologically constructivist in that it recognises that ‘...social phenomena and their meanings are continually being accomplished by social actors’ so that we see ‘...the active role of individuals in the construction of social reality.’⁷⁵ The fluidity of culture is recognised in section 2.2 below but the constructivist emphasis on culture and the culture-responsibility relationship in turn is balanced by objectivism for culture can never be new, it ‘...persists and antedates the participation of particular people.’⁷⁶

The use of content analysis is employed in sections 3.3 and 3.4 and more particularly in section 4.3 and this is described in detail in the relevant sections. Moreover the thesis has made opportunistic use of quantitative research methods, in a limited way, in presenting some of the data gathered for the review of decided cases in section 3.3 in statistical form. This is a useful way of effectively summarising a number of facts and of making comparisons with general statistics but it must be remembered that the statistics are based on a relatively small number of cases. Therefore we need to be cautious about making theoretical generalisations based on these statistics.

⁷⁵ Bryman (n 66) 33.

⁷⁶ Howard S Becker, ‘Culture: A Sociological View’ (1982) 71 (4) Yale Review 513, 521.

1.4 Literature

As described in section 1.3 above, the thesis adopts doctrinal, socio-legal, interdisciplinary and feminist methodologies. The bibliography reflects the enormous amount of material consulted to fully understand the culture-responsibility relationship, to situate it most effectively within this boundless field and to develop it to be able to make the recommendations set out in the suggested framework in Chapter 5. The challenge is finding a balance between covering the academic field and selecting the most relevant work for analysis. As with methodology (other than the doctrinal approach) the search for relevant literature is reflexively driven in a bid to get to the very essence of the culture-responsibility relationship. Bryman describes two main types of literature review, narrative and systematic. The latter involves ‘...exhaustive literature searches of published and unpublished studies’ and seeks an evidence based solution or definitive answer to a research question.⁷⁷ Such an approach does not easily lend itself to answering a research question that spans many fields and so the review of literature undertaken here is critically narrative and again interpretivist, a bid to understand in the sense of the ‘thick description’ identified by Geertz. However, Geertz says that ‘...the besetting sin of interpretive approaches to anything - literature, dreams, symptoms, culture - is that they tend to resist, or be permitted

⁷⁷ Bryman (n 66) 102 quoting D Tranfield, ‘Towards a Methodology for Developing Evidence-Informed Management Knowledge by Means of Systematic Review’ (2003) 14 *British Journal of Management* 207, 209.

to resist, conceptual articulation and thus to escape systematic modes of assessment.⁷⁸ It is argued that the review of literature undertaken here is, in its way, 'systematic' because the attitude of the law, practice and policy to culture is always central to our interpretation of the materials. This is especially so in relation to the decided cases and sentencing decisions and law (section 3.3) and policy statements about multiculturalism (section 4.3) although these important sources are perhaps more rightly defined as data. In fact the conclusions reached from the data on decided cases and sentencing decisions offer an original account of the approach of the practice of the criminal law to the culture-responsibility relationship. A formal literature review seems inappropriate because of the large body of work drawn upon and because there is not yet literature that directly addresses the culture-responsibility relationship, at least not in the specifically nuanced way that this thesis argues that we need to understand it, and so critical commentary is passed on relevant academic sources throughout the thesis and in section 1.5 the work that has particularly informed each Chapter is identified.

However, we have already seen that the concept of the 'cultural defence' is the starting point for academic discourse about the place of culture in the criminal law and Renteln's work, relentless in its support of the 'cultural defence', is significant in informing this thesis and relevant throughout. Renteln claims that her 2004 book *The Cultural Defense* is the first book length specific study of the topic and despite taking issue with some of her ideas this thesis shares her broadly stated aim of questioning the '...proper role of cultural evidence in legal systems' and

⁷⁸ Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York, Basic Books 1973) 24.

agrees that ‘...justice requires us to look at the context of individuals’ actions.’⁷⁹ Renteln’s later book, co-edited with Foblets, is a useful collection of essays that is also drawn on throughout the thesis.⁸⁰ The third stated aim of this volume is to ‘...inspire practitioners to consider raising the possibility of a cultural defence in appropriate cases.’⁸¹ The answer to the research question here will allow practitioners in England and Wales to know when such ‘appropriate cases’ arise. Another edited collection of essays, *Criminal Law and Cultural Diversity* is relevant throughout the thesis. The aim of the book is to ‘...encourage criminal law scholars to reflect upon where and how information that could be called cultural should be deemed relevant, especially in the application of the rules regarding personal responsibility and blameworthiness.’⁸² This book contributes to understandings of the difficulties apparent at this problematic intersection but stops short of offering a conclusion to the ideas or a discernible agreed consensus on the way forward.

⁷⁹ Renteln (n 40) 102.

There are many places in which this thesis takes a different viewpoint from Renteln. We have already identified the lack of clear definition of the ‘cultural defence’ in her work and a divergence of opinion about the purpose of culture in the courtroom.

⁸⁰ Foblets and Renteln (n 4).

⁸¹ *ibid* (introduction). The other aims of this volume are stated to be to document the experiences of litigants and to encourage scholarship in ‘other’ jurisdictions (presumably ‘other’ refers to other than US).

⁸² Kymlicka, Lernestedt and Matravers (n 24) 5.

1.5 Overview of Thesis

This introductory Chapter has identified and contextualised the research question, defined the boundaries of the enquiry and outlined the aims and objectives of the thesis (sections 1.1 and 1.2). It has gone on to explain the methodology and research methods adopted (section 1.3) and to situate the research question within the existing academic literature (section 1.4). The purpose of this section (1.5) is to provide an overview of the thesis, to show how the answer to the research question, '*how should the criminal law of England and Wales respond to the relationship between culture and individual legal responsibility?*' will unfold.

Chapter 2

Broadly, the purpose here is firstly to define our own understanding of the culture-responsibility relationship, to explore more fully its meaning so that its essence can be understood and to emphasise its distinction from the 'cultural defence'. The Chapter begins in section 2.1 with a reflection on the ways in which culture *might* be said to affect legal responsibility and makes it clear that of these possibilities we are concerned to explore cultural determination or predisposition and moral outlook. Referring particularly to the work of Rosen and Cotterrell, the inevitable interaction between law and culture in the widest sense is then established.⁸³ In sections 2.2 and 2.3 the concepts of culture and responsibility

⁸³ Lawrence Rosen is both a lawyer and anthropologist and relates law to everyday social life. Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge, Cambridge University Press 1989). Rosen looks at the way in which judicial discretion is informed by cultural beliefs. Lawrence Rosen, *Law as Culture: An Invitation* (Princeton, Princeton University Press 2006).

are, in turn, subjected to thorough analysis to enhance understanding. Culture, it is concluded in section 2.2, is perhaps indefinable, but it is understandable and it is from this understanding, this recognition of the attribute that makes us uniquely human, that questions about its relationship with responsibility emerge. Contemporary understandings of culture also firmly reject the notion of static and bounded groups and this interpretation is very much in keeping with the objective here of refocusing the interplay between criminal law and culture to concentrate on the individual.

If section 2.2 gives us an understanding of culture, section 2.3 enhances our understanding of responsibility. Tadros identifies a number of elements to responsibility and it is broadly the attribution of responsibility that we are concerned with, ‘...the conditions under which an action or event can be attributed to an agent who has appropriate status’ where ‘...that action reflects in the appropriate way on the agent *qua* agent.’⁸⁴ Here those conditions are considered in the widest possible sense, looking beyond the realm of orthodox subjectivism to a morally contextual understanding of responsibility. Drawing primarily on the work of Norrie and Lacey the section takes forward to section 2.4 the idea that responsibility can be both a matter of agency and of the moral values that different cultures engender.⁸⁵ Following Fletcher’s analysis of the general

Roger Cotterrell takes a socio-legal approach to the understanding of legal ideas and takes socio-legal to mean ‘a perspective informed by social theory’. Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Farnham, Ashgate Publishing 2006).

⁸⁴ Tadros (n 44) 23.

The other three elements to criminal responsibility identified by Tadros are (i) who counts as a responsible agent? (ii) defining the ambit of responsibility; and (iii) the defendant’s part in the crime. The second refers to criminalisation and although the thesis is concerned with the backward looking attribution of responsibility in criminal cases ‘cultural offences’ are considered in section 3.2 in connection with the purpose of the criminal law and in section 3.3 in looking at legislation which could be said to have created ‘cultural offences’ in the wider context of assessing the engagement of the criminal law with culture.

⁸⁵ Lacey (n 44).

Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press 2014).

part of the criminal law, understandings of responsibility are construed widely in a second sense, that is to include the degree of responsibility (perhaps more accurately culpability), the deemed degree of responsibility being reflected at the sentencing stage.

In section 2.4, recognising that the culture-responsibility relationship is more likely to gain credibility where it is conceptualised as a pre-disposition rather than within the determinism/free-will paradigm, tentative arguments that culture *may* affect responsibility in terms of agency and that it *can* certainly affect responsibility in terms of moral values are put forward. Here a review of ideas from a number of disciplines is undertaken but it is Ortner's continuum of positions on culture as a hard or soft determinant of behaviour that is most useful in establishing the credibility of the culture-responsibility relationship.⁸⁶ Ortner explains that we begin by acting as individuals but when we recognize that our actions fit within a pre-organised schema, we are likely to choose to follow the schema. When acting in the cultural schema the path dictated by the schema becomes intuitive for the actor. A link between the concepts of culture and responsibility is thus established allowing us to conclude that legal responsibility in the criminal law needs to be revisited in our multicultural world. This section is then proactive in identifying inherent difficulties within the culture-responsibility relationship and in attempting to dispel concerns around them. These are both practical (evidential difficulties in court, the apparent prioritisation of one group over another) and theoretical (strict notions of equality may be undermined by perceptions of individualised

Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford, Oxford University Press 2000).

Norrie, *Law and the Beautiful Soul* (n 32).

⁸⁶ Ortner, S. 1990) 'Patterns of Shared History: Cultural Schemas in the Founding of Sherpa Religious Institutions' in *Culture Through Time: Anthropological Approaches* (ed) Ohnuki-Tierney, E. (Stanford, Stanford University Press) 43.

justice, cultural determinism has implications for agency and free will, the culture-responsibility relationship raises concerns of cultural and/or moral relativism). This renewed and self-critical understanding of the culture-responsibility relationship, summarised in section 2.5 is carried forward to be applied to and tested in the context of the foundations of the criminal law and the practice and policy of the criminal law and criminal justice system of England and Wales in Chapter 3.

Chapter 3

Chapter 3 focuses on the criminal law and criminal justice system of England and Wales, the first of the two distinct parameters for the exploration of the culture-responsibility relationship set out in section 1.2. The foundations of the criminal law are explored in section 3.2 to assess the extent to which they may or may not be able to accommodate the culture-responsibility relationship and Ashworth and Horder (on the general principles of the criminal law) complemented by the more critical approach of Wells and Quick provide useful guidance here.⁸⁷ Sections 3.3 and 3.4 can be thought of as ‘fact finding’ but they sit at the heart of the thesis in engaging in turn with the black letter of the criminal law and policy within the criminal justice system to prove the hypothesis that there is an absence of engagement between the practice and policy of the criminal law and culture. Section 3.3 involves an analysis of legislation aimed at outlawing ‘cultural practices’, traditional defences and decisions on substantive law and sentencing in 32 case with a cultural element is undertaken. As well as supporting the

⁸⁷ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford, Oxford University Press 2009); Celia Wells and Oliver Quick, *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials* (4th edn, Cambridge, Cambridge University Press 2010)

hypothesis the section concludes therefore that the criminal law cannot support a standalone 'cultural defence' or even the recognition of culture within the traditional defences because its boundaries are not currently receptive to that idea. However, there is a place for culture at the sentencing stage in personal mitigation, where a pre-disposition or altered moral outlook may be construed as a motive in influencing behaviour. Sentencing laws need to reflect clearly the admissibility of culture as a factor in personal mitigation in individual cases where it is established that culture has had an influence on behaviour. There need to be clear procedural rules within the law of evidence on how evidence of the effect of culture on behaviour should be introduced and considered in the courtroom.

Following the analysis of the Police, Crown Prosecution Service and Judiciary in the context of the culture-responsibility relationship in section 3.4 the section concludes that the Judiciary (and prosecution and defence lawyers) need specific training that goes beyond the stated aim in the Equal Treatment Bench Book of 'increasing awareness and understanding of the different circumstances of people appearing in courts and tribunals' on how to deal with cultural evidence in court. Other areas explored in this Chapter include 'honour' and the gendered implications of allowing culture into the courtroom in criminal cases. A perception of mistrust between the concept of culture and the criminal justice system also emerges from this Chapter.

Chapter 4

The Chapter focuses on the second of the two distinct parameters within which the culture-responsibility relationship is situated, multiculturalism in the United Kingdom. This is explored through three perspectives, social reality (section 4.2), policy (section 4.3) and philosophy (section 4.4). Section 4.2 involves a historical analysis of migration to and from the United Kingdom from 1800 to the present day in order to arrive at a thorough understanding of the make-up of our multicultural population. We discover that the particular trajectory of the development of multiculturalism in the United Kingdom has led to a focus on immigration control rather than on the settlement of migrants after arriving in the country, largely evidenced within a race relations framework. We see also a focus on the delegation of settlement to local government and communities rather than central government taking a strong and pro-active lead. We see a focus in academic and political discourse on the immigrant, in particular immigrant groups which does not necessarily reflect the contemporary social reality of a more fluid migrant population.

The approach to multicultural policy in section 4.3 involves a thematic content analysis of policy statements or, where these do not exist, of implied policy throughout time. After considering understandings of integration the section is divided into different time periods and the overriding theme emerging from the analysis is the lack of coherent and clear policy from the different political parties in office across time coupled with a failure to follow through on stated policy objectives. Sections 4.2 and 4.3 together provide a comprehensive picture of multiculturalism in the United Kingdom but they also provide evidence of a lack

of engagement between multiculturalism and law in general and the culture-responsibility relationship in particular. They also allow the emergence of the argument that the culture-responsibility relationship has the ability to sit comfortably within the policy objectives of integration.

Section 4.4 situates the culture-responsibility relationship within understandings of multicultural philosophy and the discourse on multicultural justice. The analysis here centers firstly on the politics of recognition and considers how the relationship can best do justice to recognition and how it can avoid misrecognition. Secondly it centers on dialogical theory and the search for operative public values (Parekh) or norms of mutual recognition (Shabani) and considers whether the culture-responsibility relationship could become such a norm or value. In section 1.1 we emphasised the importance of the individual as being at the centre of the culture-responsibility relationship but multicultural philosophy focuses, broadly on the group. This section reconciles inherent conflicts between group and individual (and in some cases state) and whilst it goes without saying that the attribution of responsibility in the criminal law of England and Wales rests with the individual we can see the importance of the group in informing identity.

Chapter 5

Section 5.1. summarises the findings of the thesis before going on in section 5.2 to outline reflections on culture and multiculturalism in the context of justice. The main purpose of the Chapter (and of course of the thesis) is to offer a forward looking framework for the ongoing development of the culture-responsibility

relationship. This framework, set out in section 5.3 draws together the findings made throughout the thesis in the realm of theory, policy and practice and offers a practically based and roundly considered and just way in which the criminal law and criminal justice system of England and Wales can respond to relationship between culture and responsibility in a multicultural society. Section 5.4 takes advantage of the opportunity to set out a number of questions that emerge during the course of the thesis about the ongoing just development of the criminal law in an era of multiculturalism.

CHAPTER 2

THE CULTURE- RESPONSIBILITY RELATIONSHIP

*'...the degree of moral responsibility for wrongful conduct is something which is beyond human power to allocate...'*¹

2.1 Introduction

As seen in Chapter 1, this thesis seeks to answer the question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* What exactly are we asking here and how do we go about answering the question in a multicultural society requiring both equality and strict standards through criminal norms? To answer the question we must firstly attempt to understand, in turn, the concepts of culture and responsibility. Only then can we begin to focus on what we have already identified as the paramount concern of this thesis, the *relationship* between them in individual cases. There are a number of possible ways in which it *might* be said that culture *might* be relevant to legal responsibility. For the sake of absolute clarity a list of these possibilities and their place in the criminal justice system (at guilt or at sentence) is given here, together with an indication of the dilemmas, legal and philosophical, that each might give rise to:

I. D should not be responsible because he does not know that his actions contravene the criminal law of England and Wales.

This could be relevant to guilt.

Difficulties:

- Conflict with the principle of criminal law in England and Wales that ignorance of the law is no excuse (discussed in section 3.2).
- Concerns of legal pluralism.

¹ Dennis Lloyd, *The Idea of Law* (London, Penguin Books 1964) 64.

- Challenges notions of strict equality.

II. D should not be responsible because he is culturally determined or pre-disposed to act in a certain way and therefore his agency is compromised.

This could be relevant to guilt and/or sentence.

Difficulties:

- Evidential difficulties at both the guilt stage and the sentencing stage.
- Challenges to the limits of excusatory defences (examined in section 3.3).
- Undermining of agency and free will.
- Claims of essentialising 'the other'.
- Apparent prioritization of one group (the cultural group) over another (another cultural group or, as discussed in section 2.4, women).
- Balancing claims of individualised justice against equality.

III. D should not be responsible because his moral outlook is influenced by his culture.

This could be relevant to guilt and/or sentence.

Difficulties:

- Evidential difficulties at both the guilt stage and the sentencing stage.
- Cultural relativism/moral relativism
- Challenges to the limits of justificatory defences (examined in section 3.3).
- Apparent prioritization of one group (the cultural group) over another (another cultural group or, as discussed in section 2.4, women).
- Balancing claims of individualised justice against equality.

IV. D should not be responsible simply because he is a 'member' of or belongs to a particular 'cultural group' (ie. his apparent identity is disconnected from his legal responsibility) .

This could be relevant to guilt.

Difficulties:

- 'Membership' of a group alone is no longer sufficient to establish a relationship between culture and responsibility in individual cases which must now be seen in terms of (II) or (III) above.
- 'Membership' relies on outmoded views of culture as static and bounded (discussed in section 2.2).
- Claims of essentialising the other.
- Concerns of legal pluralism.
- Challenges to strict notions of equality.
- Apparent prioritization of one group (the cultural group) over another (another cultural group or, as discussed in section 2.4, women).
- Adducing evidence of 'membership' in court.

V. D cannot be responsible because he has a 'right to culture' or his culture needs protecting.

This could be relevant to guilt.

Difficulties:

- Cultural rights and the protection of culture, whilst of huge importance, do not lie in the domain of the attribution of responsibility in criminal law.

Setting out the possibilities in this way overcomes the criticism of lack of definition levelled at the 'cultural defence'. We can dismiss number I fairly quickly by reference to the principles of criminal law in England and Wales (see section 3.2) and number V, included because it is consistently raised in connection with the 'cultural defence', can never be said to be truly relevant to the culture-responsibility relationship. Number IV is more difficult because it stems, once again, from 'cultural defence' discourse and the wider domain of multicultural theory with its emphasis on the group and group rights and it moves beyond law and into the realm of identity politics. But as will be seen in section 2.2, this thesis aims to move forward under an understanding of culture that rejects the static and bounded group and that focuses on the way in which culture is acquired, adopted and adapted and therefore uniquely processed in each and every individual case. We are therefore limiting the culture-responsibility relationship to

instances where it *might* be said that culture *might* affect responsibility either because a defendant is culturally determined or pre-disposed to act in a certain way and therefore his agency is compromised (number II) or because his moral outlook is influenced by his culture (number III), and in either case that determination or pre-disposition or altered moral outlook needs to be considered in connection with a breach of the criminal law. The question of how the criminal law should respond to such breaches is asked both in the context of the attribution of legal responsibility through the application of the criminal law to arrive at decisions on guilt or innocence and in the application of sentencing laws to arrive at a just punishment in cases of guilt. 'Responsibility', as understood in section 2.3, is therefore widely construed to include too the degree of responsibility deemed to be just and reflected in sentencing decisions.

The above list of possibilities identifies a number of problems that are inherent within the culture-responsibility relationship and even if we confine this list to those pertinent to the understandings set out in numbers II and III above these are not insignificant. These difficulties, along with attempts to diffuse them, are discussed in detail in the context of establishing the existence and importance of the culture-responsibility relationship in section 2.4. They are largely theoretical and fall under two headings, firstly what we can broadly identify as 'equality, inequality and relativist concerns' which encompasses notions of individualised justice, pluralism, legal, moral and cultural relativism and essentializing and secondly 'feminist concerns'. Raising them does not contribute directly to answering the question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* However, attempting to rationalise these difficulties enhances the commitment within this thesis to the development of a holistic understanding of this problematic relationship and the

paradoxes within it so that the suggested answer to the research question framed in Chapter 5 is as well considered as it can possibly be.

An initial practical problem, however, is the treatment of cultural evidence in court and this needs to be considered to fully answer the question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* The culture-responsibility relationship is therefore relevant both to the rules of procedure within the criminal justice system and to the substantive criminal law. The issue of culture in the courtroom is addressed in section 2.4, evidence of the approach of the courts and of the Judiciary to the rules of procedure is extracted during the analysis in Chapter 3, and more detailed practical suggestions for a way forward in this dimension are included in Chapter 5. A further problem that does not arise directly from the culture-responsibility relationship but nonetheless affects the issue of culture in court is the perception within 'cultural defence' discourse of an endemic cultural bias within the legal system of England and Wales, something that is linked in turn to the wider issue of discrimination. These issues too will be addressed in section 2.4. Bias, the '...inclination or prejudice for or against one person or group, especially in a way considered to be unfair' is an emotional issue and although it is beyond the scope of this thesis to consider where the line between a unique legal culture and bias lies this impression of bias needs to be acknowledged in the context of the culture-responsibility relationship.² A perception of bias can arise from the interaction between law and culture in all jurisdictions and it is useful at this stage to consider the interaction between law and culture more widely, to reconsider why and how the domains of culture and law are of interest to each other at all.

² Definition of bias from Oxford English Dictionary
<<https://en.oxforddictionaries.com/definition/bias>> accessed 1st October 2018.

Cotterrell and Rosen both write about the symbiotic relationship between law and society with the former taking a sociological approach and the latter an anthropological approach. Cotterrell bases his work on, among others, the theory of Ehrlich who developed the idea of a sociology of law in the early twentieth century and who asserts that ‘...law lives in all human association.’³ Law therefore has no ‘truth’ of its own but its understandings come from participants in the legal system and in this way law and the social are mutually constitutive as ‘...law gains its meaning and ultimate authority from the social at the same time as it shapes the social through regulatory force.’⁴ Therefore, argues Cotterrell, legal scholarship requires a sociological understanding of law. For Cotterrell this sociological understanding of law is rooted not in the concept of culture but in the idea of community because although culture is useful to uncover community ‘...the term culture embraces a too indefinite and disparate range of phenomena’ to be useful to legal theory.⁵ We therefore need to break culture down into its component parts and see it as expressed in different types of social relations of community. Our own understanding of culture, arrived at in section 2.2, is, as Cotterrell suggests, indefinite but community along with culture is in every way a group endeavor. At times it is difficult to see the difference between Cotterrell’s ‘community’ and the understanding of culture developed in section 2.2.⁶ Cotterrell does challenge the concept of the group asking if the Rule of Law can recognise groups as ‘cultural persons assuming rights and subject to duties’.⁷ This is a

³ Ehrlich, E. (1936) *Fundamental Principles of the Sociology of Law* (Transaction Reprint, New Brunswick) (2002), Summarised in Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Farnham, Ashgate Publishing 2006) 4

⁴ Cotterrell (n 3) 25.

⁵ *ibid* 97.

⁶ For example, Cotterrell relies on the work of Cohen to describe community as a web of understandings about the nature of social relations. This is very close to Geertz’s definition of culture discussed in section 2.2.

Cotterrell (n 3) 67. The work by Cohen is Cohen, A. (1985) *The Symbolic Construction of Community* (London, Routledge) p19.

⁷ *ibid* 98.

theme we return to in section 2.2 when we question the ability of the group to 'own' a culture. Despite an emphasis on community, Cotterrell argues that juristic scholarship is not addressing issues of culture even though there is interaction between law and culture in many different ways and asks '...how can culture be appropriately dealt with juristically?'⁸ This suggests that even though culture may not be useful to legal theory it has to be addressed in the practical realm.

Rosen argues that law is a 'cultural domain' that does not exist in isolation but emerges when '...we create our experience, knit together disparate ideas and actions and in the process fabricate a world of meaning that appears to us as real.'⁹ Law cannot be divorced from the culture within which it exists. In this way legal decision makers are bound to draw upon the wider domains alongside which the law exists. So if culture influences law, then equally law influences culture in '...contributing to the formation of an entire cosmology, a way of envisioning and creating an orderly sense of the universe, one that arranges humanity, society, and ultimate beliefs into a scheme perceived as palpably real.'¹⁰ Rosen illustrates this hypothesis through a number of historical examples within our legal system including juries who are an 'important sign of the culture of law.'¹¹

⁸ Cotterrell (n 3) 97.

Cotterrell lists six examples of where this interaction occurs and the list includes cultural defences

1. References to legal culture in comparative law
2. Liberalism and Multiculturalism
3. Legal definitions of culture
4. Cultural defences
5. Law and popular culture
6. Law and cultural heritage

Ibid 98-101.

⁹ Lawrence Rosen, *Law as Culture: An Invitation* (Princeton, Princeton University Press 2006)

4.

¹⁰ *ibid* 11.

¹¹ *ibid* 146.

In *The Anthropology of Justice*, '...a study of law as culture and culture as integral to law', Rosen takes these ideas and tests them in an ethnographic study of the Islamic law courts of Morocco which focuses on judicial discretion and how that is tied to culture.¹² He finds that inevitably cultural concepts shape judicial reasoning and decisions. In section 2.4 we refer to this symbiosis less benignly as the 'endemic cultural bias' in the legal system of England and Wales and although we cannot justify a 'cultural defence' to counteract that bias we can endorse Rosen's argument that '...the analysis of legal systems...requires at its base an understanding of the categories of meaning by which participants themselves comprehend their experience and orient themselves toward one another in their everyday lives.'¹³ This is a call for us to be self-reflective about the culture that informs the practice of our criminal law, particularly our judicial reasoning and decision making, and to be able to reflect in turn upon the cultural perspective of others. It is, in its way, a reason for the importance of the culture-responsibility relationship.

In fact, Cotterrell and Rosen (writing at different times) both appear to give us a licence to consider the culture-responsibility relationship. We will see in Chapter 3 how culture is making its way into the judicial realm and how it is met with uncertainty and reluctance. Rosen seems to recognise a space within the criminal law for the culture-responsibility relationship stating that '...at moments of contested social change the propulsion to tie various cultural domains together may be intense: it may also appear most strongly when the results or norms of a given statutory structure no longer seem to satisfy existing sensibilities.'¹⁴ It is

¹² Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge, Cambridge University Press 1989) xv.

¹³ *ibid* xiv.

¹⁴ Rosen, *Law as Culture* (n 9) 200.

argued throughout this thesis that those 'existing sensibilities' are not satisfied by the current *ad hoc* approach of the criminal law and criminal justice system to culture and the need for a roundly considered and consistently applied culture-responsibility relationship is asserted. We appear to be in a liminal space when it comes to what to do about culture in the courtroom and the time is right to move the discourse forward and into the practical realm. Cotterrell too issues a call to '...introduce a new paradigm that reunite(s) concepts that have been fractionated by instances that prior ideas have been increasingly unable to contain.'¹⁵ That new paradigm, in the context of criminal law and culture, is the culture-responsibility relationship.

The aim of this Chapter is to explore understandings of culture and responsibility (section 2.2 and 2.3 respectively). It takes these nuanced understandings forward to section 2.4 where the existence, scope and importance of the culture-responsibility relationship is established and the problems inherent within it, both practical and theoretical, are explored and rationalised. In a somewhat circular argument these problems in themselves are reconstructed to provide a justification for the place of a roundly considered culture-responsibility relationship in the criminal law and criminal justice system of England and Wales.

¹⁵ *ibid* 173.

2.2 Understanding Culture

We all have some idea of what we mean and understand by culture but defining or describing it, pinning it down in words, is another matter. Although Rosen states that the key concepts of culture began before we became human, when early hominids began to organise work groups, the first written references to culture are thought to come from Cicero, who explored human culture metaphorically in writing of the cultivation of the soil in his *Tusculanae Disputationes* in 45 BC.¹⁶ More recently the concept of culture gained visibility in the fifteenth century, an age of exploration, when Western adventurers encountered the 'primitive savages' of other worlds, tribes who were perceived to be 'different' and in need of 'civilization'. By the nineteenth century these diverse cultures were providing fascinating grounds for study and so the discipline of anthropology, 'the science of the nature of man', emerged with early understandings of culture emanating from the findings of cultural anthropologists who travelled to far flung corners of the earth to undertake ethnographic studies of isolated tribes.¹⁷ This means that for centuries culture is something that has been perceived both as belonging to 'others', to non-western people and groups and to which 'others' belong. A deemed group, membership of which is based on racial or ethnic similarities, is ascribed a culture and that culture becomes a strong aspect of identity, something which individuals in that group feel that they belong

¹⁶ *ibid* 3.

¹⁷ This definition came from Theodor Waitz, *Introduction to Anthropology* (London, Longman and Roberts 1863)

There seems to be some confusion over the classification of different branches of anthropology and their areas of study, perhaps as a result of different terminology in the UK and the US. Early anthropology was based on animism, the idea that natural beings possess a spiritual element. 'Cultural anthropology' refers to the study of cultural variation and is attributed to the work of Franz Boas in the US and Edward Tylor in the UK. It is to be distinguished from 'social anthropology' which is a more sociologically based discipline emerging in the UK in the early twentieth century and based on the ideas of Durkheim and on Malinowski's methodology of 'participant observation'.

to. In contrast, the west has been perceived as a-cultural, an idea that we will return to in section 2.4.

It is not intended to provide a definition of 'culture' in this section but simply to set out the parameters within which culture must be understood. Jahoda, in his critical reflection of recent definitions of culture, reiterates Lang's conclusion that '...attempts at defining culture in a definite way are futile'. However, he simultaneously recognises that the concept of culture is indispensable and advocates clarification of the specific use of the term when used for empirical or theoretical reasons. We do therefore need to establish our own understanding of culture in the context of the culture-responsibility relationship.¹⁸ Calling on a handful of influential definitions from the last 150 years and tracing the development of the concept provides a good starting point in achieving that understanding.

The Oxford English Dictionary gives two meanings of culture in addition to those related to the arts or biology:

The ideas customs and social behaviour of a particular people or society.

The attitudes and behaviour characteristics of a particular human group.¹⁹

These are drawn from the field of anthropology and from the start anthropologists have attempted to define culture. In 1952 Kroeber and Kluckhohn put together a list of 164 definitions of culture having identified the emergence of 6 new definitions between 1871 and 1920 and 100 more between 1940 and 1950.²⁰

¹⁸ Gustav Jahoda, 'Critical Reflections on Some Recent Definitions of Culture' (2012) 18 (3) Culture and Psychology 289 quoting A Lang, 'Thinking Rich as Well as Simple: Boesch's Cultural Psychology in Semiotic Perspective' (1997) 3 Culture and Psychology 383, 389..

¹⁹ Oxford English Dictionary definition

<<https://en.oxforddictionaries.com/definition/culture>> accessed 3rd August 2018.

²⁰ Alfred L Kroeber and Clyde Kluckhohn, 'Culture: A Critical Review of Concepts and Definitions' (1952) 47 (1) Papers Peabody Museum of Archaeology and Ethnology.

More recently Varene has compiled a collection of definitions of culture that he claims ‘...could someday lead to a new version of Kroeber and Kluckhorn’s *Culture: A Critical Review of Concepts and Definitions*.’²¹ In 2004 Woodman claimed that there are over 3000 definitions of culture, an assertion that may indeed be credible, and argued, in analyzing the ‘cultural defence’ that there is no need to define culture.²² On the other hand, Van Broeck, who advocates the use of ‘cultural offences’ to regulate undesirable practices, argues that we do need a definition of ‘cultural’.²³ Clearly any attempt to analyse these definitions in depth is beyond the scope of this work.

The most widely accepted early definition came from Tylor in 1871:

‘Culture, or civilization, taken in its broad ethnographic sense, is that complex whole which includes knowledge, beliefs, arts, morals, law, customs, and any other capabilities and habits acquired by man as a member of society’.²⁴

²¹ Herve Varene, ‘Snippets from Overhearing a Conversation about “Culture”’ (19th October 2007)

<http://varene.tc.columbia.edu/hv/ct/and/culture_def.html> accessed 19th October 2018. Varene writes on ‘the culture of culture’.

There seems to be a recent interest in compiling definitions of culture with Spencer-Oatley working on a similar set of definitions. Helen Spencer-Oatley, ‘What is Culture? A Compilation of Definitions’ (2012) Global PAD Core Concepts 1

<https://warwick.ac.uk/fac/soc/al/globalpad/openhouse/interculturalskills/global_pad_-_what_is_culture.pdf> accessed 10th October 2018.

²² G Woodman, ‘The Culture Defence in English Common Law: The Potential for Development’ Chapter 1 in Marie-Claire Foblets and Alison Renteln Dundes (eds), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Oxford, Hart Publishing, 2009) 8.

However, Woodman randomly chooses a definition from the Canadian Commission for UNESCO without offering explanation for his choice.

²³ Jeroen Van Broeck, (2001) ‘Cultural Defence and Culturally Motivated Crimes (Cultural Offences)’ (2001) 9 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 1.

²⁴ *Encyclopedia Britannica* (28 September 2018)

Edward B. Tylor, (1871) *Primitive Culture* as reproduced in *Popular Science Monthly* 26 (1884): 145. Public Domain and cited by <<https://www.britannica.com/biography/Edward-Burnett-Tylor>> accessed 15th May 2018.

Tylor is considered to be the founder of British cultural anthropology. Early anthropology is based on animism, the idea that animals in nature possess a spiritual essence.

Appiah has recently been critical of the concept of ‘western civilisation’ and of Tylor’s approach to culture for its assumption that the west is ‘civilised’, and the rest of the world in not. His criticisms were made in the 2016 Reith Lectures and reported in the *Guardian* 9th November 2016. <<https://www.theguardian.com/world/2016/nov/09/western-civilisation-appiah-reith-lecture>> accessed 20th September 2018.

This was based on the Herderian idea of *Volksgeist* or the spirit of the people and on *Bildung*, which referred to the 'totality of experiences that provide a coherent identity'.²⁵ Tylor's definition is criticized for being vague around the edges and already by 1940 Blumenthal was critical of social scientists in general for using common sense definitions and called for a 'scientific' one.²⁶ In a bid to overcome these inconsistencies, White tried to impose a scientific order to the concept of culture defining it as '...the extra-somatic means of adaptation for the human organism.'²⁷ That is a good and simple definition but it does not enhance understanding from a social perspective and in any event by 1949 Haring had already concluded, in an article whose title asked the very question 'Is Culture Definable?', that culture is not definable.²⁸ However, in 1950 Kroeber claimed that the most significant contribution of anthropology in the first half of the twentieth century was 'the extension and clarification of the concept of culture'.²⁹

By the 1970's Geertz had formed the idea that culture is:

'...an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate and develop their knowledge about and attitudes to life.'³⁰

Geertz argues that cultural anthropologists traditionally attempt to describe different cultures without acknowledging the limits that their own cultural standpoint places on their ability to interpret the cultures of others and so we need

²⁵ Herder believed that everyone belonged to the *Volk* which was not the rabble but the spirit of a nation and included everyone from the king down (as discussed in Dictionary of Anthropology Anthrobase). <http://www.anthrobase.com/Dic/eng/pers/herder_johann_g_von.htm> accessed 28th September 2018.

²⁶ Albert Blumenthal, 'A New Definition of Culture' (1940) 42 (4) *American Anthropologist* 42 (4) 571.

²⁷ Leslie White, *The Evolution of Culture: The Development of Civilization to the Fall of Rome* (New York, McGraw Hill 1959).

²⁸ Douglas Haring, 'Is "Culture" Definable?' (1949) 14 (1) *American Sociological Review* 14(1) 26.

²⁹ Kroeber and Kluckhohn (n 20).

³⁰ Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York, Basic Books 1973) 89.

a 'symbolic anthropology' grounded in interpretive social sciences (which goes back to Weber's notion of *verstehen* and the idea that 'man is an animal suspended in webs of significance')³¹ so that the '...analysis of culture is not an experimental science in search of law but an interpretive one in search of meaning.'³² In this way we achieve a 'thick description' of culture. Geertz is critical of cultural anthropologists too for searching for universal understandings of culture and following a stratigraphic conceptualisation of man through layers from the organic through to the psychological, social and cultural in turn when these factors should be treated as '...variables within unified systems of analyses.'³³ This is a step towards seeking the individual, or perhaps the particular in the universal, and brings the understanding of culture closer to one that is a better fit with the culture-responsibility relationship.

In 1989 Roosens moved towards a more cognitive definition, relevant for our purposes, because it refers to the effect of culture on an individual's behaviour.

Culture is:

'...an encompassing system of thinking, doing, evaluation. It touches different domains of human life and has some overall logic without being completely deterministic.'³⁴

A final definition to consider is that of Spencer-Oatley. Culture is:

'... a fuzzy set of basic assumptions and values, orientations to life, beliefs, policies, procedures and behavioural conventions that are shared by a group of people and that influence (but do not determine) each members'

³¹ n74 Chapter 1.

³² Geertz (n 30) 5.

³³ *ibid* 44.

³⁴ Eugeen Roosens, *Creating Ethnicity: The Process of Ethnogenics* (California, Sage Publications 1989).

behaviour and his/her interpretation of the 'meaning' of other peoples' behaviour.³⁵

And so we can draw from these definitions for our own clarification and to inform our own understanding. The common theme in these definitions is the idea of a 'complex whole' (Tylor), something that is 'fuzzy around the edges' (Spencer-Oatley). This 'fuzzy complex whole' is a good starting point. The question is whether or not we need to compile a list of what constitutes that 'complex whole'. We have 'knowledge, beliefs, arts, morals, law, customs' (Tylor) and 'assumptions and values, orientations to life, beliefs, policies, procedures and behavioural conventions' (Spencer-Oatley). We have 'thinking, doing, evaluation' (Roosens) and more recently Matravers has added 'experience of migration' but could we add to this, for example, folklore, religion, tradition, and identity?³⁶ Tylor suggests that his list is not definitive in adding '...any other habits and capabilities acquired by man' and it is probably best not to be prescriptive but rather to allow for the evolution of what, in different times and places, may be included in this 'complex whole' because there will always be disagreement about what should and should not be on the list.

Pagel, for example, argues that religion is not part of culture but a way of advertising commitment to a particular culture so that religion, along with music and arts, is a 'cultural enhancer'.³⁷ Tradition, described by Glenn as a belief or behaviour passed down with its origins in the past, is a more comprehensible idea than culture because although it is historically grounded '...it is recognized

³⁵ Spencer-Oatley (n 21) 3.

³⁶ Nicola Lacey, 'Community, Culture and Criminalisation' Chapter 3 in Will Kymlicka, Claes Lernestedt and Matt Matravers (eds) *Criminal Law and Cultural Diversity* (Oxford, Oxford University Press 2014) 50.

³⁷ Mark Pagel, *Wired for Culture: The Natural History of Human Cooperation* (London, Allen Lane 2012) 132.

that traditions are not internally stable' and all societies can have traditions whereas the dominant culture, as stated above, can be seen at times to be a-cultural.³⁸ Somehow, tradition seems a weak concept in comparison with culture and it is hard to imagine 'tradition' alone being considered in relation to legal responsibility but there is absolute merit in its inclusion as a component of culture. Giddens encourages us to look to tradition because it has the capacity to circumnavigate the postmodern critique of culture (which claims that culture leads us to think of societies as static and internally coherent with the danger of the '...reified exoticification of the lifeways of people' who are different from us).³⁹ This postmodern attack raises awareness of concerns about understandings of culture in the context of the culture-responsibility relationship - the myth of the bounded culture, the hierarchy of cultures, the emphasis on the group and conceptions of 'the other' and we will return too to these.

Whilst culture is an important factor in shaping identity and cultural identity is therefore a characteristic of the individual, Benhabib bemoans our failure to interrogate the meaning of cultural identity and argues that '...culture has become a ubiquitous synonym for identity' (and she is critical of this because, she argues, groups form around such identity markers and demand legal recognition and resource allocation and identity politics draws the state into 'cultural wars').⁴⁰ But this cannot be wholly right as individual identity is influenced too by other markers

³⁸ Patrick H Glenn, *Legal Traditions of the World* (5th edn, Oxford, Oxford University Press 2014) 30.

³⁹ A Giddens, 'Living in a Post Traditional Society' in Ulrich Beck, Anthony Giddens and Scott Lash (eds) *Reflexive Modernization: Politics, Tradition and Action in the Modern Social Order* (Cambridge, Cambridge Polity Press 1994). Quote from anthrobase <<http://www.anthrobase.com/Dic/eng/def/culture.htm>> accessed 10th October 2018.

On the other hand Renteln criticises the 'postmodern tendency to deconstruct culture so that it is no more than a social construction.' Alison Dundes Renteln, *The Culture Defense* (Oxford, Oxford University Press 2005) 11.

⁴⁰ Seyla Benhabib, *The Claims of Culture* (Princeton, Princeton University Press 2002) 1.

such as race, gender, history, sexuality and religion and so identity, in the individual, is greater than culture and culture, being as indeterminate as we are understanding it to be, arguably only exists in the mind of the individual. Appiah too sees culture as a source of identity (along with religion and nation and race) but warns that all these things ‘...can become a form of confinement, conceptual mistakes underwriting moral ones.’⁴¹ Bhatt challenges us to refuse the origin stories and identity myths that claim to be part of our culture on the basis that they are recent constructions (or reconstructions) of the past and to develop a deeper sense of personhood, responsible to humanity as a whole because culture is a creative and dynamic process, and using it as an excuse to follow certain behaviour is dangerous.⁴² Both Appiah and Bhatt therefore see culture as something that may not be benign.

We can see in this exploration of the understandings of culture that the focus is on the individual but we can further the construction of understandings of culture for the purposes of the culture-responsibility relationship by finding in the definitions studied here insight into the relationship between the individual and the group. Culture is conceptualized as originating in the group and so it comprises ‘...capabilities and habits acquired by man as a member of society’ (Tylor) or ‘...inherited conceptions expressed in symbolic forms’ (Geertz) or ‘...assumptions [etc]...that are shared by a group’ (Spencer-Oatley) or it is the means by which ‘... men communicate, perpetuate and develop their knowledge about and attitudes to life’ (Geertz). This is understood, but what we are concerned with in the culture-responsibility relationship is a conscious or

⁴¹ Kwame Anthony Appiah, ‘There is no Such Thing as Western Civilization’ *The Guardian* (London, 9 Nov 2016) <<https://www.theguardian.com/world/2016/nov/09/western-civilisation-appiah-reith-lecture>> accessed 28th September 2018.

⁴² Chetan Bhatt, TED Talk on Identity <https://www.ted.com/speakers/chetan_bhatt> accessed 30th September 2018.

subconscious acceptance by the individual of the conceptions of the group. What we are effectively questioning is the extent to which the individual has taken this joint construction of meaning on board, the extent to which the individual has internalized the group cultural identity. Both Roosens and Spencer-Oatley include reference to the cognitive domain in their definitions of culture but both fall short of claiming that culture is deterministic. Barry argues that cultural beliefs are freely affirmed and so consciously adopted but Parekh says that cultural beliefs are more a product of circumstance than deliberately chosen because ‘... in some cases a cultural inability can be overcome with relative ease by suitably reinterpreting the relevant cultural norm or practice; in others its constitutive of the individual’s sense of identity and even of self-respect and cannot be overcome without a deep sense of moral loss.’⁴³ Kymlicka takes a middle ground believing that people are capable of personal autonomy (in deciding whether or not to take cultural beliefs on board) but the culture in which they are brought up is usually the given context within which that autonomy is achieved.⁴⁴ Relating this to law and to the culture-responsibility relationship, it seems there is some recognition of agency in decisions to accept culture or part of a culture or not and as will be seen in section 2.4 Levine takes Ortner’s work on this and applies it to the ‘cultural defence’. A final point of importance about the individual and the group is that whilst culture is a product of the group it remains a ‘concept’, nebulous and evolving, created over time through the interaction of people. It therefore exists only in minds and it is understood in different ways in different

⁴³ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke, Macmillan 2000) 241.

Brian Barry, ‘Second Thoughts- and Some First Thoughts Revived’ in Paul Kelly (ed), *Multiculturalism Reconsidered: ‘Culture and Equality’ and its Critics* (Cambridge, Polity Press 2002) 216.

⁴⁴ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon 1995) 95.

minds according to different experiences. It cannot therefore be said that culture 'belongs' to the group although the individual may feel a sense of 'belonging' to a particular cultural group and may internalize a group cultural identity. It is the 'membership' of a particular cultural group that has been at the heart of 'cultural defence' discourse and a significant factor in its failure to bear strict legal scrutiny but as stated in section 1.2 the culture-responsibility relationship moves away from this idea of belonging because belonging alone may not be relevant to the mind of the defendant. Multiculturalism implies that the basis of all groups is cultural but Barry says that this is simply 'bad anthropology' and, like Benhabib, argues against the politicisation of groups based on culture.⁴⁵

We are therefore working towards a subjective understanding of culture, grounded in the individual, despite the legacy of historical anthropological studies, where cultures were grounded in the group which was seen as being 'internally integrated and externally bounded' and culture a singular and universal driving factor in the lives of those studied, making for a more objective definition of the group as a whole.⁴⁶ Geertz is critical of both Levi Strauss for his structuralist approach, his search for objective data to place anthropology in the realm of positive science with a focus on the similarity of human structures everywhere, and of Malinowski for his functionalist and absolute explanation of cultures.⁴⁷ The

⁴⁵ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Polity Press) 21.

⁴⁶ This objectivity was seen for example in Ruth Benedict's 1935 work. '...culture, like an individual, is a more or less consistent pattern of thought or action' with 'characteristic purposes not necessarily shared by other types of society.' Ruth Benedict, *Patterns of Culture* (London, Routledge and Kegan Paul 1935) 33.

⁴⁷ Malinowski published *Argonauts of the Western Pacific* in 1922 following a number of years spent living among the people of the Trobriand Islands. (Bronislaw Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea* (London, Routledge and Kegan Paul Ltd 1922)). Radcliffe Brown is said to have combined functionalism with structuralism in looking at the purpose and meaning of myths in the Andaman islands (*The Andaman Islanders: A Study in Social Anthropology*) although this was published in 1922 forty years before the seminal structuralist work of Levi Strauss *La Pensee Sauvage* (1962). For the sake of completeness the work of Boas, grounded in historical accounts of culture, should be mentioned. All three approaches are based on extensive fieldwork and all

tendency to see cultures as bounded and static encourages the perception of a hierarchy of cultures with ethnocentric views meaning that non-western cultures are seen as inferior. Moreover, as Kukathas asserts, groups are fluid and constantly changing and although early ideas refer to the 'culture of the group' and the emergence of 'group rights' Kukathas argues that there cannot be group rights, only individual rights and the authority that upholds them.⁴⁸ This is returned to in section 2.4 and fits in with what is at stake here because for the most part the criminal law is concerned with individual responsibility, not group responsibility. Dick argues for example that our understanding of culture comes from historical, colonialist and imperialist discourse so that minorities are seen as socially primitive and culturally determined and Volpp objects to the idea that culture is conceptualized and linked with race so that '...culture is a pseudo-biological property of communal life' and the exclusion of some groups from 'us' a form of epistemic violence.⁴⁹ But is culture so bounded and isolated?⁵⁰

As we will see in Chapter 4 liberal multiculturalism is founded on the idea of 'group rights' but we can see ideas that move away from this framework and emphasis. Benhabib, for example, argues that participants within a culture experience it '...through shared, albeit contested and contestable, narrative accounts...from within a culture need not appear as a whole; rather it forms a horizon that recedes each time one approaches it.'⁵¹ In 1995 Waldron recognized the period in which

share the same ideology, that culture is the essence of human nature but Geertz is critical of all three because they do not permit the entry of the individual anywhere in their accounts.

⁴⁸ Chandran Kukathas, 'Are there any Cultural Rights?' (1992) 20 (1) Political Theory 105, 116.

⁴⁹ Caroline Dick, 'A Tale of Two Cultures: Intimate Femicide, Cultural Defences, and the Law of Provocation' (2011) 23 (2) Canadian Journal of Women and the Law 519, 547.

Leti Volpp, 'Blaming Culture for Bad Behaviour' (2000) 12 Yale Journal of Law and the Humanities 89.

⁵⁰ The question of the incommensurability of cultures and cultural hierarchies will be considered in section 4.4. The question of whether 'others' are culturally driven to some extent informs the research question in this thesis.

⁵¹ Benhabib (n 40) 5.

he was writing as an era of 'cultural hybridity' where cultures have become cosmopolitan, because '...we live in a world formed by technology and trade; by economic, religious and political imperialism and their offspring; by mass migration and the dispersion of cultural influences. In this context to immerse oneself [in a culture] involves an artificial dislocation from what is actually going on in the world'.⁵² And modern cultural anthropologists are keen to break down old habits of unreflective ethnocentric judgments. Contemporary ethnographer Whitehouse rejects claims of universal dispositions and claims that '...anthropologists have now developed theories of culture that support varying levels of individual idiosyncrasy'.⁵³ In fact he refers to Ortner's continuum of cultural determinism as evidence of the recognition of individualism in cultural theory.⁵⁴ Deckha points out that we need a postcolonial approach where culture is considered in a nuanced way and certainly some feminist writers see cultures as hybrid, contested and overlapping, so that perhaps there is *de facto* cosmopolitanism, whereby individuals code-switch from one group to another.⁵⁵ Challenging this individualism, Renteln criticizes 'the postmodern tendency to deconstruct culture so that it is no more than a social construction.'⁵⁶ But isn't that exactly what it is? Indeed, Benhabib defends '...social constructionism as a comprehensive explanation of cultural differences' not least because it avoids

⁵² Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative' (1991) 25 University of Michigan Journal of Law Reform 751. Reprinted as Chapter 4 in Will Kymlicka, *The Rights of Minority Cultures* (Oxford, Oxford University Press 1995) 100.

⁵³ Harvey Whitehouse

⁵⁴ This is discussed in section 2.4 below. In 1990 Ortner proposed that culture can be a soft determinant of culture (where cultural structures exist as models or symbolic resources external to actors), a mid determinant (where actors may internalize a schema under certain conditions and thus be constrained by its form but under other conditions may re-establish a distance between themselves and the schema) or, based on the ideas of Bordieu, a hard determinant (where actors require an internal programming which generates behaviour or parameters of behaviour).

⁵⁵ Maneesha Deckha, 'Is Culture Taboo? Feminism, Intersectionality and Culture Talk in Law' (2004) 16 Can J Women & L 14.

These are Phillips, Sachar and Deveaux.

⁵⁶ Renteln, *The Culture Defense* (n 39) 10.

cultural essentialism (something that we will return to in section 2.4).⁵⁷ But Bush too is critical of postmodern culturalism which 'simultaneously promotes cosmopolitanism and a universal hybridization of cultures.'⁵⁸ The issue is that, to some extent and depending on where we sit on the Barry-Kymlicka-Parekh scale of autonomy, in a multicultural world there is a choice and the ability to exercise that choice will vary from individual to individual in the same way that conceptions of culture vary from individual to individual. Because the degree of choice is part of the culture(s) in question. As Uberoi and Modood state '...cultures are linked to individual autonomy... but people need something to choose with, which is the beliefs and norms of their culture'.⁵⁹

To reinforce this recognition of cultural hybridity and the idea of autonomy (and whilst respecting feminist concerns) we have to argue that culture is wider than Rimonte's description of '...a body of beliefs, ideas and ideals held by an ethnic group about the nature of women and men and about their roles and relationships' and we can no longer say that the beliefs, ideas and ideals identified by Rimonte are held by an 'ethnic group' partly because culture and ethnicity are distinct and partly because we are of course concerned with the beliefs, ideas and ideals held by the individual though informed by the group.⁶⁰

Definition aside, do we all have a 'culture'? Environmental biologists can provide us with an answer to this question. In this field there seems to be little dispute that culture exists and that it is what makes us 'human' as recent work claims to

⁵⁷ Benhabib (n 40) 5.

⁵⁸ Bush 192.

⁵⁹ Varun Uberoi and Tariq Modood (eds), *Multiculturalism Rethought: Interpretations, Dilemmas and new Directions* (Edinburgh, Edinburgh University Press 2015) 5. The authors views reflect the earlier ideas of Charles Taylor on personhood and identity.

⁶⁰ Nilda Rimonte, 'A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defence' (1990) 43 (6) *Stan L Rev* 1311, 1315.

prove that we are 'wired for culture.'⁶¹ Yet there is a tendency to assume that white culture is nonexistent or invisible and to see 'other' cultures as sites of oppression where individuals have struggled as slaves, colonised or conquered, so that culture belongs to the oppressed. Bhabha encourages us to think about our own cultures because we assume 'monolithic characterisations of minority migrant cultures' and assume 'the western democratic scene is egalitarian and empowering' and that minorities are 'huddled in the gazebo of group rights, preserving the orthodoxy of their distinctive cultures in the midst of the great storm of western progress.'⁶²

And so what we have arrived at here is an understanding of culture as a fuzzy complex whole, derived from the historical interpretation and adaptation by a group of a number of possible influential factors that an individual may adopt, consciously or subconsciously, freely or not, in whole or in part, and that contributes to both collective and individual identity. Culture is therefore fluid not certain, ephemeral not concrete and we can leave aside for now the question of the 'influential factors' that should be included to make up this 'whole' The interpretations of culture are therefore multiple. Is it an intellectual cop out to decline to define culture? No, because fluid ideas are valuable and save us from accusations of imposing our white western cultural biases in interpreting what we think culture is and perhaps our understanding here can be considered another of what Geertz calls 'sites of interpretation.'⁶³ This ties in with the need to see cultural practices through a lens '...for which there is never a fully exclusive inside

⁶¹ See for example the book of that title *Wired for Culture: The Natural History of Human Cooperation* by Mark Pagel. Pagel (n 37).

⁶² H Bhabha, 'Liberalism's Sacred Cow' in Joshua Cohen, Matthew Howard and Martha C Nussbaum (eds) *Is Multiculturalism Bad for Women?* (Princeton, Princeton University Press 1999) 79.

⁶³ Geertz (n 30) 5.

⁶³ *ibid* 44.

and outside.’⁶⁴ Cotterrell argues that law has an inherent constitutive power, a capacity to create the meaning by which people understand the social environment in which they live and their place in it and so law can confer ‘cultural meanings’ on many things and perhaps in time it will bring its own meaning to ‘culture’.⁶⁵

For now we can carry forward from this section a conceptual understanding of culture and an agreement that we all possess a culture. Although anthropologists cannot agree on a definition of culture they recognize that for the purposes of the law what is important is the effect that culture has or does not have on behaviour and that will be explored in depth in section 2.4. Before exploring the idea of responsibility in section 2.3 we can consider this one last definition from Honig. Culture is ‘...a way of life, a rich time worn grammar of human activity, a set of diverse and often conflicting narratives whereby communal (mis)understandings, roles and responsibilities are negotiated.’⁶⁶ This reinforces the malleable nature of culture and in the next section the commutative understanding of responsibility over time will be seen.

⁶⁴ P Kelly, ‘Situating Parekh’s Multiculturalism’ Chapter 1 in Uberoi and Modood (n 59) 51. The book is a collection of essays in honour of the work of Parekh and this quote is a summary of Parekh’s views on cultural practices as sites of interpretation.

⁶⁵ Cotterrell (n 4) 99.

⁶⁶ B Honig, ‘My Culture Made me Do it’ in Cohen, Howard and Nussbaum (n 62) 35-40

2.3 Understanding Responsibility

Matravers states that ‘...different conceptions of the criminal law will not only have different accounts of responsibility...but may have different places for the very idea of responsibility.’⁶⁷ Responsibility is often seen as forward looking through the creation of offences, something that is addressed in this thesis in section 3.2 in the context of the purpose of the criminal law, and backward looking through findings within the criminal justice system that an individual has committed such an offence. For the purpose of establishing the existence and importance of the culture-responsibility relationship we are concerned here with understanding a backward looking responsibility in the context of the individual. The theory of the Criminal Law is largely concerned with something called the ‘general part of the criminal law’, that is, the structure of criminal liability and within that we need to consider when an actor can or cannot be held ‘responsible’. Broadly, and adopting a traditional dual structural analysis of the criminal law, most crimes consist of an *Actus Reus* and a *Mens Rea*. The *Actus Reus* revolves around an individual voluntarily carrying out an act (or in rare cases allowing an omission to occur) that causes a certain outcome and the *Mens Rea* makes that act a crime if the individual possesses the required mental state and if there is no recognised defence. Together, therefore the *Actus Reus* and the *Mens Rea* make the individual ‘responsible’ or liable for the commission of a crime in the absence of a defence. The emphasis on responsibility is, however, a modern idea because in earlier times there was simply ‘blame’. In his *Nicomachean Ethics* Aristotle asked ‘what exculpates us from blame and when is blame appropriate?’⁶⁸ In pre-

⁶⁷ Matt Matravers, ‘Responsibility, Morality and Culture’ Chapter 5 in Kymlicka, Larnestedt and Matravers (n 36) 90.

⁶⁸ Aristotle *Nicomachean Ethics* as described by Nicola Lacey, ‘In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory’ (2001) 64 (3) *The Modern Law Review* 350.

Medieval times it was the harm that counted in English law and it is not until the thirteenth century that Bracton first refers to 'the will'.⁶⁹ There has been, over time, a shift from simple *act* to the *will* to choose defining action in attracting criminal responsibility. There has also been a shift from a law that simply defined specific offences (for example Blackstone (1760) and James Fitzjames Stephens (1880) both focus on individual crimes)⁷⁰ to the development of the general part of the criminal law, an ongoing development that began at the beginning of the twentieth century. The idea of legal responsibility is complex in a number of ways. Two broad questions relating to responsibility arise in the context of this thesis. Firstly, where does responsibility sit within the criminal justice process? Secondly, what makes an individual legally responsible?

In section 3.2 we identify the maintenance of social order as the purpose of the criminal law, achieved in three ways through criminalisation to prevent harm, the application of the criminal law to attribute responsibility through findings of guilt, and sentencing decisions to enforce punishment. The first question raised here, 'where does responsibility sit?' calls on differing structural paradigms of the criminal law and looks a little more closely at where we find the attribution of responsibility in the criminal justice process. We said in section 2.1 that we need a wide understanding of responsibility to include not just findings of guilt but the degree of responsibility deemed to be just and reflected in sentencing decisions. In *Rethinking Criminal Law*, Fletcher recognizes the traditional dual account of manifest criminality (the act) and subjective criminality (the mind) set out above

⁶⁹ Joel Eigen *Mental Absence and Criminal Responsibility in Victorian London* (Baltimore, John Hopkins University Press, 2004).

⁷⁰ Lacey (n 68).

Interestingly, the etymology of the word 'responsibility' reveals that its use was originally confined to the political arena and first appeared in the *Federalist Papers* of 1787. Even in the nineteenth century responsibility was a word used in the context of representative government and was not concerned with ideas around free will.

but is critical of Anglo-American legal theory for focusing on the actor's responsibility generally rather than focusing on the actor and his accountability for the particular act in question. For Fletcher therefore 'accountability' consists of wrongdoing (the categorical violation of a prohibitory norm without justification), the finding of culpability (where excuses may challenge the degree of culpability) and punishment (which is retributively related to desert to reflect the degree of culpability).⁷¹ It is clear from his work that these three components all work together to determine not only guilt but the level of culpability and there is a link that runs between all three strands because the criminal law is making a judgment about '...whether a wrongful act is attributable to character or to circumstances that overwhelmed [the actors] capacity for choice.'⁷² Fletcher sees in the second strand, the attribution of responsibility (or in his words, the finding of culpability), the potential for an individualised account of responsibility that acknowledges the fact that it is easier for some actors to avoid wrongdoing than others but if one falls below the minimum threshold of being able to avoid wrongdoing then he should be excused.⁷³ However, there are inherent limits on how many people we can excuse in the interests of social control and safety and Fletcher suggests that excuse should be confined to a '...limited temporal distortion of the actor's character' because excuses do not change the norm of law but entail a judgment in a particular case.⁷⁴ The recognition of excuses in law, says Fletcher, is motivated by compassion but this is acted out in decisions in the criminal justice system through 'mercy' with the implication that a 'superior' actor is showing

⁷¹ George P Fletcher, *Rethinking Criminal Law* (Oxford, Oxford University Press 2000) 458-462.

⁷² *ibid* 801.

Fletcher's main thesis is on the distinction between justification and excuse and he takes an interesting approach here in incorporating what would traditionally be considered after a finding of responsibility in the form of 'defences' at the stage of finding a defendant culpable. (He seems to avoid the word 'responsible'). Justification is relevant in deciding whether a norm has been broken in the first place; excuse is relevant to challenging the degree of culpability.

⁷³ *ibid* 514.

⁷⁴ *ibid* 514.

mercy to an 'inferior' actor. Fletcher sees 'law' as applied to the individual beyond the narrow interpretation of norm and justification and construes it in '...a broad sense [that] encompasses the total set of criteria that affects the outcomes of particular cases', that is norms and justifications, excuses and culpability and retribution and desert.⁷⁵

This is the breadth of responsibility we need to see in the culture-responsibility relationship, what we refer to in section 3.2 in turn firstly as the attribution of responsibility and secondly punishment. Culture, if superimposed onto Fletcher's three part framework could find a place in any part of the scheme. However, we see in section 3.3 less flexibility to accommodate culture in the traditional defences (both justifications and excuses) than Fletcher implies. Therefore sentencing decisions too are crucial to understandings of responsibility in the context of the culture-responsibility relationship with the degree of responsibility determined at sentencing and the juncture at which we may witness Fletcher's 'mercy'.

The second question 'what makes an individual responsible?' is harder to answer not least because of the vast number of ideas in academic discourse on the subject, although there is a lack of specific engagement between the field of legal theory and multiculturalism. Responsibility in a liberal democracy is linked to the autonomy of the individual and traditional accounts of responsibility focus on agency. These ideas of agency emerged from Enlightenment philosophy, particularly the work of Kant, so that '...individuals have free will and are able to make rational self-interested choices.'⁷⁶ This is reflected, for example, in the

⁷⁵ *ibid* 812.

⁷⁶ Ian Dennis, 'The Critical Condition of Criminal Law' (1997) 50 (1) *Current Legal Problems* 213, 237.

Criminal Law Commission's Seventh Report which states that 'the notion of prevention through the medium of the mind, necessarily assumes mental ability adequate to restraint', a capacity based account of responsibility.⁷⁷ Tadros says that for the purposes of the criminal law we need to consider who can be a responsible agent (for example children are not generally held responsible for their actions), the ambit of responsibility (for example, we are not generally held to account for omissions), causation and 'attribution-responsibility'. Traditional accounts of the attribution of responsibility are based on capacity, choice and character and see the nature of responsibility as universal. Tadros, for example, builds a theory of responsibility that argues that '...the central ideas that motivate character theory are central to criminal responsibility, but these ideas need to be carefully refined' and also suggests that '...capacity has a proper place in the theory of criminal responsibility.'⁷⁸

The traditional approach to understanding responsibility can however be challenged. We can see this challenge in two recent (2016) accounts of responsibility offered by Farmer and Lacey. These have been chosen because they reject the idea of a universal personhood (and therefore should reflect most closely the social reality of our multicultural society). They can in turn be contrasted with Norrie's earlier relational account of responsibility and his challenge to orthodox subjectivism.

Farmer does not subscribe to a universal theory of responsibility but argues that the policy of the criminal law is concerned with '...situating the concept of

⁷⁷ Felonies and Misdemeanours, *Criminal Law Revision Committee Seventh Report* (Cmnd 2659, 1965) (HMSO) 22.

⁷⁸ Victor Tadros, *Criminal Responsibility* (Oxford, Oxford University Press 2007) 22.

responsibility in an account of its functions.’⁷⁹ In other words, responsibility is a moveable phenomenon defined according to the aims of the criminal law at different times. Perhaps we can read into Farmer’s statement that ‘...the individual is embedded in social relations and must attune their conduct to the conduct of others in an increasingly complex and interconnected society’ a recognition of our multicultural population and the need for law’s understandings to accommodate that. Farmer’s theory allows space for the culture-responsibility relationship because responsibility is not absolute but driven by the aims of the law in different contexts. For Farmer responsibility cannot be disentangled from the practices of holding an individual to account so that responsibility is ‘...a legal artefact...linked to the particular nature of civil order in modernity.’⁸⁰

For Lacey too criminal responsibility is indeterminate and defined in terms of ideas, interests and institutions, so that ‘...the underlying notion of a responsible subject is shaped by an interlocking set of conditions that change over time and place in tandem with factors such as the human situation, prevailing ideas, institutions and the distribution of power.’⁸¹ This invites us to consider the conditions that exist in a multicultural era and how responsibility should be construed in the face of cultural diversity because, as Lacey says responsibility ‘...is grounded in historically and culturally specific understandings’ and we should therefore not simply accept Enlightenment understandings of responsibility.⁸²

⁷⁹ Lindsay Farmer, *Making the Modern Criminal Law: Criminalisation and Civil Order* (Oxford, Oxford University Press 2016)193.

⁸⁰ *ibid* 168.

⁸¹ Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford, Oxford University Press 2016) 3.

⁸² *ibid* 6.

Lacey begins her analysis of responsibility with 'ideas'.⁸³ The first idea is capacity, both as choice and as fair opportunity. Capacity as choice is subjective and relates to intention, knowledge or foresight whilst capacity as fair opportunity is objective and relates to negligence or objective recklessness. This latter category of capacity is harder to situate in a world of moral pluralism because it fails to answer the question of what is fair. But in both cases the '...attribution of responsibility for specific actions lies in human capacities of cognition- knowledge or circumstances, assessment of consequences- and volition- powers of self-control.'⁸⁴ Capacity is central to the culture-responsibility relationship because we are considering ideas of determination, pre-disposition and an altered moral outlook and the effect of these upon choice and behaviour.

Lacey's second idea is character whereby the attribution of responsibility is an evaluation of character. Here we '...condemn not merely the sin but also, and fundamentally, the sinner' because we are resorting to 'character essentialism' or 'character determinism' where identity is fixed and character determines conduct.⁸⁵ In relying on character responsibility we are questioning the defendant's conduct as evidence of criminal character, asking '...does the defendant's conduct *qua* moral agent display the sort of vice which calls for criminal law's communicative role of expressing moral indignation to be invoked?'⁸⁶ This seems a dangerous approach in assessing the responsibility of defendants from other cultures because it is difficult to draw a line between making a judgement about an individual's breach of the criminal law and about a

⁸³ Lacey's ideas on responsibility include capacity and character and outcome and risk. The latter two are much more relevant to the forward looking responsibility found in criminalisation and so are not discussed here.

⁸⁴ *ibid* 28.

⁸⁵ *ibid* 35.

⁸⁶ Tadros (n 78) quoted in Lacey (n 81) 36.

culture that may have informed that breach. If we return to Fletcher's criticism of Anglo-American legal thinking for focusing on an actor's responsibility generally rather than on an actor's liability for this particular breach of this particular law we can see that character responsibility is not a constructive way forward and may lead to the possibility of a less just outcome for that actor. From the outset we have emphasized the need for the culture-responsibility relationship to concern itself with the *relationship* between culture and responsibility in individual cases. Lacey's understanding of character responsibility is based on wrong or bad character at one end of a spectrum or good character where a vicious trait that has been displayed is 'out of character' at the other. The culture-responsibility relationship carefully places its actors in the middle of this spectrum, neither inherently good nor bad but whose capacity, either in choice or fair opportunity, has possibly been influenced by culture. However, character as broadly construed to reflect the influence of culture is relevant to mitigation in sentencing.

Lacey recognizes the shifting alignment of ideas of responsibility through time based on 'interests' and so that interpretations of law are shaped by underlying power structures. Over time she charts the shift, broadly, from the alignment between judgements of responsibility and judgements of bad character in the eighteenth century to the realisation of capacity responsibility in the nineteenth century to a 'dual track era' of capacity (for 'real crime') and outcome responsibility (for 'regulatory crime') in the twentieth century. She identifies the current predominance of capacity responsibility but sees that character (and risk and outcome) also hold sway at the prosecution and sentencing stage so that we now have a '...hybrid pattern of responsibility attribution.'⁸⁷ In addition she recognizes that '...different conceptions of responsible personhood may be

⁸⁷ Lacey (n 81) 78.

operating at the prosecution, trial and punishment stages- and each contributes to the overall construction of the subject of criminal law.⁸⁸ Lacey's analysis of responsibility and the culture-responsibility relationship can work well together. Ultimately we are searching in this thesis for a forward looking framework that can work in practice. If we can understand responsibility as an individual's capacity for agency both in terms of choice and fair opportunity at the guilt stage and add to this character evidence in decisions on sentencing we may have a just starting point for the development of the culture-responsibility relationship.

However, we are still accepting in this construction of the responsible person the Kantian autonomous agent. Wells and Quick state that '...crime is a construct of particular legal and social systems, reflecting temporally and geographically specific interests, imperatives and arrangements' and so we must question '... how responsibility for crime comes to be attributed exclusively to individual offenders rather than (also) to the social, legal and political systems which define and enforce law.'⁸⁹ Norrie challenges us, not to move away entirely from this ideological individual and not to dispense with notions of agency altogether because '...the situation calls for a form of judgement that can unite appreciation of the social and political environment with individual agency.'⁹⁰ Like Lacey and Farmer, Norrie does not engage with the concept of culture but he does draw on ideas of community. He situates himself between Sereny's assertion that guilt is a question for the individual and Giddens' assertion that it is a question for community so that community is relevant to ideas of individual responsibility and

⁸⁸ *ibid* 64. For example, the prosecution stage may see differential policing around race, ethnicity, class and gender based on character assumptions and those on the Sex Offenders Register may be 'presumptively criminal'.

⁸⁹ Celia Wells and Oliver Quick, *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials* (4th edn, Cambridge, Cambridge University Press 2010) 89.

⁹⁰ Alan Norrie, *Law and the Beautiful Soul* (London, Glasshouse Press 2005) 57.

guilt.⁹¹ He draws on the social psychology of Harre and the dialectics of Bhashkar so that ‘...individual identity exists within an overall, totalising context and its nature is radically affected thereby.’⁹² He describes his approach as relational and dialectic and this provides the bedrock for his critique of Kantianism. This approach fits well with the understanding of culture that we arrived at in section 2.2. Bhaskar describes his dialectic as the ability ‘...to see things existentially constituted and permeated by their relations with others; and to see our ordinary notion of identity as an abstraction.’⁹³ Culture too is existential, a group created construction that is adopted and adapted by the individual and so we see both in Norrie’s critique of Kant and in our understandings of culture the interplay between the individual and the greater world around him. In *Punishment, Responsibility and Justice* Norrie asks us to consider ‘what if identity is not individual, fixed, and stable but rather located in significant measure beyond the individual in the social realm and therefore fluid and changing?’⁹⁴ In section 2.2 we do consider this non-monadic character, at least in so far as the identity of the individual is informed by culture. The culture-responsibility relationship therefore makes us naturally open to Norrie’s socially connected construction of the individual.

Whilst we might embrace Norrie’s resistance to the ‘abstract juridical individual’, the ‘autonomous moral agent with abstract will’ informed by the Enlightenment

⁹¹ Gitta Sereny, *Albert Speer: His Battle with Truth* (London, Picador 1996).

Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge, Polity 1991).

Giddens asserts that in late modernity the significance of communities is reduced because of the erosion of established normative communities. This is resonant of our perception of culture as no longer ‘belonging’ to bounded groups.

⁹² Norrie, *Law and the Beautiful Soul* (n 90) 91.

⁹³ Roy Bhaskar, *Dialectic: The Pulse of Freedom* (Frist published 1993, London, Routledge 2008) 125.

⁹⁴ Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford, Oxford University Press 2000) 12.

philosophy of punishment, the difficulty with Norrie's entity relationalism is fitting it into the criminal law and criminal justice system of England and Wales and Norrie offers no practical guidance.⁹⁵ We can question, however, whether we are recognising in the culture-responsibility relationship the application of Norrie's dialectic because whilst we are calling the individual to account we are insisting too upon a reflection on the effect of culture on his behaviour. In making a judgment on the defendant with a 'different' cultural background is the court not considering Norrie's demand that

'...the process of judgment must take account of the broader environment, social policy and conditions, because these establish the circumstances under which family life occurs and children grow up. It includes the parents of the children, the surrounding neighbourhood and ultimately the broader society. These are not easy judgements; they are multi-faceted and particularistic, recognizing general circumstances in the moment of individual agency'?⁹⁶

Perhaps in this we are over-simplifying Norrie's ideas but that which the criminal law and criminal justice system may not tolerate in theory can sometimes be found to slip into practice. Norrie explains that '...the key difference between a Kantian individualist view of responsibility and a dialectical-relational point of view is that, for the latter, responsibility exists both in and beyond the individual and the 'significant others' in her community or communities.'⁹⁷ For now, perhaps we can acknowledge the significance of the relational approach to the culture-responsibility relationship in the attribution of individual responsibility (in both guilt and sentencing) whilst simultaneously accepting that in reality and in practice significant others and those beyond will not be called to account.

⁹⁵ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, Cambridge University Press 2014).

⁹⁶ Norrie, *Law and the Beautiful Soul* (n 90) 58.

⁹⁷ Norrie, *Punishment, Responsibility and Justice* (n 94) 14.

There is a third question that is often addressed in understanding responsibility and that relates to the interplay between legal responsibility and moral responsibility. There has long been debate about the interplay between law and morals but it is generally accepted that a guilty verdict is the outcome (other than in cases of strict or vicarious liability) for those deemed to be 'morally responsible' for actions that infringe the criminal law. Law's authority, says Lloyd, is based on a belief in our moral obligation to obey the law and in turn law needs to be '...buttressed by the moral convictions of the community.'⁹⁸ The obvious question arises. What are those moral convictions in a multicultural era? Returning again to Norrie, he argues that linking law and morality is problematic because 'blame' is inadequate and we need to look to a 'blaming relation' to counter individualistic moral or legal theory. But he acknowledges that there is something important in doing individual justice and so, as we know, he advocates a shift from orthodox subjectivism to moral contextualism because divorcing the individual from her moral community allows us to make no sense of what is good and what is bad. Whilst we need to be aware of strong positivist arguments from, for example, Raz who sees law simply as social fact, we can accept for the purpose of this thesis the correlation between law and morality and in section 2.4 we will examine the idea that an altered moral outlook can have an effect on behaviour in the context of the culture-responsibility relationship.

In this section we have arrived at an understanding of responsibility so that we are clear about where responsibility can sit within the criminal justice system and about what can make an individual legally responsible. We can add this understanding of responsibility, widely based so that it can in theory be situated in any one of the three parts of Fletcher's account of the general part of the

⁹⁸ Lloyd (n 1) 66.

criminal law and to reflect Lacey's fluid concept of agency based on capacity but with an awareness of the role of character responsibility and of Norrie's moral contextualism, to the conception of culture as a 'fuzzy, complex whole' arrived at in section 2.2 and take both forward to section 2.4 in establishing the existence and importance of the culture-responsibility relationship.

2.4 Establishing the Existence and the Importance of the Culture-Responsibility Relationship and Overcoming its Inherent Difficulties

In *Criminal Law and Cultural Diversity* Kymlicka, Lernestedt and Matravers seek to address two crucial questions, what to criminalise and how to ascribe responsibility, calling for a reflection on when 'cultural information' can be relevant to personal responsibility.⁹⁹ Lernestedt advocates that we '...respect the demand for true blameworthiness so that investigation gets profound enough and close enough to this particular defendant.'¹⁰⁰ This, in essence, is what we are trying to achieve with the culture-responsibility relationship, a contemporary and embracing understanding of the notion of 'true blameworthiness' based on the understandings of culture and responsibility arrived at in sections 2.2 and 2.3 respectively.

What we are looking for then is a *relationship* between culture and legal responsibility according to which it can be said that culture *might* affect responsibility in individual cases. Establishing this link, in the terms set out in section 2.1, validates the call for a revised approach to legal responsibility in the criminal law of England and Wales in specifically defined cases in the context of multiculturalism.¹⁰¹ As emphasized throughout it is the existence or perceived

⁹⁹ Kymlicka, Lernestedt and Matravers (n 36) 1.

¹⁰⁰ *ibid* n26.

Lernestedt is critical of the Swedish legal system for using 'our' (ie Swedish) yardsticks to measure the behaviour of defendants from somewhere else. He argues that 'cultural information' is necessary or 'has a natural place' in the rules determining personal blameworthiness.

¹⁰¹ There is a recent argument in contract law in Canada for looking at unconscionability through the lens of culture. Instead of looking at the transaction, courts should look at the parties. Lima argues that in *Harry v Kreutziger* [1978] 9BCLR 166, 95 where there was an argument that a fisherman had been treated unconscionably in agreeing the price for the sale of a boat the evidence for the court should not be 'someone took advantage of a fisherman' but 'someone, who is probably a white western male, negotiated with someone of an Aboriginal culture with results that are unfair to that person in view of his culture.' Augusto Lima, 'When Harry met Kreutziger: A Look into Unconscionability Through the Lenses of Culture' (2008) 28.

existence of the *relationship*, if any, between culture and responsibility that will need to be established if the criminal law is to adapt in the face of *de facto* multiculturalism in order to achieve just outcomes. What we are essentially asking is whether culture can have an effect on individual agency or upon morality such that the attribution of criminal responsibility and punishment should be reconsidered. If we take a paired down view on free will then agency and responsibility depend on rational choice. But if we open up the understanding of human behaviour to include background, context, emotions, learned behaviour and responses then there may be more to it than absolute unfettered free will. If we adopt a mono-culturally-centric view of morality then right and wrong are clear-cut. But different cultural backgrounds may influence moral standards. In section 2.1 we set out the possible ways in which culture *might* be relevant to legal responsibility and carried forward to the culture-responsibility relationship cultural determination or pre-disposition that compromises agency or cultural influences on moral outlook. The line between determinism and pre-disposition is not always clearly drawn.

Whilst it may not be possible to provide a definitive answer to the question 'does culture affect responsibility?' we can conclude that culture *can* affect responsibility (or at least that there is a perception that it can) and that is why the culture-responsibility relationship needs to be explored, within the two distinct and

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1124922> accessed 25th September 2018.

Canadian Tort Law has also seen developments recently in the context of culture with a number of court cases in which claimants have argued that something in their religion or culture or both entitles them to a finding of liability or greater damages. These cases have been criticized as posing a threat to equality and to national and social cohesion. Vaughan Black, 'Cultural Thin Skulls' (2010) 60 UNBLJ 186.

defined parameters set out in section 1.2, and to find its proper place in the criminal law and criminal justice system of England and Wales.

The relationship between culture and responsibility crops up, directly or indirectly, in a surprising number of disciplines and so we need to consider a range of views in attempting to answer the question 'does culture affect responsibility?' Beginning with science, there are recent claims from neuroscience that all human behaviour is determined.¹⁰² Vincent states that '...science and law have been locked in a dialogue on the nature of human agency ever since the thirteenth century when a mental element was added to the criteria for legal responsibility.'¹⁰³ In Vincent's summary, these developments in neuroscience, and behavioural genetics and psychology too, suggest findings that threaten the moral foundations of legal responsibility by revealing that determinism is true. Relying on a stochastic approach Green and Cohen argue that advances in neuroscience show that '...free will as we ordinarily understand it, is an illusion' so legal responsibility, which is essentially backwards looking, has no place in a 'scientifically informed approach to the regulation of society.'¹⁰⁴ If that were infallibly so then the administration of criminal justice would be a much easier affair. No fault liability across all crimes with a focus on deterrence and prevention rather than retribution. But there must be caution because we have yet to prove

¹⁰² See for example the work of Wegner, who asserts that conscious will is an illusion and that we delude ourselves when we think that intentions are causal. Daniel M Wegner, *The Illusion of Conscious Will* (Cambridge, MIT Press 2002). Clearly it is beyond the scope of the thesis to attempt to assess the validity of such claims but reference needs to be made to them. The idea is that the operation of the mind is linked to the operation of the brain. The brain is a mechanism and operates according to the laws of the physical world and not the metaphysical world.

¹⁰³ Nicole A Vincent (ed), *Neuroscience and Legal Responsibility* (Oxford, Oxford University Press 2013).

¹⁰⁴ Joshua Green and Jonathan Cohen, 'For the Law, Neuroscience Changes Nothing and Everything' in Judy Illes and Barbara J Sahakian, (eds) *Oxford Handbook of Neuroethics* (November 2012)

<<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199570706.001.0001/oxfordhb-9780199570706-e-039#oxfordhb-9780199570706-div1-039004>>

accessed 1st October 2018.

that the will is not metaphysically free and Vincent calls for a more nuanced approach, ‘...one that provides the mind sciences with a genuine opportunity to enrich the legal understanding of agency and to inform legal responsibility practices rather than just attempting to eliminate them.’¹⁰⁵

If we accept that the argument that free will does not exist is currently not fully developed we need to return to the idea that culture can affect behaviour. Environmental biologists are engaging in discussion around the place of culture in human development. Going back to Locke’s *tabula rasa*, Pagel argues that the human brain is primed for culture but that ‘we are not primed to acquire any particular culture.’¹⁰⁶ His book, *Wired For Culture*, is about ‘...how our cultures came to occupy our minds, what they demanded of us, how those demands have been met, and whether our cultural nature provides useful solutions for living in a modern world’.¹⁰⁷

Another scientific approach comes from the world of primatology, a discipline that looks at the biology and psychology of primates and finds similarities between human and primate behaviour. There is evidence that primates, like humans, learn cultural behaviour and so, going back to White’s 1959 definition of culture, primates too demonstrate this ‘extra-somatic means of adaptation.’¹⁰⁸ A 2010 study by Horner *et al* develops a theory of ‘prestige based cultural transmission’ concluding that chimpanzees will follow the example of the higher ranking

¹⁰⁵ Vincent (n 103).

¹⁰⁶ Pagel (n 37) 5.

Locke’s *tabula rasa* is a ‘blank slate’, referred to in his *Essay Concerning Human Understanding*. His idea is that sensory experiences throughout life fill and inform the mind that is blank at birth.

¹⁰⁷ *ibid* 11.

¹⁰⁸ White (n 27).

individual, in just the way that humans do.¹⁰⁹ This following is innate, the product of subconscious choice and when projected onto humans suggests a predisposition to follow those of higher social status. Haraway is critical of primatology because ‘...the scientific practices and discourses of modern primatology participate in the pre-eminent political act in western history: the construction of man.’¹¹⁰ Primatology is raised here as one way of approaching the effect of culture on behaviour; Haraway’s resistance to the scientific account on the grounds that is anti-feminist is raised because the thesis is committed to a feminist methodology, to ‘asking the woman question.’¹¹¹ However, the science of primatology can only help us to understand culture and behaviour in the most general of terms.

Cultural determinism is a controversial idea and bringing culture into the realm of determinism perhaps follows patterns in criminology where there was a shift from classical criminology based on autonomy and free will to the positivist criminology of Lombroso in the nineteenth century. Fox is very critical of any suggestion that culture is determinative, questioning how culture, itself only an idea, can affect behaviour.¹¹² He uses the word ‘culturology’ to describe deterministic arguments and warns against stereotyping and homogenizing ‘explanations’ of the human condition in different societies.¹¹³

Moving away from science to consider determinism in the realm of the social sciences, it is helpful to revisit Ortner’s continuum of positions wherein she

¹⁰⁹ Victoria Horner, Darby Proctor, Kristin Bonnie, Andrew Whiten & Frans BM de Waal, (2010). ‘Prestige Affects Cultural Learning in Chimpanzees’ (2010) 5 (5) *PLoS ONE* <[10.1371/journal.pone.0010625](https://doi.org/10.1371/journal.pone.0010625)> accessed 1st October 2018.

¹¹⁰ D Haraway, ‘Primatology is Politics by Any Other Means’ (1984) *Proceedings of the Biennial Meeting of the Philosophy of Science Association* 489-452, University of Chicago Press, Chicago 489-452.

¹¹¹ *ibid.*

¹¹² Richard G Fox, *Lions of the Punjab* (University of California Press 1985).

¹¹³ *ibid* xii.

recognises that culture can be a hard or a soft determinant of behaviour.¹¹⁴ Ortner perhaps comes closest to asking the pertinent question about the relationship between culture and responsibility ‘...did my culture, this assemblage of shared meanings and standards to which I have become ‘enculturated’, determine or influence my behaviour?’¹¹⁵ The ‘soft’ position is that culture has little to do with behaviour at the time of the offence or the behaviour in question. It is just called upon later to explain, describe or legitimate what happened. Here, we ‘appropriate after the fact’ to understand and validate what happened and with echoes of ‘group membership’ it is not something that we can consider as helpful in establishing a culture-responsibility relationship in individual cases.¹¹⁶ At the other end of the spectrum is hard determinism and Ortner calls on the structuralist work of Levi-Strauss where ‘myths operate in men’s minds without their being aware of the fact’ and the ‘habitus’ of Bordieu according to which actors require an internal programming that generates behaviour or patterns of behaviour to elucidate what is meant.¹¹⁷ Ortner herself takes a ‘middle position’, explaining that we begin by acting as individuals but when we recognize that our actions fit within a pre-organised schema, we are likely to choose to follow the schema. When acting in the cultural schema the path dictated by the schema becomes intuitive for the actor. She summarises it in the following paragraph:

‘With that shift in perception the cultural schema is appropriated and further moves appear as the next rational step. In effect the cultural schema has been moved by an actor from an external to an internal

¹¹⁴ S Ortner, ‘Patterns of Shared History: Cultural Schemas in the Founding of Sherpa Religious Institutions’ in Emiko Ohnuki-Tierney (ed), *Culture Through Time: Anthropological Approaches* (Stanford University Press 1990).

This work was discussed briefly in section 2.2.

¹¹⁵ *ibid* 43.

¹¹⁶ Kay L Levine, ‘Negotiating the Boundaries of Crime and Culture: A Socio-Legal Perspective on Cultural Defense Strategies’ (2003) 28 (1) *Law & Social Inquiry* 39, 43.

¹¹⁷ Claude Levi-Strauss, *The Raw and The Cooked* (John and Doreen Weightman (tr), Harmondsworth, Penguin 1969) 12.
Pierre Bordieu, *Distinction: A Social Critique of Judgment and Taste* (Richard Nice (tr) London, Routledge, 1989).

position, from an abstract model of deeds done by ancient heroes and ritual participants to a personal program for understanding what is happening to one right now and for acting upon it.¹¹⁸

But the actor can move away from the schema.¹¹⁹ Applying this to the culture-responsibility relationship, it is a matter of balancing the degree of agency of the individual against the degree of control of the cultural schema over the individual. If the degree of control of the cultural schema is stronger then, as Levine suggests, it is reasonable for the actor to rely on it.¹²⁰ Ortner's approach to cultural determinism and/or predisposition is credible because it reflects the understanding of culture developed here which emphasises the individual's interpretation of shared experiences and recognises the 'personal program'. It also appears workable and there is potential for its adaptation for courtroom use, something that Levine considers in the context of the 'cultural defence' and these ideas will be returned to in Chapter 5.¹²¹ However, it is open to criticism. In section 2.2 we saw how Appiah and Bhatt are aware of the confinement that 'deeds done by ancient heroes' can bring to the individual with Bhatt encouraging us to move away from identity myths. Ortner's schema does allow for an individual response to what she defines as a historically grounded culture, although Washburn pertinently questions what the ability to resist the cultural schema is based upon. He asks if we should regard culture as a 'supra-individual phenomenon' and if so

¹¹⁸ S Ortner, 'Patterns of Shared History: Cultural Schemas in the Founding of Sherpa Religious Institutions' in Ohnuki-Tierney (n 114) 89.

¹¹⁹ *ibid* 88-90.

¹²⁰ Levine (n 116) 43.

¹²¹ In summary Levine applies Ortner's continuum of possibilities to consider a practical approach to the 'cultural defence' and suggests that to rely on culture the defendant must show

1. the hard/internal position for cultural reliance ie culture dictated behaviour (rather than explained it after the fact)
2. the cultural reliance was reasonable (rather than the US legal standard)
3. behaviour was consistent with existing and current cultural beliefs and practices.

ibid 56.

the question is 'how cognitively encompassing is it?'¹²² The answer to this question must vary from individual to individual.

It is interesting to contrast Ortner's cultural schema with Renteln's ideas on the relationship between culture and responsibility. As we know Renteln is a supporter of the 'cultural defence' and relies on the argument that certain cultural practices should be allowed as a defence. She says that four questions need to be asked in deciding whether a 'cultural defence' should be allowed:

1. Is the litigant a member of an ethnic group?
2. Does the group have such a tradition?
3. Was the litigant influenced by the tradition when he acted?
4. Is the practice irreparably harmful?¹²³

In clarifying our understanding of the culture-responsibility relationship in section 2.1 we confirmed that membership of or belonging to a group is not in itself sufficient to establish a *relationship* between culture and responsibility, and in section 2.2 we cast doubt upon the ability of a group to 'own' a culture. Furthermore, in understanding the socially constructed and fragmented nature of the cultural group it is difficult to think in terms of 'membership' and 'group traditions'. Renteln's first two questions are therefore not relevant to the culture-responsibility relationship. Renteln's fourth question does not fit within the purpose of the criminal law of England and Wales as discussed in section 3.2. As we will see, in essence 'harm' is the basis for criminalisation and so if a defendant is in court, the act of which he is accused is by definition considered 'harmful'. Whether it is 'irreparably' so is very difficult to determine but what, if harmful, is not in some way irreparably harmful? Death is irreparably harmful; other actions

¹²² Daniel Washburn 'Enculturation and the Degenerative Principle' (2008) 1 (1) *Contemporary Issues* 49.

¹²³ Renteln, *The Cultural Defense* (n 39) 207. The fourth question is not included in her 2004 book but added in later work.

may cause a variety of irreparable harms, both to the victim and others. This just leaves the third question in Renteln's scheme 'was the litigant influenced by the tradition when he acted?'. This is something akin to the question 'how might culture be said to affect responsibility in this individual case?' but it could also be asking the simpler question of how 'tradition' affects conduct. In either case, guidance as to how the question(s) might be answered remains undeveloped. However, Renteln's ideas are still well regarded and an international conference in honour of her work was held at the University of Cagliari in 2016 where the 'cultural defence' was further explored.¹²⁴ At that conference she reminds delegates that the aim of her 2004 book is '...not to open the door to every cultural claim but to invite judges and policy makers to become aware of the cultural component that a behaviour can have and to remind them that culture is a human right to be protected.'¹²⁵ Again, this is a missed opportunity for considering when behaviour might include and be influenced by that cultural component.

¹²⁴ Details of the conference can be found online at

<<http://www.clisel.eu/culturaldefense.pdf>> accessed 20th September 2018.

At the conference Ruggiu suggested a 12 point test for when culture should be regarded as a defence. The proposed test consists of the following questions:

- 1) Is it possible to use the category of culture?
- 2) How can the cultural practice be described in detail?
- 3) How is the cultural practice related to the broader cultural system?
- 4) Is the practice essential (to the cultural survival of the group), compulsory or optional?
- 5) Is the practice shared or contested within the group?
- 6) Is the group vulnerable within a society? Is it discriminated against?
- 7) How would a reasonable person in that group behave in the same circumstances?
- 8) Is the subject sincere?
- 9) Is there a "cultural equivalent" ie. a similar or comparable practice in the majority culture?
- 10) Is the practice harmful?
- 11) What is the impact of the practice on the culture and value system of the majority?
- 12) What good reasons does the minority present for continuing to following the practice at issue?

This list does not help us at all in attempting to formulate a framework for the development of the culture-responsibility relationship. It is still reliant on concepts of the 'group' and 'cultural practices'. The list does not bear legal scrutiny, for example, what does question 8 ('Is the subject sincere?') mean?

¹²⁵ Conference details in note above.

We have already been critical of Renteln's work for its lack of clarity in both the definition and purpose of the 'cultural defence'. There is some confusion too about whether she believes culture pre-disposes an individual to certain behaviour or whether culture is determinative. In a Chapter in *Criminal Law and Cultural Diversity*, her most recent work, she states that the 'cultural defence' is '...a defence employed by individuals who claim that their cultural background predisposed them to commit certain acts'.¹²⁶ This departs from her reply to Magnarella's argument that the debate on the freestanding 'cultural defence' is theoretical/ideological where she conceptualizes it within the practical realm. Here she argues that individual behaviour can be influenced to such an extent by culture that either the defendant did not believe that his behaviour contravened any laws (something she calls the 'cognitive case') or the defendant was compelled to act in a certain way because of culture (the 'volitional case').¹²⁷ Renteln argues that both cases should be allowed with a view to ensuring equal application of the law to all parties and relies on the work of Dworkin who believes that individual justice should focus on the actor as well as the act.¹²⁸ Renteln's commitment to the 'cultural defence' in the cognitive case is problematic for the criminal law of England and Wales because it brings us face to face with the principle that ignorance of the law is no excuse and that is discussed in section 3.2.

¹²⁶ A Renteln, 'What do we have to fear from the Cultural Defence' Chapter 9 in Kymlicka, Lernerstedt and Matravers (n 36) 182.

¹²⁷ Paul J Magnarella, 'Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial' (1991) 19 (3) *The Journal of Ethnic Studies* 65, 65.

Alison Dundes Renteln, 'A Justification of the Cultural Defence as Partial Excuse' (1992) 2 *Cal Rev L & Women's Stud* 437.

This article is obviously written 12 years before the publication of *The Cultural Defence* and Renteln may have, quite reasonably, shifted her position to see culture more clearly as leading to a pre-disposition.

¹²⁸ Ronald Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977) 227.

If we take Renteln's response to Magnarella just to apply to the volitional case this is probably one of Renteln's best argued pieces of work because she looks at the whole picture and follows the implications of the 'cultural defence' throughout the criminal justice system. We need, she argues, a 'cultural defence' as a partial excuse because *mens rea* should include considerations of motive in establishing guilt. This is based on the idea of enculturation, which should in turn be considered in the context of retributivism, proportionality and individualised justice. Retributivism and motive are discussed in section 3.2 in the context of Norrie's morally contextual interpretation of retributivism which leads to later arguments in this thesis for the place of culture in personal mitigation at the sentencing stage. But there is still a lack of clarity in the reference to the defendant being 'compelled' to act in a certain way and 'compulsion' seems to sit somewhere between determination and pre-disposition.

To fully understand these arguments about the effect of culture on behaviour we need too to grasp the concept of enculturation. Both Ortner and Renteln rely heavily on the idea of enculturation which Herskovits summarises as a process of socialization whereby the norms of one's indigenous culture including its salient ideas values and concepts are maintained.¹²⁹ Kottak describes enculturation as '...the process where the culture that is currently established teaches an individual the accepted norms and values of the culture or society within which the individual lives...enculturation helps mould an individual into an acceptable member of society'.¹³⁰ Washburn disputes this, arguing that individuals are 'intrinsically idiosyncratic'.¹³¹ He bases his arguments on work by

¹²⁹ Melville Herskovits, *Man and His Works: The Science of Cultural Anthropology* (New York, Alfred A Knopf, 1949) 5.

¹³⁰ Conrad Phillip Kottak, *Window on Humanity: A Concise Introduction to Anthropology* (Boston, McGraw Hill 2010).

¹³¹ Washburn (n 122) 1.

the neuroscientist Edelman who identifies individual idiosyncrasy from the cellular level outwards.¹³² Once again, it is beyond the scope of this thesis to be able to form a view on the credibility or otherwise of findings in neuroscience but for the purposes of the culture-responsibility relationship we do need to question whether enculturation is still valid as an idea in the social sciences. Richland, in criticizing Renteln, says that culture ‘...relies on anachronistic notions of enculturation, assimilation, and acculturation whilst simultaneously dismissing more recent deconstructionist views of cultural practices as ignoring reality.’¹³³ There is very little recent academic engagement with the concept of enculturation but it is often understood in terms of its difference from acculturation. If we are enculturated in our culture of birth then we become acculturated as we move from one culture to another. It is at this point that ‘culture conflict’ may emerge, something identified by Sellin in 1938.¹³⁴ A whole body of work has emerged under the broad heading of ‘cross-cultural adaptation theory’ drawing on the disciplines of anthropology, sociology and psychology.¹³⁵ This is now most credible within wider understandings of ‘strain theory’ which focuses on negative relationships with others as a cause of crime through the creation of pressures on individuals towards delinquency.¹³⁶ Criminologists (and now cultural criminologists such as Hayward and Young) have contributed to the field in

¹³² Gerald Edelman, *Neuronal Darwinism: The Theory of Neuronal Group Selection* (New York, Basic Books 1987).

¹³³ Justin B Richland, ‘Culture Shock’ (2006) 877. Review of A Renteln, *The Cultural Defence*, Richland is also critical here of Renteln’s lack of recognition of other possible ‘cultural defences’ for example, gay and lesbian, urban poor, rural poor and women. He says that Renteln relies on a false dichotomy in arguing for culture as a defence although the dichotomy is not really false, it’s just one of many.

¹³⁴ Jonathan Thorsten Sellin, *Culture Conflict and Crime* (New York, Social Science Research Council 1938).

¹³⁵ Kim Young Yun, ‘Adapting to a New Culture’ in William Gudykunst (ed), *Theorizing about Intercultural Communication* (London, Sage Publications 2004).

¹³⁶ Agnew, R. (1992) ‘Foundation for General Strain Theory of Crime and Delinquency’ *Criminology* 30(1) 47.

examining the relationship between culture and law breaking.¹³⁷ During the 1930's the 'Chicago School' of sociology developed a symbolic interactionist methodology in carrying out ethnographic studies of gangs, particularly of immigrants settling in the US. Rock has since explained that meanings and motives '...are not established and confirmed by the self in isolation. They are a social accomplishment...subcultures themselves are taken to be exaggerations, accentuations or editings of cultural themes prevalent in the wider society.'¹³⁸ Renteln, however, says that sub-cultures should not be allowed a 'cultural defence' as their worldview '...is not radically different from the rest of society's.'¹³⁹ This is somewhat confusing.

It is sometimes suggested that 'acculturation' is a policy response to a multicultural population but this is more accurately a psychological change evidenced within the individual when he or she is exposed to a second culture.¹⁴⁰ Even though acculturation cannot properly be defined as a policy response to multiculturalism, it may be part of the process of assimilation, which in turn can be and has indeed formed such a policy response. Earlier work on acculturation theory is now criticized for seeing acculturation as a one-sided process leading to a static and, from the point of view of the majority, desirable outcome for immigrants.¹⁴¹ More recently Berry has defined acculturation as '...the dynamic interplay of behaviours and identity representing acculturation 'strategies''.¹⁴²

¹³⁷ K Hayward, J Young, 'Cultural Criminology' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, New York, Oxford University Press 2012).

¹³⁸ P Rock, 'Sociological Theories of Crime' in Maguire, Morgan, Reiner (n 137) 31.

¹³⁹ Renteln, 'A Justification of the Cultural Defence as Partial Excuse' (n 127) 497.

¹⁴⁰ This understanding is summarized in the following article by Berry and Sam. David L Sam and John W Berry, 'Acculturation When Individuals and Groups of Different Cultural Backgrounds Meet' (2010) 5 (4) *Perspectives on Psychological Science* 472, 472.

¹⁴¹ For example, Milton Gordon's book *Assimilation in American Life: The Role of Race Religion and National Origins*, in which he outlines the 'Seven Stages of Assimilation' with acculturation being the first. Milton Gordon, *Assimilation in American Life: The Role of Race Religion and National Origins* (New York, Oxford University Press 1964).

¹⁴² J Berry, 'Acculturation and Adaptation' in Harry C Triandis and Walter Lonner, *The Handbook of Cross- Cultural Psychology* (Vol III, Boston, Allyn and Bacon 1997).

According to Berry these strategies involve the adoption (or not) of the majority culture and the maintenance (or not) of the minority culture. He identifies four possible acculturation outcomes within his acculturation framework: integration, assimilation, separation and marginalization. Berry's work is interesting in the context of the culture-responsibility relationship because, as a psychologist, his focus is on the individual and he recognises that '...psychological acculturation can occur independently of group level processes and will also be more closely linked to individual adaptation'.¹⁴³

Yet, if Berry is critical of his predecessors for seeing acculturation as a static outcome, his acculturation framework in turn appears to represent four possible static outcomes that do not account for shifting or multiple identities. Looking at each of these static outcomes in turn, marginalisation (the loss of the minority culture but with no compensation from the majority culture) and separation (the exclusive maintenance of the minority culture) have never been policy objectives in themselves but both are seen as undesirable side effects of 'state multiculturalism' or indeed of a multicultural population. In fact, both are now blamed for a number of social evils including radicalization and home grown terrorism and as identified in the Rotherham Report child sexual exploitation because '...an unhealthy culture of misplaced political correctness' led to an unwillingness to intervene in the practices of a marginalized group.¹⁴⁴ And so there is an argument that the degree of acculturation is relevant to the culture-

¹⁴³ Berry, as summarized in Alita Nandi and Lucinda Platt, 'Britishness and Identity Assimilation Among the UKs Minority and Majority Ethnic Groups' (2013) Working Paper Series no 2013-08.

¹⁴⁴ Louise Casey, 'Report of Inspection of Rotherham Metropolitan Borough Council' under S10 Local Government Act 1999 HC 1050 (4th February 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401125/46966_Report_of_Inspection_of_Rotherham_WEB.pdf > accessed 4th August 2015. Quote from Executive Summary, 3.

responsibility relationship in the extent to which the defendant's pre-disposition or moral outlook is modified.

Another way culture may be linked to predisposition is through understandings of self-control, which can be culturally specific. 'Loss of control' in the criminal law of England and Wales exists solely as a partial defence to murder and the extent to which there is space within that statutory defence to encompass culture is examined in section 3.3. However, 'provocation' may be relevant in mitigation at sentencing and it may be that the courts will have the opportunity to assess the effect of culture on a defendant's ability to exercise self-control at that stage.

Up until now we have focused on the relationship between culture and responsibility in terms of determinism and predisposition. Sometimes it is hard to draw a line between the two. Parekh confidently asserts that '...while the individual's culture shapes his or her thoughts and disposes them to approach the world in certain ways it does not and cannot determine them and deprive them of their agency.'¹⁴⁵ This seems intuitively right and a safe position from which to develop the culture-responsibility relationship. The conclusion must be that culture can pre-dispose an individual to certain behaviour. Determinism is harder because it ties into notions of agency, free will and choice. Ashworth and Horder offer a summary of the philosophical position on determinism stating that '...most philosophers arrive at compromise positions which enable them to accept the fundamental proposition that behaviour is not so determined that blame is generally unfair and inappropriate and yet to accept that in certain circumstances behaviour may be so strongly determined that... the normal

¹⁴⁵ A Renteln 'What do we have to fear from the Cultural Defence' Chapter 9 in Kymlicka, Lernestedt and Matravers (n 36) 182.

B Parekh 'Cultural Defence and Criminal Law' in Kymlicka, Lernestedt and Matravers (n36) 109.

presumptions of free-will may be displaced'.¹⁴⁶ The difficulty lies in applying this philosophical position in the practical realm but in essence it comes down, once again, to each and every individual case.

The importance of individual cases is even more important in matters of morality. Hart asks what makes for 'moral responsibility' and gives the following answer '...the capacities of understanding, reasoning and control of conduct. The ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements and to conform to decisions when made.'¹⁴⁷ Moody-Adams is firmly opposed to the idea of exculpation through moral ignorance, writing strongly against the 'inability thesis' that recognises a culturally induced blindness. She argues that the link between culture and agency does not exempt humans from responsibility because there is no independent causal power that prevents individuals from resisting the demands of culture and questioning the moral wrongfulness of actions.¹⁴⁸ In looking at responsibility, morality and culture Matravers focuses on the relationship between enculturation and morality and identifies the critical issue in questions of responsibility as '...what is involved in grasping (understanding) a moral reason?' There is a difference, he argues between a defendant who has the capacity to understand a moral reason and who chooses to reject it and the defendant whose '...enculturation is such that he lacks the capacity to understand that there is a moral issue at all.'¹⁴⁹ This latter person would lack a participant understanding of morality but Matravers goes on to question why he should be

¹⁴⁶ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford, Oxford University Press 2009) 23.

¹⁴⁷ H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, Oxford University Press 1968) 227.

¹⁴⁸ Michele M Moody-Adams, 'Culture, Responsibility and Ignorance' (1994) 104 (2) *Ethics* 291.

¹⁴⁹ M Matravers, 'Responsibility, Morality and Culture' Chapter 5 in Kymlicka, Lernerstedt and Matravers (n 36) 94.

exempt from responsibility on this basis. After all, if he has done some 'serious moral wrong' (and the state itself is not seriously unjust so that no issue of standing arises) then '...the significance of culture (usually) does not undermine the responsibility of the alleged offender in any general sense because it does not (usually) undermine the alleged offender's ability to grasp and follow reason.'¹⁵⁰ There is not much space within this for the recognition of an altered moral outlook although the use of the word 'usually' perhaps allows for cases where a defendant may display a genuine inability to grasp and follow reason.

Despite being unable to offer a black and white conclusion on the ability of culture to affect behaviour we have considered the arguments and can confidently assert that there is a perception that culture can affect responsibility and that perception justifies the place of the culture-responsibility relationship in the theory and practice of the criminal law. Moving away from the need to assess the extent of the effect of culture on behaviour we can turn again to Cotterrell who says that the 'cultural defence' is simply '...a demand for differential interpretations of law'.¹⁵¹ This is echoed by Rosen who says that culture is relevant even where behaviour is not determined or influenced by culture because '...the failure to take seriously people's cultural concepts as part of their chosen world, and not simply as one imposed upon them, can distort the role of law in their lives every bit as much as failing to consider how their choices may be limited.'¹⁵² As with our understanding of culture we can ask if it is an intellectual cop out not to be more definitive about the effect of culture on behaviour and again we can answer that it is not firstly because there is simply no empirical evidence to allow us to give a categorical answer and secondly because our understanding of

¹⁵⁰ *ibid* 102.

¹⁵¹ Cotterrell (n 3) 100.

¹⁵² Rosen, *Law as Culture* (n 9) 195.

responsibility now gives us the parameters within which to consider whether culture has an effect in each individual case.

Moving beyond the individual there are wider socio-legal justifications for bringing the idea of culture and its relationship with responsibility into the legal practice of decision making in the criminal justice system. We can now consider these justifications and begin to address the problems inherent within the culture-responsibility relationship. In section 2.1 we identified a number of potential difficulties that have emerged around 'cultural defence' discourse and that need to be addressed in the context of the culture-responsibility relationship. We can group these into four broad categories:

- Perceptions of an endemic cultural bias in the criminal justice system and discrimination.
- Cultural evidence in the courtroom.
- Theoretical difficulties around the notion of equality and inequality and relativist concerns.
- Feminist concerns

Yet the problems in themselves can act as a socio-legal justification for the aim here of finding the right and just place for the culture-responsibility relationship in the criminal law of England and Wales. The practical difficulty of culture in the courtroom is tackled ahead of the theoretical difficulties but before that we need to address another problem, not something that is necessarily specific to the culture-responsibility relationship but something that is sometimes used, wrongly, as a justification for a 'cultural defence'. That is the perception of an endemic cultural bias in the criminal justice system of England and Wales and the wider perception of discrimination in the criminal justice system as a whole.

Endemic Cultural Bias and Discrimination within the Legal System

The idea of a relationship between culture and responsibility might assume an a-cultural legal system but as Loeb points out ‘...legal processes imagined as almost neutral are themselves constituted by the cultural particularity of the dominant hegemony’.¹⁵³ Cotterrell talks of our ‘legal culture’ being ‘...public knowledge of and attitudes and behaviour patterns towards the legal system’ and whilst we cannot endorse Renteln’s view that we need a ‘cultural defence’ to protect minorities against ‘majoritarian bias in the legal system’ we can question whether a carefully constructed and applied culture-responsibility relationship might contribute to the alleviation of distrust in the criminal justice system identified by Lammy and discussed below.¹⁵⁴ We have already taken issue with Renteln’s ‘purposes’ of a ‘cultural defence’ and cannot support a culture-responsibility relationship for this reason alone but we can agree that measures should be taken to overcome broader perceptions of bias and discrimination in the interests of justice. This view is endorsed by Fournier, who sees ‘cultural imperialism’ in the judicial process in the ways in which it asserts its perspective to be universal and neutral and who challenges the universality of legal claims to truth because ‘truth’, as established in the legal system, is complicit in the othering of minority people.¹⁵⁵ Lawrence takes this a step further in her assertion that ‘courtrooms are critical sites in the production of our understanding of culture’ and that legal systems paint distorted and questionable views of non-mainstream cultures but an equally distorted more flattering picture of the mainstream. The

¹⁵³ Elizabeth Loeb, ‘Reviewed Work: The Cultural Defense by Alison Renteln’ (2005) 78 (1) *Anthropological Quarterly* 297.

¹⁵⁴ Cotterrell (n 3) 83.

Renteln, *The Culture Defense* (n 39) 6.

¹⁵⁵ Pascale Fournier, ‘The Ghettoization of Difference in Canada: Rape by Culture and the Danger of a Cultural Defence in Criminal Trials’ (2002) 29 *Man LJ* 81, 81.

To clarify, the law seeks to establish the truth, but in so doing it adopts an understanding of ‘others’ or outsiders based on preconceptions. Not only is this a barrier to finding ‘truth’ but it contributes to reinforcing the preconceptions surrounding ‘others’ allowing them an even greater credibility in the legal process.

result is 'racialisation' with legal systems assigning to others the traits of ignorant victims as 'zealous followers of deviant norms'.¹⁵⁶ This, argues Lawrence, amounts to a perpetuation of cultural racism under the guise of cultural sensitivity.¹⁵⁷

Magnarella seems to support this, taking the practical point that there is an overrepresentation of people of colour in the criminal justice system of the US because in part of the '...inability of judges and juries from the dominant culture to understand the perceptions/actions of people from minority cultures.'¹⁵⁸ He argues that evidence must not be excluded because the defendant had a state of mind that was unacceptable or incomprehensible to the trial judge from the dominant culture.¹⁵⁹ He has a point and we can see evidence of the convergence and lack of convergence of the minds of judge and defendant leading to questionable decisions in the criminal law of England and Wales. On the one hand, why was Lavinia Woodward, an Oxford undergraduate convicted under S20 Offences Against the Person Act 1861 for attacking her boyfriend with a breadknife given a 10 month prison sentence, suspended for 18 months, and the opportunity to 'prove herself' by taking treatment for her eating disorder and addiction? The trial judge identified with her intellect and middle class career aspirations and found that she was 'too clever to go to prison'.¹⁶⁰ On the other hand why was Kiranjit Ahluwalia convicted of the murder of her abusive husband rather than involuntary manslaughter on the grounds of provocation?¹⁶¹ In

¹⁵⁶ Sonia Lawrence, 'Cultural (In) sensitivity: The Danger of a Simplistic Approach to Culture in the Courtroom' (2001) 13 *Can J of Women & L* 107, 111.

¹⁵⁷ *ibid* 112.

¹⁵⁸ Magnarella (n 127) 65.

This is the subject of the Lammy Report in England and Wales, discussed below.

¹⁵⁹ *ibid* 99.

¹⁶⁰ *The Telegraph* (25th September 2017)

<<https://www.telegraph.co.uk/news/2017/09/25/oxford-student-judge-suggested-bright-prison-spared-jail-stabbing/>> accessed 1st October 2018.

¹⁶¹ *R v Ahluwalia* [1992] 4 All ER 889 (unreported but appeal reported).

addition to recognising the legal arguments that hampered Ahluwalia's defence because her loss of control was not 'sudden', Phillips argues that Ahluwalia did not conform to the stereotypical image of the Muslim woman and so was incomprehensible to the western judge. Culture for Muslim women, argues Phillips, '...only becomes available to female defendants when they conform to prevailing images of the subservient non-western wife.'¹⁶² Lee relies on Bell's 'interest convergence theory' in the context of the 'cultural defence' to argue that it is more successful where '...the cultural norms underlying [their] defence are either similar to or coalesce with those of the dominant majority' because cultural narratives can be more persuasive when they tap into social norms.¹⁶³ But there are counter arguments to Magnarella's assertions. Many criminals and criminal acts may be incomprehensible to judges and assuming an inability on the part of judges to comprehend cultural difference essentialises the white western judge in the way that we seek to avoid essentialising 'the other' and overlooks the fact that the white western judge does not exist in a vacuum but in the real socio-legal world.

There is also the concern that hidden morality is at work in the assessment of cases involving culture, as highlighted by Fisher.¹⁶⁴ Relying on Dworkin's theory of adjudication he identifies how moral arguments, such as racism, cultural pluralism and fairness to women are played out in the 'culture defence' debate and at how judges look at the 'internal moral question' in the individual case rather than at the external question of whether the 'cultural defence' plays a part in the

¹⁶² Anne Phillips, 'When Culture Means Gender: Issues of the Cultural Defence in English Courts' (2013) 66 (4) *Modern Law Review* 510.

¹⁶³ Cynthia Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defence' (2007) 49 *Arizona Law Review* 911.

¹⁶⁴ James Fisher, 'The Role of Morality in Cultural Defence Cases: Insights from a Dworkian Analysis' (2013) 1 (2) *Birkbeck Law Review* 281.

law.¹⁶⁵ This of course may help in explaining the hypothesis here that judicial approaches to issues of culture in the courts are *ad hoc* and inconsistent. Ultimately we do want the culture-responsibility relationship to address the ‘internal moral question’ but within a carefully considered framework. Supporting the views of Magnarella above, Fisher concludes that defendants are more likely to be able to rely on the ‘cultural defence’ where ‘...the cultural factors reflect the morality of the legal system to which he is subject.’¹⁶⁶ This goes back to a point made in section 1.1 about ‘honour’ in dueling cases.

But we have to be careful here for, as Fournier points out, ‘...too often culture is in the hands of the power elite...and the disempowered are left out of its configuration.’¹⁶⁷ To support this argument, Fournier cites the Canadian case of *R v Lucien*¹⁶⁸ in which the judge attributes the absence of the defendant’s remorse for rape to a ‘cultural context’ rather than to individual ‘sexual misbehavior’. This, says Fournier makes for a transition from biological racism to cultural racism (the implication being that men from this particular culture are unable to show remorse) so an attempt at a culturally sensitive decision turns out to be racist. All of the above is critical of an endemic cultural bias in the legal system but we have to consider that many organisations claim to have a unique ‘culture’, something that it is no doubt possible to be inside of or outside of. Rosen recognizes that ‘...legal reasoning, even in its most professionalized versions, must therefore tap into the recognizable modes of a culture’s reasoning for at least a portion of its legitimacy’ but that equally we cannot hold defendants to a standard of behaviour without comprehending, from their perspective, what they

¹⁶⁵ Dworkin (n 128) 293.

¹⁶⁶ *ibid* 300.

¹⁶⁷ Fournier (n 155) 81.

¹⁶⁸ *R v Lucien* (1998) AQ no 8 (Cour de Quebec).

were doing.¹⁶⁹ In these thoughts Rosen is engaging directly with the 'cultural defence' but it seems that he is in fact endorsing something much more akin to the culture-responsibility relationship. The pertinent issue, in any event, is managing the injustice that may arise from a perception cultural bias in the criminal law and criminal justice system of England and Wales and considering how the culture-responsibility relationship can play a part in that management.

For at least 150 years there has been overt recognition of the potential for cultural bias in the legal system of England and Wales. The judicial oath is set out in the introduction to the Equal Treatment Bench Book and reads 'I will do right to manner of people after the laws and usages of this realm without fear of favour, affection or ill will.'¹⁷⁰ We can see here a clear theoretical commitment to equal treatment within the criminal justice system. The commitment of the Judicial College to creating a diverse Judiciary (discussed in section 3.4) displays a forward looking understanding of the issues of equality and discrimination in our legal system. However, there are still clear perceptions of cultural bias with a natural link to discrimination within the criminal law and the criminal justice system and we need to consider these claims, for whilst there is an inevitability in the reality of a system having a culture, cultural bias is less benign especially if it leads to the more dangerous emergence of discrimination and injustice.

In 2005 Shute, Hood and Seemungal carried out research into the treatment of ethnic minorities in the criminal courts of England and Wales.¹⁷¹ Conducting 1000

¹⁶⁹ Rosen, *Law as Culture* (n 9) 144.

¹⁷⁰ Judicial College, *Equal Treatment Bench Book* (February 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf>> accessed 1st October 2018.

This is different from the Oath of Allegiance whereby judges swear allegiance to the sovereign. Confusingly, the Judicial Oath cited here and the Oath of Allegiance make up the 'Judicial Oath'. The wording comes from the Promissory Oaths Act 1868.

¹⁷¹ Stephen Shute, Roger Hood and Florence Seemungal, *A Fair Hearing: Ethnic Minorities in the Criminal Courts?* (Cullompton, Willan Publishing 2005).

case observations and interviews, they concluded that there was a perception (reinforced through the findings of institutional racism in the McPherson Report)¹⁷² that ethnic minorities are discriminated against within the criminal courts and by other agencies within the criminal justice system. They emphasized that this discrimination may be a perception rather than necessarily a fact but questioned what needed to be done to increase the confidence of ethnic minorities in the criminal courts. These perceptions extend to the probation service, where there is a perception that less effort is expended for Asian offenders. Research by Hudson and Bramhall looked at pre-sentence reports and risk assessments of 144 white males and 54 other males (all Pakistani save 3). They concluded that there is ‘...considerable difference in the attribution of remorse and acceptance of responsibility...and a difference in scoring of risk assessment.’¹⁷³ Perhaps, more measurably, Asian reports are simply ‘thinner’ with a more prevalent use of distancing language. In assessing risk Asians were deemed to be more ‘reckless’ and ‘irresponsible’ leading to the authors finding that the Pakistani or Asian Muslim is emerging as the ‘criminalised other’.

In January 2016 David Cameron commissioned an independent review of racial bias and BAME representation in the criminal justice system.¹⁷⁴ The Lammy Review published its findings in September 2017.¹⁷⁵ Its purpose is ‘...to make recommendations for the ultimate aim of reducing the proportion of BAME

¹⁷² McPherson Report, *The Stephen Lawrence Inquiry, Report of an inquiry by Sir William Macpherson* (Comn 42621, February 1999) <<https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry>> accessed 21st June 2018.

¹⁷³ Barbara Hudson and Gaynor Bramhall, ‘Constructions of Asianness in Risk Assessments by Probation Officers’ (2005) 45 (5) *British Journal of Criminology* 721.

¹⁷⁴ BAME is an acronym for British and Minority Ethnic.

¹⁷⁵ Lammy Review, ‘An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System’

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf> accessed 1st October 2018.

offenders in the criminal justice system.’¹⁷⁶ The review found that BAME communities make up 14% of the population but that 25% of those making up the prison population are from such communities and 40% of young people in custody are from BAME backgrounds. The report makes 35 recommendations and calls for ‘...robust systems [to be put] in place to ensure fair treatment in every part of the criminal justice system.’¹⁷⁷ Obviously the report is concerned with race not culture and we must be wary of falling into the trap that it is only those of a different race who have a culture, but there are implications for the fair treatment of those from other cultures. Many of the recommendations relate to the systematic gathering of data on race. With our undefined understanding of culture it is more difficult to see how meaningful data on culture can be gathered but a nuanced reading on race/cultural statistics must be possible. Recommendation 8 asks that ‘...where practical all identifying information should be redacted from case information passed to [the Crown Prosecution Service] by the police allowing the Crown Prosecution Service to make race-blind decisions.’ This may lead to culture-blind prosecuting decisions. The main issue identified is that of trust. For example, BAME defendants are much less likely to plead guilty (and thus be eligible for a one third reduction in sentence) because of a lack of trust and an ‘us and them’ attitude towards the criminal justice system. The report calls for the publication of sentencing remarks at crown court level to increase transparency (Recommendation 13) and for ‘...a system of online feedback on how judges conduct cases. This information, gathered from different perspectives, including court staff, lawyers, juries, victims and defendants could be used by the judiciary to support the professional development of judges in the

¹⁷⁶ *ibid* 3.

¹⁷⁷ *ibid* 6. Key Principle 1.

future' (Recommendation 14).¹⁷⁸ Both of these recommendations would be welcome in the context of the culture-responsibility relationship as it would force an openness of judicial reasoning in relation to culture, something that we identify as missing in the review of decided cases carried out and discussed in section 3.3.

The Lammy Report focuses on 'over-representation' of people from BAME communities rather than on the more emotive idea of 'discrimination' but the perceptions of discrimination identified by Shute *et al* remain. The question is whether the culture-responsibility relationship can challenge that perception and give those from other cultures some sense of assurance that their apparent unequal position is being assessed. It is argued that it can and that there is thus a practical reason for the culture-responsibility relationship to be embraced and explored as a real issue for criminal justice in the twenty first century. But we must be clear that we can only justify its application where there is a true *relationship* between culture and responsibility in individual cases.

Taking these thoughts on discrimination further, Maguigan claims that there are higher conviction rates and longer sentences for 'outsider defendants' because '...the present system does not reflect the shared values of a multicultural society but instead reinforces the white traditionally male identified values of the dominant culture.'¹⁷⁹ Whilst this may be a one dimensional interpretation (there are, of course, all sorts of reasons for these higher conviction rates) Maguigan supports the view that cultural information is valuable at trial in support of

¹⁷⁸ In Chapter 3 we refer to a Freedom of Information Act request for clarification of when sentencing remarks are published. The latest version of the Equal Treatment Bench Book (February 2018) is discussed in Section 3.4 and shows a forward thinking approach to equality in the courtroom.

¹⁷⁹ Holly Maguigan, 'Cultural Evidence And Male Violence: Are Feminists and Multiculturalists on a Collision Course in the Criminal Courts?' (1995) 70 New York University Law Review 36, 46.

traditionally recognised defences (on the basis that the standards of the dominant culture support traditional defences) and at sentencing but is at pains to point out that this is only where there is a link between cultural evidence and *mens rea*, where there is, in effect, what we are calling a culture-responsibility relationship.¹⁸⁰ She accepts the idea of the admissibility of cultural evidence where it is relevant to the *mens rea* of the defendant in the spirit of working to multiculturalist reform through ‘...a system that takes a more pluralistic approach to the assessment of blame and the imposition of punishment’.¹⁸¹ Is ‘pluralistic’ the right word here? In the culture-responsibility relationship we are emphasizing the individual defendant and the effect, if any, of culture on that person. Perhaps her ideas belong to a time where ‘multiculturalism’ was more clear cut because she devises a hierarchy that offers three levels of protection to defendants depending on where they were enculturated.¹⁸² Whilst this is a brave attempt to counteract the inequality of a system where a white, male dominant culture prevails with clear cut rules, it is clearly overly simplistic to assume that defendants can fit neatly into one of three (or one of any number really) categories. She is attempting to address arguments about inequality here but is also tackling ‘cultural bias’. Whilst her tiered approach is open to criticism she is one of the most perceptive of the writers from the 1990’s in both recognizing and advocating the need for a link between culture and *mens rea* in the context of the ‘cultural defence’.

¹⁸⁰ She also says it is valuable at pre-trial negotiation but this is less relevant in England and Wales.

¹⁸¹ Maguigan (n 179) 45.

¹⁸² The 3 categories are

- People born and enculturated outside the USA
- People born and enculturated within an indigenous culture within the USA
- People born and enculturated within a subculture of the USA

Recognising then the perception of bias within the criminal justice system of England and Wales (arguably a 'bias' inevitable in any legal system) and perceptions of discrimination backed up by the findings of the Lammy Report, a carefully constructed and utilised culture-responsibility relationship has the potential to assist the criminal justice system in tackling cultural diversity as well as being a tool for justice in the wider sense that those from other cultures feel that their standpoint is understood.

Culture in the Courtroom

Caughey asserts that '...what we need to bring to trials is our most sophisticated professional understanding of how culture influences human thought.'¹⁸³ If we add to this 'in individual cases' we have something akin to the culture-responsibility relationship rather than the loosely termed 'cultural defence'. Yet culture in the courtroom appears to be problematic, with Woodman recognizing both the 'theoretical and practical difficulties about bringing information about culture into the courtroom.'¹⁸⁴

A number of authors emphasize the potential difficulties from different angles. Demian argues that culture is a legal fiction in terms of the courtroom '...an assumption formed through argumentation to achieve the desired outcome in court- with the purpose of knowing the intentions of another.'¹⁸⁵ Lawrence states that '...courtrooms are critical sites in the production of our understanding of

¹⁸³ J Caughey, 'The Anthropologist as Expert Witness: the Case of a Murder in Maine' Chapter 14 in Foblets and Renteln (n 22) 323.

¹⁸⁴ G Woodman, 'The Culture Defence in English Common Law: The Potential for Development' Chapter 1 in Foblets and Renteln (n 22) 32.

¹⁸⁵ Melissa Demian, 'Fictions of Intention in the Cultural Defence' (2008) 110 (4) American Anthropologist 432,434.

culture.’¹⁸⁶ D’Hondt raises concerns ‘...about how minority cultures are represented in cultural defence discourse, the collective abnormalisation and stereotyping to which they are subjected and the way in which the agency of individual members is erased.’¹⁸⁷ There is the further argument that raising culture shifts the focus of a case onto the merits of a particular culture and away from the defendant’s behaviour. Sachar acknowledges that culture can be a sword (raised as an advantage) or a shield (as protection from disadvantage) and in civil cases supports the latter so long as it is ‘...not a sole or pre-determinative factor in the judicial making process.’¹⁸⁸ She sees this as being a middle ground between cultural blindness (where there is no place for culture) and cultural determinism, a ‘culture demystifying approach’ where identity is neither privileged nor excused but where litigants can elaborate on ‘sources of the self’.¹⁸⁹ This approach to civil law can be adopted in the criminal law through the careful consideration of the culture-responsibility relationship in individual and limited cases.

On the other hand Renteln argues that cultural evidence should be allowed as a ‘procedural matter’ in *all* cases and that judges should always appoint a ‘cultural expert’.¹⁹⁰ Rosen agrees with the use of experts in ‘cultural cases’ because, as seen earlier in this section, judges do use their own cultural assumptions to ‘fill in the facts’.¹⁹¹ Benhabib says that culture presents itself through narratively

¹⁸⁶ Lawrence (n 156) 117.

¹⁸⁷ Sigurd D’Hondt, ‘The Cultural Defence as Courtroom Drama: The Enactment of Identity Sameness and Difference in Criminal Trial Discourse’ (2010) 35 (1) *Law and Social Inquiry* 67.

¹⁸⁸ A Sachar, ‘Family Matters: Is There Room for Culture in the Courtroom?’ Chapter 7 in Kymlicka, Lernerstedt and Matravers (n 36) 120.

However, Sachar points out that the criminal law is different, and that more safeguards are needed.

¹⁸⁹ *ibid* 122.

‘Sources of the self’ is an idea of Charles Taylor. Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge MA, Harvard University Press 1989).

¹⁹⁰ Alison Dundes Renteln and Rene Vallardes, ‘The Importance of Culture for the Justice System’ (2009) *Judicature* 92(5) 194, n 211: 197.

¹⁹¹ Rosen, *Law as Culture* (n 9) 117.

contested accounts for two reasons, ‘...human actions and relations are formed through a double hermeneutic- we identify what we do through an account of what we do - words and deeds are equi primordial.’¹⁹² Overall there is a sense that cultural evidence can be helpful so long as we are aware of the sensitivities raised above.

What is the current legal status of cultural evidence in the courtroom? The law of evidence in England and Wales is still governed by common law although there are Criminal Procedure Rules and Criminal Practice Directions which set out the detail of the admissibility of evidence in the criminal courts. Generally, expert evidence may be admitted with the permission of the court where it can assist with understanding beyond the knowledge of judge and jury and the expert must have relevant expertise, must be impartial and must pass the ‘reliability threshold’. The duty of the expert is to provide the court with an objective and independent opinion. A 2011 Law Commission Report on Expert Evidence in Criminal Proceedings found a *laissez faire* approach to expert evidence within the criminal justice system and called for reliability tests to be stricter.¹⁹³ A Criminal Evidence (Experts) Bill was introduced in 2011 but not adopted although some of the Law Commission recommendations were later incorporated into practice through amendments to Criminal Procedure Rules.¹⁹⁴ We will see in section 3.3 that in *R v Sebastian Pinto and Others* the expert evidence of an anthropologist from Kings College London was dismissed as a ‘cultural horoscope’ and in *R v Khatun* the judge ruled that expert assistance was not

¹⁹² Benhabib (n 40) 5.

¹⁹³ Law Commission, *Report on Expert Evidence in Criminal Proceedings* (2011) <<https://www.lawcom.gov.uk/project/expert-evidence-in-criminal-proceedings/>> accessed 1st October 2018.

¹⁹⁴ The concerns were largely around scientific evidence, especially the credibility of medical and statistical evidence in cases of sudden infant death syndrome and ensuing miscarriages of justice.

required in cultural issues, a ruling upheld by the Court of Appeal.¹⁹⁵ The Crown Prosecution Service guidance on expert evidence lists 16 areas of expertise. 'Forensic Anthropology' relates to the identification of human remains. There is no mention of expertise on culture, multiculturalism or more general anthropology.¹⁹⁶ The UK Register of Expert Witnesses has only one entry under 'multiculturalism' and that relates to 'multicultural health'. There are 111 entries under the heading of culture with experts on Muslims (2), Pakistani culture (1), Islamic culture (2), Indian culture (2), ethnic minority culture (1), Asian culture (1) and Arab culture (1).¹⁹⁷ The Law Society Gazette directory of expert witnesses has no entries for experts in anthropology, culture or multiculturalism.¹⁹⁸

Yet there are a number of anthropologists who have worked as expert witnesses in the courts and Holden draws together accounts of their experiences in her edited volume *Cultural Expertise and Litigation: Patterns, Conflicts and Narratives*.¹⁹⁹ She states that this is based on the 'cultural defence' although there are 'less extreme' examples too of work around family matters, immigration and asylum and the evidence of anthropologists has usually been associated with customary law and native title. Her definition of 'cultural expertise' is helpful. It is '...special knowledge that enables socio-legal scholars, anthropologists or more generally speaking, cultural mediators, the so-called 'cultural brokers', to locate and describe relevant facts in light of the particular background of the claimants, litigants or the accused person(s), and in some cases of the victim(s)'.²⁰⁰ In March

¹⁹⁵ *R v Sebastian Pinto and Others* [2006] EWCA CRIM 749.

R v Khatun [2010] EWCA CRIM 138.

¹⁹⁶ The Crown Prosecution Service, 'Guidance on Expert Evidence' (1st edn, 2014) <<https://www.cps.gov.uk/legal-guidance/expert-evidence>> accessed 1st October 2018.

¹⁹⁷ UK Register of Expert Witnesses <<https://www.jspubs.com/>> accessed 1st October 2018.

¹⁹⁸ The Law Society Gazette <<http://directories.lawgazette.co.uk/legal-services/expert-witnesses/1001076.category>> accessed 1st October 2018.

¹⁹⁹ Livia Holden, *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* (London, Routledge 2011).

²⁰⁰ *ibid* 2.

2015 the Society for Applied Anthropology in the USA held a conference on the theme of 'The Anthropologist as Expert Witness: Theory, Practice and Ethics'.²⁰¹ The conference explored the idea that there are general differences in methodologies between law and anthropology, with law seen as black and white and anthropology as much more grey which can be problematic.

This begs the question as to whether we need 'expert' evidence in cases involving the culture-responsibility relationship. Lacey asks '...is there any reason to think that the challenge facing the advocate of extended cultural defenses here is analytically or practically different from that faced by anyone interested in how criminal law should respond to other situational differences between defendants which may bear on their offending behaviour?'²⁰² If we are moving away from ideas of degrees of enculturation and situations where a judge might be called upon to establish degrees of assimilation there is an argument that the challenges of evidence are not unique. But the newness of overt references to culture in the courtroom makes it an unknown and as Caughey says, we are looking, particularly in the culture-responsibility relationship, for understandings of 'what happened' through a 'person centered ethnography'.²⁰³ Cotterrell recognizes that we are beginning to interpret law in a gendered way (for example with the recognition in the new law on loss of control of 'slow burn', something that was not recognized in the old law of provocation which needed a 'sudden' loss of control) but calls for a parallel 'cultural interpretation' because law is shaped by certain cultural assumptions '...and in contemporary conditions of considerable

²⁰¹ 'The Anthropologist as Expert Witness: Theory, Practice and Ethics'.(University of Cincinnati March 2015) <<https://www.uc.edu/news/articles/legacy/enews/2015/03/e21378.html>> accessed 1st October 2018.

²⁰² N Lacey, 'Community, Culture and Criminalisation' Chapter 3 in Kymlicka, Lernerstedt and Matravers (n 36) 59.

²⁰³ J Caughey, 'The Anthropologist as Expert Witness: the Case of Murder in Maine' Chapter 14 in Foblets and Renteln (n 22) 321.

(and perhaps only partially mapped) conditions of cultural diversity such a position is no longer tenable.²⁰⁴ There can be no harm therefore in providing a framework for the use of cultural evidence in limited and necessary circumstances and for encouraging courts to turn to experts where they can assist with understandings beyond those of judge and jury.

Maeder and Yamamoto undertook research to question whether a culturally based argument in non-insane automatism cases was beneficial or detrimental to defendants. Placing cases before a mock jury the findings were that ‘...ethnocentrism led to a lower perceived defendant credibility in the cultural condition but not in the standard automatism condition.’²⁰⁵ Culture may not necessarily be, therefore, Sachar’s shield. With thought culture can be accommodated in the courtroom and there are a number of reasons why it should be. One way of overcoming the recognised difficulties of culture in the courtroom would be to follow Renteln’s suggestion that ‘lawyers could study cultural analysis in the required legal ethics class in law school.’²⁰⁶ Yet the difficulties identified above by Woodman, Demian and D’Hondt can be moderated through the exploration of equality, inequality and relativism below. The difficulties may arise too because there is not currently in place a specific framework for the treatment of cultural evidence and courts have been reactive when faced with culture, rather than proactive in preempting the probability of coming face to face with it in a multicultural society and considering guidance to deal with it. Alternatively we

²⁰⁴ Cotterrell (n 3) 100.

²⁰⁵ Evelyn Maeder and Susan Yamamoto, ‘Culture in the Courtroom: Ethnocentrism and Juror-Decision Making’ (2015) 10 (9) PLoS one e0137799
<<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0137799>>
accessed 1st September 2018.

²⁰⁶ Renteln and Vallardes (n 190) 497.

may be seeing once again a reluctance to engage with culture or even a fear of it.

Equality, Inequality and Relativist Concerns

The notion of equality is a fundamental tenet of justice and equality in the application of the law is protected by the Rule of Law. Perceptions of equality are especially important in the light of perceptions of discrimination. Yet there has always been great philosophical debate about what 'equality' means and how it can achieve both formal justice and social justice. There are arguments that a 'cultural defence' undermines formal equality (and that allegation can of course be leveled at the culture-responsibility relationship) and that it can give rise to a whole host of inegalitarian evils such as individualised justice, legal, moral and cultural pluralism (and, stemming from that, relativism) and that it leads to essentializing and the erosion of agency of the 'other'. Sometimes it is hard to know where one of these 'evils' ends and another begins and so they are addressed here under the broad heading of 'inequality and relativist concerns' but it is argued that the culture-responsibility relationship is less of a threat to equality than the 'cultural defence' and on some understandings it can indeed contribute to achieving equality.

In 1881 Holmes wrote '...the standards of the law are the standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education which make the internal character of a given act so different in different men.'²⁰⁷ In the twenty first century we are seeing a shift so that the Rule of Law for example (discussed in section 3.2) should apply equally

²⁰⁷ Oliver Wendell Holmes, *The Common Law* (Boston, Little, Brown and Co 1881).

to all ‘...except where objective differences justify differentiation.’²⁰⁸ Waldron examines the way in which the law can accommodate difference without compromising the basic ethos of legal equality.²⁰⁹ He draws on the work of Dworkin who distinguishes treatment as an equal (the right to be treated with equal concern and respect) from equal treatment.²¹⁰ We strive for a society based on equality but the law of England and Wales does not recognize ‘cultural equality’. Bringing the culture-responsibility relationship into wider discourse around equality will surely aid in our quest for equality. As a contemporary dilemma it sits at the centre of the interaction between law and multiculturalism and it problematizes a number of other pressing social questions within the wider political domain.

The Equality Act 2010 makes it an offence for one person to discriminate against another on the grounds of certain protected characteristics and applies in certain areas such as education and the workplace but also to ‘Services and Public Functions.’²¹¹ Culture is not a protected characteristic. Race, religion and belief are and perhaps belief (‘...any religious or philosophical belief’) could be construed as including a cultural belief?²¹² As we saw in section 2.2 definitions and understandings of culture are nebulous and perhaps not suited to the legislative framework and we are careful to avoid the claim that ‘...any view of culture as clearly delineable wholes is a view from the outside that generates

²⁰⁸ This is discussed in section 3.2 and this is the second of Bingham’s 8 Principles on the Rule of Law.

The 8 principles are summarised and accessible on The Bingham Centre for the Rule of Law website <<https://binghamcentre.biicl.org/schools/ruleoflaw> > accessed 24th April 2018.

²⁰⁹ J Waldron, ‘Status versus Equality: The Accommodation of Difference’ Chapter 7 in Omid A Payrow Shabani (ed), *Multiculturalism and Law: A Critical Debate* (Cardiff, University of Wales Press 2007).

²¹⁰ Dworkin (n 128) 227.

²¹¹ Equality Act 2010 Part III.

²¹² These are listed in S4 Equality Act 2010 and the definition of ‘belief’ is included in S10 (2).

coherence for the purpose of understanding and control' but is a reductionist sociology of culture.²¹³ However, the Equality Act demonstrates once again the failure of our law to engage directly with culture.

There is however, hidden within the Equality Act, a provision that might support, very indirectly, some idea of 'cultural equality' within the criminal justice system. Under S149 (1) a Public Authority must, in the exercise of its functions, have due regard to the need to :

- eliminate discrimination
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it

and S149 (6) states that compliance with the duties in this section may involve treating some persons more favourably than others. If a cultural belief is a 'belief' within S10(2) of the Equality Act could this be binding on the courts and other institutions within the criminal justice system? It's a tenuous claim and in any event we need to fit the culture-responsibility relationship into the concept of equality whether culture is protected by statute or not.

In the context of multiculturalism equality has been addressed through the group. 'Liberal multiculturalism' has at its core the values of freedom, democracy and equality and identifies the need to move beyond guarantees of non-discrimination and tolerance to the provision of 'accommodation' for minority groups through what Kymlicka terms 'group differentiated rights.'²¹⁴ This has led to Barry's attack on multiculturalism and his defence of one status of citizen so that everyone

²¹³ Benhabib (n 40) viii.

²¹⁴ Kymlicka (n 44) 95.

enjoys the same legal and political rights.²¹⁵ As we seek to disengage from the idea of the group in our understanding of culture in section 2.2 it is necessary to take a similar position with regard to equality. But Crowder argues that Kymlicka's idea of compensation for undeserved cultural disadvantage through group rights in fact establishes individual rights because the group has no moral existence of its own.²¹⁶ We are seeking through the culture-responsibility relationship equality of individuals so that each and every person's actions are contextualized. Renteln states that the reason for admitting a 'cultural defence' '...is to ensure equal application of the law to all citizens...actions of defendants should be judged against behavioural standards that are reasonable for a person of that culture in the context of this culture'.²¹⁷ But these things are seen as a threat to universalism.

Universalism stems from natural law principles and in its simplest form recognizes that there are certain moral laws that are binding on all human beings in all places at all times. Yet for centuries universal truths have been challenged, for example by the Reformation in England that saw competing religious claims of Catholics and Protestants and by Marxism in the late nineteenth and twentieth century when moral values became secondary to economic inequality. In modern times Cotterrell defines the universal standards as respect for human dignity and the autonomy of others as individuals.²¹⁸ Multiculturalism challenges these universal understandings further, raising too the fears of pluralism and relativism. We need to consider these perceived threats so that we can overcome the thought that acknowledgement and acceptance of each of these is an inevitable

²¹⁵ Barry (n 45) 7.

²¹⁶ George Crowder, *Theories of Multiculturalism: An Introduction* (Bristol, Polity Press 2013) 45.

²¹⁷ Renteln, *The Cultural Defence* (n 39) 6.

²¹⁸ Cotterrell (n 3).

consequence of the socio-legal recognition of the culture-responsibility relationship.

The culture-responsibility relationship in particular can give rise to fears of legal pluralism. In section 1.2 we raised the idea of legal pluralism and made it clear that the culture-responsibility relationship is intended to be firmly situated within the criminal law and criminal justice system of England and Wales. Woodman points out that ‘...English law has historically displayed a readiness to adopt bodies of non-state law observed by sections of the population.’²¹⁹ In fact, our common law was established by the Royal Courts and customary law was allowed to run alongside it but when it comes to the criminal law it is fairly clear that there has only been one legal system and that is state law. Notwithstanding this Benhabib argues that pluralist legal systems can be compatible with universal values so long as there is egalitarian reciprocity, voluntary self-ascription and freedom of exit and association.²²⁰ In some ways it could be argued that ‘cultural offences’ are a form of legal pluralism, applicable to all but directed only at certain groups.²²¹

Even if we do not endorse legal pluralism we do have to recognize that multiculturalism brings with it value pluralism. In 1914 Figgis referred to ‘...the hurly burly of competing opinions and strange moralities’ in relation to the rights of churches and 100 years later those competing opinions and moralities arise from the social reality of multiculturalism.²²² We have already argued for those ‘moralities’ to be considered as relevant to the behaviour of certain defendants

²¹⁹ G Woodman, ‘The Culture Defence in English Common Law: The Potential for Development’ Chapter 1 in Foblets and Renteln (n 22) 14.

²²⁰ Benhabib (n 40) 19.

²²¹ We see in section 4.3 evidence of a call for multicultural policy to become firmer around the recourse to certain tribunals for the purposes of Alternative Dispute Resolution.

²²² John Neville Figgis, *Churches in the Modern State* (London, Longmans, Green 1914) 120.

where there is a relationship between culture and responsibility and the alarm bells of individualised justice may begin to ring.

There are writers from the 1990's, when academic discourse around the 'cultural defence' was rife, who raise a pluralist objection to it and who ask how it can be fair to afford members of a minority culture a defence denied to members of the dominant culture.²²³ But the opportunity to establish a culture-responsibility relationship is denied to no-one. If recognition of the culture-responsibility relationship strikes up fears of pluralism then it also make us wary that we are embracing individualised justice. Black states that '...acknowledging that something in an accused's cultural background might justify an acquittal for otherwise criminal behavior seems to be a step down the path to individualised justice which corrupts the equal protection that should be offered by the criminal law. In short it threatens anarchy.'²²⁴ However, if we move away from the idea of a generally applicable 'cultural defence' then such fears can be assuaged because we are addressing the culture-responsibility relationship in a nuanced way, essentially searching for the link between culture and responsibility in individual cases. Black and others overlook this essential link between culture and responsibility because any allowances within criminal law (and of course not necessarily such that would come even close to acquittal) could never be based simply on background but would have to stem from a clear link between that background and the behavior in question. Demian supports and makes this point neatly in arguing, from an anthropological point of view, that the criminal justice system is not interested in what culture is but for law and lawyers culture is a

²²³ For example, Julia P Sams, 'The Availability of the Cultural Defence as an Excuse for Criminal Behaviour' (1986) 16 Georgia Journal of International & Comparative Law 335.

²²⁴ Black (n 101).

'revelatory mechanism'²²⁵ whereby the intentions of defendants are made known because we do not need to ask 'when is culture relevant?' but 'when are intentions cultural?'²²⁶ Blind justice is thought to equate to equality but in many ways we are extending our understanding of responsibility to encompass understandings of the individual and his accountability for the particular act in question and not just the act of which he is accused in isolation or his responsibility generally. This ties into Fletcher's explanation of accountability discussed in section 2.3.

Lernstedt identifies the need for the criminal law to balance personal blameworthiness against individualised justice. To achieve this a criminal trial needs to ask two questions

- Does an action break the law? This is the same for everyone.
- To what extent is this defendant responsible?

This is where the culture-responsibility relationship comes in.²²⁷ There is a balance between finding out everything about the defendant's background and blind justice, but there should be a minimum threshold of information that is considered so that the yardsticks used in determining responsibility are put at an equal distance from every defendant.

Parekh suggests that '...all justice is individualized justice in the sense that it relates to this defendant, not anyone else, and to this action, and not one that abstractly or superficially looks like it but is really quite different'.²²⁸ And

²²⁵ Demian (n 185) 433.

²²⁶ *ibid* 434.

²²⁷ C Lernstedt, 'Criminal Law and 'Culture'' Chapter 2 in Kymlicka, Lernstedt and Matravers (n 36) 26.

²²⁸ B Parekh, 'Cultural Defence and Criminal Law' Chapter 6 in Kymlicka, Lernstedt and Matravers (n 36) 109.

sentencing is always individualised. But, as Cotterrell argues, even individualised justice can have different meanings. The aim of law may be to treat like cases alike but '...the art of law is to judge reliably which are like cases and which are unlike...to do justice is to categorise and to act consistently on the basis of categorization.'²²⁹ How might culture affect categorization? How 'unlike' does the multicultural criminal make a case? One suggestion is to assess the 'cultural difference of the accused' by looking to the law of the country of origin and to offer a defence if the conduct is not illegal in that country.²³⁰ This seems a much more objective approach to individualised justice but what strength must there be in the link with the country of origin? And it opens itself to accusations of 'othering'. Hallevy's idea is based upon migrants or refugees who could still claim a stronger understanding of the law elsewhere but the difficulty of establishing the link would still remain.

'Othering' and essentialising arise from an 'us' and 'them' mentality and Uberoi and Modood argue that 'essentialism is one of the most important themes in post-multicultural literature.'²³¹ The tendency to essentialise however goes hand in hand with the perception of cultures as bounded groups, a myth that we have tried to move away from in our fluid understanding of cultures summarized usefully by Benhabib as '...constant creations, recreations, negotiations of imaginery boundaries between 'we' and 'other'.²³² We are moving away from the idea that group traits are relevant because the criminal law is ultimately concerned with individual responsibility and not from endorsing the views of

²²⁹ Cotterrell (n 3) 2.

²³⁰ Gabriel Hallevy 'The Impact of Defence Arguments Based on the Cultural Difference of the Accused in the Criminal Law of Immigrant Countries and Societies' *Journal of Migration and Refugee Issues* (2009) 5 (1) 13.

²³¹ Uberoi and Modood (n 59) 211.

²³² Benhabib (n 40) 8.

Renteln and Valladares that ‘...members of groups do share common characteristics...individualised justice based on group traits may be necessary to safeguard the rights of individual defendants.’²³³

Chui takes a highly philosophical approach, situating her arguments against the cultural defence in the realm of the historical management of ‘difference’ and seeking to ‘...legitimate cultural imperatives while rejecting the metaphysical construction of Asian difference’.²³⁴ She warns against the acceptance of the ‘cultural defence’ (on the basis of exclusion or othering of minorities) and against its rejection (on the basis of forced assimilation) introducing instead a hybrid position that allows for cultural evidence to be admitted if relevant to the defendant’s state of mind. This has the potential to provide ‘individualised justice’ (based on ignorance of the law or deeply ingrained cultural values) within ‘...a criminal law whose defences are a product of the same culture as the defendant’.²³⁵ Chui is of course recognising the essential culture-responsibility relationship, although her aim is narrower in demanding that the identity of Asian American women be individually constructed and not essentialized. Here there is subtle reference to the work of Crenshaw and the idea of intersectionality. Chui expresses doubt in the workability of her own hybrid position, concerned (along with D’Hondt) that raising culture shifts the merits onto the focus of the defendant’s culture and not the relationship between the defendant’s actions and his state of mind and it is questionable whether the inclusion of cultural evidence can ever ‘...allow for uncertainties and unknowns and identities [to] be constructed, not essentialised’.²³⁶ We have to guard against essentializing and

²³³ Renteln and Vallardes (n 190).

²³⁴ Daina Chui, ‘The Cultural Defence: Beyond Exclusion, Assimilation and Guilty Liberalism’ (1994) 82 (4) Cal L Rev 1053, 1055-1056.

²³⁵ *ibid* 1097.

²³⁶ *ibid*.

we need to avoid the claim that a 'cultural' act is normative within that culture.²³⁷

The culture-responsibility relationship can be effective in this.

A close reading of Volpp's work reveals, rather than an endorsement of the freestanding 'cultural defence', a dismissal of it as a *non sequitur*. She asserts that in American courts any defendant is entitled to raise social context evidence and questions why, when attorneys offer cultural explanations, we assume '...immigrants to be the beneficiaries of a special treatment that is tolerated as a necessary concomitant of the pluralistic values of multiculturalism'.²³⁸ Furthermore, her work can be interpreted as being intolerant of the narrative surrounding the cultural defence debate because these narratives '...reinforce a preexisting presumption that misogynist acts are typical of and unique to certain immigrant cultures'.²³⁹ Notwithstanding her lack of focus on the 'cultural defence' itself her contribution is valuable in placing the dialogue in the wider context of the social construction of 'the other', notably the construction of problematic behaviour of people of colour as cultural as opposed to the problematic behaviour of the white majority as an '...isolated instance of aberrant behaviour'.²⁴⁰ She calls upon the relationship between nationalism, gender, sexuality and race to explain this construction, exploring the idea that the female body is the nations symbol of honour and purity, serving as '...the boundary marker[s] of the nation'.²⁴¹ In this way the nation can consolidate its identity by projecting beyond its own borders the sexual practices or gender behaviours it deems abhorrent.

²³⁷ Demian (n 185)..

²³⁸ Volpp (n 49) 105.

²³⁹ *ibid.*

²⁴⁰ *ibid* 108.

²⁴¹ *ibid.*

D'Hondt raises concerns about how '...minority cultures are represented in cultural defence discourse, the collective abnormalisation and stereotyping to which they are subjected and the way in which the agency of individual members is erased.'²⁴² Today we have much greater awareness of this stereotyping and understand why it must be avoided and so the more interesting point is the concern about the erosion of agency. D'Hondt however seems preoccupied with questions of agency being based on 'membership' of a particular cultural group (reiterating the concerns of Demian and Renteln that the culture of the legal system is invisible) when what we are concerned with in exploring the culture-responsibility relationship is the question of establishing the influence of culture on individual agency and thus attributing responsibility.

As seen above, Phillips too decries the 'stereotypical representation of the non-western other' that the 'cultural defence' may allow and is highly critical of the fact that, outside of feminist circles, principles of gender equality are being used to demonise minority cultural groups but she objects to the 'cultural defence' on the basis that individual agency is eroded.²⁴³ She is critical of the way that members of minority groups are '...represented as driven by their culture and compelled by cultural dictate to behave in certain ways'.²⁴⁴ It is this perception of the 'stereotypical other' (submissive women, coercive parents) lacking in agency that contributes to Phillips's cry for 'multiculturalism without culture', whereas defensible multiculturalism acknowledges human agency. Foblets and Renteln assert that although there is concern that the 'cultural defence' is '...predicated on the notion that cultural factors determine the behaviour of legal actors' there

²⁴² D'Hondt (n 187) 68.

²⁴³ Anne Phillips, *Multiculturalism Without Culture* (Princeton, Princeton University Press 2007)

8.

²⁴⁴ *ibid.*

now seems to be agreement that it is '...based on the idea that culture predisposes individuals to act in ways that conform to their cultural upbringing'.²⁴⁵ So many of these concerns can be assuaged by the shift from the cultural defence' to the culture-responsibility relationship. Similarly, concerns of cultural relativism can be alleviated by a focus on the culture-responsibility relationship with its commitment to the individual rather than the group.

As a final thought on this, culture as a way of explanation need not necessarily be racially set. For example, there is the idea of a culture of honour in the Southern States of the US which emerged in the eighteenth century with the arrival of Scots or Irish immigrants and their Celtic cultural values based on *Lex Talionis*.²⁴⁶ Doucet *et al* claim that this culture of honour has been passed down generations for hundreds of years and competes with claims of higher temperatures in offering explanations for raised levels of violence in the Southern states.²⁴⁷

Feminism versus Multiculturalism

We know that the concept of the 'cultural defence' emerged in the 1980's and early literature emanated almost exclusively from writers considered by others or self-identifying as feminist so that for a long time commentary on the 'cultural defence' appeared inextricably linked with the issue of gender equality. The feminism versus multiculturalism debate gained momentum during the 1990's and feminist literature of that time displayed firm resistance to the idea of a freestanding 'cultural defence'. However, there were calls for criminal justice

²⁴⁵ Foblets and Renteln (n 22) 337.

²⁴⁶ *Lex Talionis*- the law of retaliation where punishment resembles the original offence.

²⁴⁷ J Doucet, J D'Antonio-Del Rio and C Chauvin, (2013) 'The Southern Culture of Violence Theory and Homicide Offences by Girls Raised in the South' (2013) 29 (5) Journal of Interpersonal Violence 806.

systems to ‘...begin to accommodate the seemingly irreconcilable goals of feminists and multiculturalists’.²⁴⁸ Okin (although not addressing the ‘cultural defence’ directly) was perhaps responsible for opening the broad dialogue on the tensions between gender equality and multiculturalism in her 1989 book *Justice Gender and the Family*.²⁴⁹ Ten years later, in asking the question *Is Multiculturalism Bad for Women?* and in asserting strongly that ‘...most cultures have as one of their principal aims the control of women by men’ it is clear that she was subscribing to two feminist hypotheses, neatly summarized by Phillips.²⁵⁰ Firstly, most cultures are ‘suffused with gendered practices and ideologies that disadvantage women in comparison to men’.²⁵¹ Secondly, when claims are made on behalf of culture ‘the benefit of those claims often appears to be in the interests of more powerful men’.²⁵² Whilst there is some agreement with Okin’s perception of the implications of multiculturalism for women (for example, Phillips who argues that cultural evidence should be excluded from the courtroom on the basis that it ‘reinforces patriarchal power’), Phillips claims that Okin loses credibility because of her use of ‘eclectic examples from sensationalist newspapers’ in attempting to verify her claims, a point made in section 1.1 in relation to Renteln’s work and the ‘cultural defence’ more generally.²⁵³

Similarly, Renteln dismisses Okin’s work as ‘...an attempt to trivialise the cultural defence by associating it mainly with female genital cutting and forced marriage.’²⁵⁴ Volpp is critical of Okin for relying on a ‘caricature’ of immigrant communities and for adopting problematic notions of both feminism and

²⁴⁸ Maguigan (n 179) 45.

²⁴⁹ Susan Moller Okin, *Gender Justice and the Family* (New York, Basic Books 1989).

²⁵⁰ Susan Moller Okin, ‘Feminism and Multiculturalism: Some Tensions’ (1998) 108 (4) *Ethics* 108, 667.

²⁵¹ Phillips (n 243) 1.

²⁵² *ibid* 2.

²⁵³ *ibid*.

²⁵⁴ Renteln, *The Cultural Defence* (n 39) n36: 227.

multiculturalism.²⁵⁵ Okin's feminism is interpreted by Volpp as 'colonialist' feminism whereby liberation of women from the 'east' is seen as desirable in a spirit of colonialism (along with education, The Rule of Law and Christianity). This ideology now attracts heavy criticism on the basis that 'other' women are 'always/already victim'.²⁵⁶ Okin's multiculturalism is thought by Volpp to resemble 'crude cultural relativism', indefensible in that it assumes a homogenous (American) monoculture and overlooking the fact that '...valuing difference does not destroy our ability to judge among difference.'²⁵⁷ According to Volpp the clash between multiculturalism and feminism as constructed by Okin relies on the assumption that the western domestic scene is egalitarian and empowering whereas minorities are '...huddled in the gazebo of group rights preserving the orthodoxy of their distinctive cultures in the midst of the great storm of western progress'.²⁵⁸ The assumption is made that western liberal values will lead to their salvation. Nonetheless, as well as highlighting the clash between multiculturalism and feminism, Okin's claims set the scene for an ongoing polarized debate on the extent to which the 'cultural defence' should be allowed.

Rimonte is arguably least tolerant to the 'cultural defence', seeing it as a mechanism for excusing inexcusable behaviour and as a means of promoting 'culturally sponsored violence against women' but her work can be criticized for being single tracked and focusing narrowly on the potential for the 'cultural defence' to create, in effect, 'victimless' crimes through the decriminalization of violence against women.²⁵⁹ This is evidenced in her narrow definition of culture as '...a body of beliefs, ideas and ideals held by an ethnic group about the nature

²⁵⁵ Leti Volpp, 'Feminism and Multiculturalism' (2001) 101 *Colum L Rev* 1181, 1190.

²⁵⁶ Volpp (n 49) 116.

²⁵⁷ *ibid* 112.

²⁵⁸ H Bhaba, 'Liberalism's Sacred Cow' in Cohen, Howard and Nussbaum (n 62) 79.

²⁵⁹ Rimonte (n 60) 1315.

of women and men and their roles and relationships' (seen in section 2.2) despite her acknowledgement of the work of Geertz and other anthropologists in recognizing the shaping force of culture more generally.²⁶⁰

Although recognizing the potential conflict between feminism and multiculturalism, at the heart of her arguments Maguigan is more concerned with the equality of treatment for minority groups. She rejects a freestanding 'cultural defence', seeing the debate surrounding it as theoretical (on the basis that most trial judges are never confronted with it although this is something we dispute in an era where population movement continues to increase) and as obscuring '...the real practical problems of achieving reform goals that appear to be in competition with each other', that is feminism and multiculturalism.²⁶¹

Whilst the above considers the clash between multiculturalism and feminism in broad terms with an implication that it is the use of the 'cultural defence' by male offenders to mitigate acts of violence against women that is objectionable, it is perhaps worth emphasizing that there is a second strand to the 'cultural defence' and that it is significant in interpreting the acts of female defendants. There has long been an argument that the 'cultural defence' is only available to women when they conform to the stereotype of the non-western subservient wife. Phillips analyses the case of *Bibi* (and *Ahluwalia*, as seen above) to substantiate this point.²⁶² Zoora Shah, referred to by the court as an 'unusual woman' in her trial for the murder of an abusive partner is also illustrative here because Shah did not create a good impression in the dock and the construction of her persona by prosecuting counsel during her appeal against conviction was damaging.²⁶³

²⁶⁰ *ibid.*

²⁶¹ Maguigan (n 179) 45.

²⁶² *R v Bibi* [1980] 1 WLR 1193; *R v Kiranjit Ahluwalia* [1992] EWCA Crim 1.

²⁶³ *R v Zoora Ghulam Shah* [1998] EWCA Crim 1441.

Carline construes the label 'an unusual woman' as instrumental in the failure of Shah's appeal because there was a 'contravention of culturally accepted gender and racial scripts' in that description.²⁶⁴ However, it is important to recognize that this same stereotyping applies to women of all colour and that there has long been a perception that women in the criminal justice system are 'mad or bad' whilst the wrongdoings of male defendants are socially caused.²⁶⁵

Phillips raises more broad reaching difficulties with the concept of the 'cultural defence' but in turn warns against the refusal to acknowledge cultural diversity and tries to reconcile the multiculturalism versus feminism conflict in her book *Multiculturalism Without Culture* which is based on the contention that '...multiculturalism can be made compatible with the pursuit of gender equality and women's rights so long as it dispenses with an essentialist understanding of culture'.²⁶⁶ This is undoubtedly true and deeper understandings of the social reality of twenty first century multiculturalism and indeed an emphasis on the *relationship* between culture and responsibility should overcome this essentialist argument.

The 'cultural defence' has played its part in the twenty five year old dialogue surrounding the clash between multiculturalism and feminism. During that time ideas have evolved so that our understandings of the implications, both negative and positive, of the defence have broadened. In questioning the justifiability of the 'cultural defence' today we are aware of its potential to generate gender inequality yet alert to the need to move outside the strict multiculturalism versus

²⁶⁴ Anne Carline, 'Zoora Shah: 'An Unusual Woman'' (2005) 14 (2) *Social and Legal Studies* 14(2) 215, 230.

She goes so far as to say that the words amount to hate speech, '...a speech act that has the performative consequence of injuring the recipient'.

²⁶⁵ Anna Wilczynski, 'Mad or Bad: Child Killers, Gender and the Courts' (1997) 37 (3) *British Journal of Criminology* 419.

²⁶⁶ Phillips (n 243) 8.

feminism paradigm. In 2001 Volpp called for a constructive dialogue beyond these boundaries and asked us to see and challenge multiple overlapping and discrete oppressions.²⁶⁷ The response of feminists writers to this call has been to become almost silent. The clash between multiculturalism and feminism has all but disappeared in twenty first century academic literature and whilst interest in the 'cultural defence' is very much alive debate surrounding it is no longer limited to these seemingly irreconcilable viewpoints. It is not possible to know the reasons for this. Perhaps Phillips' ideas on 'multiculturalism without culture', along with the realization that culture alone is not capable of explaining violence against women, have gone some way towards addressing feminist concerns. Perhaps there is recognition that feminism is also present in some minority groups. Whatever the reasons, the feminist ideas discussed here lead to the conclusion that an understanding of feminist theory and an acknowledgement of feminist concerns is crucial in successfully formulating a theoretical framework of response to the culture-responsibility relationship.

Parekh identifies 12 practices that most frequently lead to what Benhabib calls 'clashes of intercultural evaluation' and 7 of these have a gendered dimension. These are FGM, polygamy, arranged marriage, marriage within prohibited degrees of relationship, the withdrawal of Muslim girls from co-educational schools, the hijab and finally and broadly the 'subordinated status of women'.²⁶⁸ These concerns are still very much alive, awareness of many of them continues to grow as just solutions are sought within the legal field. The culture-responsibility relationship, however, is not a threat to the ongoing search for

²⁶⁷ Volpp (n 255).

²⁶⁸ Parekh (n 43) 265.

For completeness the non-gendered areas include Hindu cremation, slaughter rituals, the scarring of children and the no-schooling of gypsy and Amish children. The final one is the wearing of Sikh turbans, gendered but not considered as harmful to men.

justice in these areas, partly because it stands some distance from them but mainly because it is designed to be considered in isolation in relation individual defendants. Deckha, in looking at whether 'feminists committed to a theory of intersectionality should welcome the introduction of cultural claims into law' looks at the work of Rosemary Coombe who 'insists that we abandon all inclinations to establish one single relationship between law and culture'.²⁶⁹ Coombe asks us to '...imagine culture as a practice of continually emergent differentiation, contestation, negotiation and agency and to focus on the scattered power relations that shape these actions and the dissent and resistance they generate.'²⁷⁰ In the culture-responsibility relationship we are asking the courts to apply this 'differentiation, contestation, negotiation and agency' to individual defendants of all genders to reach a view on whether culture had an effect on behaviour. The inherent injustice for women within the 'cultural defence' can be diminished by the culture-responsibility relationship.

Concluding this section 2.4 we have established the relationship between culture and responsibility and can see that the problems inherent within that relationship are double edged- a reason to be wary of it but also a way of giving it a purpose beyond that of the pursuit of individual (not individualised) justice.

²⁶⁹ Deckha (n 55) 25.

²⁷⁰ R Coombe, 'Contingent Articulations: A Critical Cultural Studies of Law' in Austin Sarat and Thomas Kearns (eds) *Law in the Domains of Culture* (Ann Arbor, Michigan University Press 2009) n 36.

2.5 Conclusion

The Chapter set out to explore understandings of both culture and responsibility and to take these nuanced understandings forward in establishing the existence and importance of the culture-responsibility relationship. The aims of the Chapter have been achieved.

We now understand culture to be fluid and complex, derived from the historical interpretation and adaptation by a group of a number of possible influential factors that an individual may adopt and adapt and that contribute to collective and individual identity. We have moved away from the idea of a static and bounded cultural group to focus on the way that culture is uniquely processed in each individual case. It is this emphasis on the effect of culture on each individual that sits at the heart of the culture-responsibility relationship. Responsibility is now understood in terms of agency (capacity in terms of choice and fair opportunity and in part character) and the limited place of culture in influencing moral responsibility has also been considered. We have looked at a range of possible ways in which culture can be said to affect responsibility and in the absence of a scientific and definitive answer to the question 'how does culture affect responsibility?' we have drawn the line somewhere around pre-disposition but it must be emphasised that this is not a line that is etched in stone and we must always be prepared to defer to evidence of a culture-responsibility relationship in individual cases. The problems inherent within the culture-responsibility relationship have been examined both to show an awareness of their existence, essential particularly for making strong and credible suggestions for a way forward in Chapter 5 and to argue that those difficulties are in themselves reasons to further the cause of the culture-responsibility relationship.

In a broader sense the Chapter has contributed to fulfilling the wider aims of the thesis in distancing the culture-responsibility relationship from the 'cultural defence' and in emphasising the importance of the individual and of the culture-responsibility relationship at the time of the alleged offence because culture should not be used as a tool to explain or legitimate a defendant's actions after the event unless we can see evidence of a genuine relationship at the time of the act. Throughout the Chapter a sense that culture is a difficult concept for the criminal law begins to emerge and this is something that we need to be mindful of throughout the thesis.

At the start of the Chapter there is a quote from Lloyd who says that it is 'beyond human power' to attribute moral responsibility. This may be so but we do have to be able to attribute legal responsibility and in undertaking this task in a multicultural world we do need the culture-responsibility relationship. Whilst the understanding of culture reached in section 2.2 can perhaps be legitimately labelled as postmodern Cotterrell states that '...contemporary law - explicitly constructed, particular and local in scope, and ever changing - might seem the quintessentially postmodern form of knowledge and doctrine: not in any sense a grand narrative, but the perfect pragmatic embodiment of contingency, impermanence, artificiality, transience and disposability; its doctrine continually adapted, amended, cancelled, supplemented or reinterpreted to address new problems'.²⁷¹ The culture-responsibility relationship fits within Cotterrell's postmodern description of the law. The next step is to take this specifically nuanced understanding of the culture-responsibility relationship forward to the

²⁷¹ Cotterrell (n 3) 24.

practical realm and to examine how the criminal law and criminal justice system of England and Wales have responded to it.

CHAPTER 3

THE CRIMINAL LAW AND THE CRIMINAL JUSTICE SYSTEM OF ENGLAND AND WALES

*'The stories that we tell to justify one state of legal affairs over another are just that, stories.'*¹

3.1 Introduction

In Chapter 2 understandings of both culture and responsibility were enhanced, the existence and importance of the relationship (or the perceived relationship) between them was established and the problems inherent within the culture-responsibility relationship were identified. Refined and specific understandings of both culture and responsibility and of the relationship between them are therefore brought forward to this Chapter. This Chapter has two broad aims.

Firstly, it seeks to gather evidence to support and advance the hypothesis that the culture-responsibility relationship has not been duly considered in theory, practice or policy. Matravers states that '...any serious reflection on the cultural defence* must be embedded in a more general account of criminal justice' and that 'more general account of criminal justice' is provided here by situating the culture-responsibility relationship within the specific theoretical foundations, substantive criminal law and criminal justice system of England and Wales, one

¹ Drucilla Cornell, *The Philosophy of the Limit* (Routledge 1992) 19. Cornell renames Derrida's deconstruction theory the 'philosophy of the limit' and emphasizes the importance of both the limits of philosophy and the gender hierarchy for law and justice.

of the three distinct and defined parameters set out at the beginning of the thesis to bound a contextually particular analysis of that relationship.² This first aim is achieved by searching for evidence of the presence of and engagement with culture in general and the culture-responsibility relationship in particular in the substantive criminal law (the law on general defences, legislation creating ‘cultural offences’, decided cases and sentencing law and decisions) and in the criminal justice system (The Police, The Crown Prosecution Service and the Judiciary). Sections 3.3 and 3.4 report on the findings from that search. Although the review of relevant legislation, decided cases and sentencing decisions where there is a cultural dimension carried out for section 3.3 adopts a doctrinal approach to legal research more generally, as described in Chapter 1, research for the Chapter takes a constructivist approach throughout, a thematic search for culture and an assessment of the law’s response (or lack of response) to it. The search for the presence of culture in the criminal law and criminal justice system reveals minimal engagement between law and culture and consequently it can be concluded that the culture-responsibility relationship has not yet found a place in practice or policy. Yet the analysis of the foundations of the criminal law set out in section 3.2 concludes that there is flexibility within the established principles, values and systemic factors that provide the theoretical grounding of our criminal law to accommodate that relationship.

The second aim of the Chapter, therefore, is to move beyond this essentially fact finding exercise and to begin to try to understand the reasons for this lack of

² M Matravers, ‘Responsibility, Morality and Culture’ Chapter 5 in Will Kymlicka, Claes Lernestedt and Matt Matravers (eds) *Criminal Law and Cultural Diversity* (Oxford, Oxford University Press 2014) 89.

* Substitute ‘cultural defence’ with culture-responsibility relationship here.

engagement between criminal law and culture, to consider how this apparent resistance to culture might be overcome and where and how, in practical terms, the culture-responsibility might find a place within our law. In other words, the aim is to begin to form an answer to the research question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* The recognition and acceptance of culture as a concept with relevance to law is fundamental to establishing the credibility and essential place of the culture-responsibility relationship in modern thinking about criminal law and to its accommodation within the legal system of England and Wales. The culture-responsibility relationship matters. It is relevant to contemporary justice. It has not been given the attention that this thesis argues that it needs and deserves and the current *laissez-faire* approach is inadequate and problematic. The culture-responsibility relationship is not only a reality but a necessary tool for achieving justice in the context of twenty first century multiculturalism. The general and tentative approach to culture identified in this Chapter needs to be followed through with clear, consistent and specific well-reasoned responses to the culture-responsibility relationship.

3.2 Foundations of the Criminal Law

With no written criminal code our criminal law is a curious mix. Of course we have some specific statutory offences and some common law offences and our defences too are a mixture of both. Underpinning all of these things are the fundamental principles and values and systemic factors that inevitably shape the extent to which our specific laws can adapt at any time. They provide both the theoretical grounding and the systemic conditions of possibility for the current approach of our criminal law to the culture-responsibility relationship and dictate the extent to which the law may be able to demonstrate flexibility in the face of argument around the culture of the defence (or indeed the prosecution) which may produce a particular way of seeing criminal situations. But to maintain credibility these principles and values must resonate with social reality. At the beginning of the twentieth century MacDonnell wrote that ‘...the strength of the criminal law is to be found in the general accord between it and the public conscience’ and, even then, more than one hundred years ago, he identified a disintegration in that harmony.³ Maintaining that harmony is more challenging than ever in our multicultural society. At the end of that century in 1997 Dennis referred to the ‘critical condition of the criminal law’, critical because of the piecemeal approach of judges (an assertion verified, though in the narrow context of culture, through the analysis of decided cases and sentencing decisions in section 3.3 below) and because of the ‘...growing uncertainty as to the correct

³ John MacDonnell, ‘The Foundations of Criminal Law’ (1912) 13 (1) *Journal of the Society of Comparative Legislation* 108,108.

Here MacDonnell identifies examples of the criminal law being ‘...in marked discord with popular sentiment’, one such example being the infanticide of illegitimate children. MacDonnell’s ideas pre-date Hart’s legal positivism whereby standards are set down by the sovereign but need moral legitimacy, established by reference to social consensus. H Hart, *The Concept of Law* (Oxford, Clarendon Press 1961) There are implications for ‘social consensus’ in a multicultural world.

philosophical basis for criminal law reform.’⁴ This section examines the unique philosophical foundations of the criminal law of England and Wales, its fundamental principles, values and systemic factors, in the context of justice in a multicultural era but firstly the purpose of the criminal law needs to be considered.

Purpose of the Criminal Law

There is great debate about the criminal laws’ purpose which falls beyond the scope of this discussion. However, to understand fully the present argument about culture and responsibility and to lay the foundations for the subsequent analysis we need to look at some of these alternative ideas, particularly those that enlighten our understanding of the culture-responsibility relationship. Ashworth and Horder state that ‘...the chief concern of the criminal law is to prohibit behaviour that represents serious wrong against an individual or against some fundamental social value or institution’ but in many ways Ashworth and Horder raise more questions than answers here.⁵ What is a ‘serious wrong’? What are our ‘fundamental social values’? Perhaps overridingly, *why* should our chief concern be the prohibition of certain behaviour? Going back a step, simply put, in modern post-industrial times the criminal law has one overriding aim, the maintenance of social order.⁶ To achieve this it needs rules and sanctions for

⁴ Ian Dennis, ‘The Critical Condition of Criminal Law’ (1997) 50 (1) *Current Legal Problems* 213, 237. Dennis presents a challenge to orthodox subjectivism as the philosophical basis for the criminal law, a challenge furthered by Norrie and discussed in Chapter 2 in the context of responsibility and below in the context of retributivism as a basis for punishment.

⁵ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford, Oxford University Press 2009) 1.

⁶ Wells and Quick identify public order as a recurring theme in the criminal law and identify threats (or perceived threats, such as folk devils or those that drive ‘moral panics’) to public order as a continuous theme throughout history. They quote the work of Young on ‘outsiders’ or immigrants ‘...those whose lifestyle deviates from the norm’, whose presence threatens the public order in a multicultural age (Young I.).

transgressions of those rules. In establishing those rules and sanctions a just system of criminal law focuses on the prevention of harm, the attribution of responsibility when harm is caused and punishment. These three 'purposes' are achieved in turn through the creation of offences, the application of the law to arrive at decisions on guilt or innocence and sentencing decisions. Before we examine these identified purposes we need to be clear about two things in particular that the criminal law should not be concerned with. Firstly, there are references throughout the relevant literature to the preservation or protection of culture and cultural rights. Renteln, for example, writes of the 'cultural defence' as a means of protecting cultural rights.⁷ In the 'Pitcairn Case' there was an argument against prosecuting those suspected of sexual offences because the island's community, and thus culture, could not survive if a high percentage of the able bodied males were found guilty and imprisoned.⁸ Secondly, the criminal law should not be concerned with proactively furthering a policy of multiculturalism. As Lernerstedt says '...the question of how criminal law can support multiculturalism is not the right one. It's about the legitimization of the application of the criminal law to individual concrete persons'.⁹ The culture-responsibility relationship is concerned with the just attribution of responsibility

Celia Wells and Oliver Quick, *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials* (4th edn, Cambridge University Press 2010).

⁷ Alison Dundes Renteln, *The Culture Defense* (Oxford, Oxford University Press 2005).

Renteln devotes a whole chapter to 'The Right to Culture' (Chapter 11) although she relates the protection of culture to tolerance and questions 'how much tolerance we should expect from liberal democracies with regard to diverse cultural practices?' (212). She sees the 'cultural defence' as an extension of the individual's right to culture. Although related to the protection of culture, the correction of historic injustice in the multicultural context in for example Australia and Canada is of course quite another matter.

⁸ International law is rightly concerned with the preservation or protection of culture and with recognising cultural rights but this should not be the role of the criminal law. International measures include Article 27 of the UN International Covenant on Civil and Political Rights which provides that 'persons belonging to such minorities shall not be denied the right, in community with members of their group, to enjoy their own culture...' and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

⁹ C Lernerstedt, 'Criminal Law and Culture' Chapter 2 in Kymlicka, Lernerstedt and Matravers (n 2) 19.

and, as the second 'purpose' of the criminal law identified here, that attribution sits between the prevention of harm and punishment. However, as we established in section 2.3, 'responsibility' as a concept is extended to include the degree of responsibility that should attach to a particular defendant, that degree being reflected in punishment at the sentencing stage.

The prevention of harm, or the 'harm principle', is widely accepted as the backbone of the criminal law, or at least of the decision to create specific criminal offences. It is, in Anglo-American legal thinking, the tenet of liberal criminal theory under liberalism. Liberalism is

'...a secular political morality which, in its currently deontological strains, takes individual human beings as the primary units of ethical concern and is fundamentally orientated towards safeguarding individuals' liberty and promoting their personal autonomy. It does this without denying the socially-situated nature of the self or neglecting the appropriate demands of distributive justice. As a public philosophy of government, liberalism is committed to equal liberty, non-discrimination, freedom of thought and conscience, toleration, pluralism, democratic accountability and the rule of law.'¹⁰

The emphasis of liberalism, as we saw in Chapter 2, is on individual autonomy. That autonomy is reflected in Mill's 'harm principle' which advocates that '...the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'¹¹ This principle has been developed by legal theorists over the years and is generally accepted as forming the basis of 'criminalisation theory'. It works because, as Hornle states '...it is the product of a down to earth, secular, functionalist and consequentialist

¹⁰ P Roberts, 'The Limits of Liberalism' Chapter 17 in A P Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Antje du Bois-Pedain tr, Oxford, Hart Publishing 2014) 337.

¹¹ John Stuart Mill, *On Liberty and Other Essays*, (Oxford, Oxford University Press 2008) 68-69.

way of thinking *and* it rests on a liberal basis which values individuals' interests higher than communitarian ideals or the ideals of value ethics or religion.'¹² The 'harm principle' was adopted and adapted in the Wolfenden Committee Report in 1957 so that the purpose of the criminal law was stated as being:

'...to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are especially vulnerable because they are young weak in body or mind or inexperienced or in a state of special physical, official or economic dependence.'¹³

This adaptation seems simple enough, legislatures can legislate to prevent harm, but it has implications for legal moralism through the reference to 'public order and decency' and 'what is offensive and injurious'. The 'harm principle' has become complicated too, both as a result of philosophical re-working and the social reality of our multicultural world, and two relevant but challenging questions emerge. Firstly, what is 'harm'? Mill sees harm as 'hurt, damage, loss and injury'¹⁴ and that has traditionally been conceptualized within the physical realm as evidenced by the Oxford English Dictionary definition of harm as 'physical injury, especially that which is deliberately inflicted.'¹⁵ 'Harm' today is at times given a wider interpretation, with for example, the offence of 'coercion and control' in S76 of the Serious Crime Act 2015 recognising emotional harm in the context of domestic violence. Von Hirsch is among theorists who advocate that 'harm'

¹² T Hornle, 'Rights of Others in Criminalisation Theory' Chapter 9 in Simester, Bois-Pedain and Neumann (n 10) 172.

¹³ Wolfenden Report 1957 Report on Homosexual Offences and Prostitution

<<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections1/sexual-offences-act-1967/wolfenden-report/wolfenden-report---contents/>>

accessed 1st August 2018.

¹⁴ John Stuart Mill, *On Liberty and Other Essays*, (Oxford, Oxford University Press 2008) 69.

¹⁵ Oxford English Dictionary online

<https://en.oxforddictionaries.com/definition/harm>

accessed 1st August 2018.

alone is not enough. We also need 'wrongdoing', a 'dual-element account (wrongfulness plus harm).'¹⁶ This becomes particularly problematic in the context of multiculturalism as both elements become open ended, not only what or who defines what is 'harm', but what or who defines what is 'wrongdoing'. Surely harm and wrongdoing are morally contingent so that understandings of these concepts can never be value neutral. For example, legislation making female genital mutilation a criminal offence assumes that it is harmful but there are those in academia, medicine and society who justify the practice and disagree with commonly held, perhaps majoritarian beliefs around the harm in the practice (discussed in 3.3 below). Does that then lead us back to the idea of 'legal moralism'? Duff identifies a 'modest' legal moralism whereby there can be criminal prohibition of a wrong provided that the wrong is a public wrong requiring a collective response because '...it is necessary to single out a smaller subcategory of public wrongs from the larger category of morally objectionable conduct in general.'¹⁷ Hornle argues that this approach '...blurs distinctions between rather different collectives; moral communities (which can be religious communities) and their norms; civil society and shared public values; the state and legal norms' but it is perhaps the most workable solution in a multicultural

¹⁶ Andrew Von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 (1) Criminal Law and Philosophy 246. Perhaps this is what Ashworth and Horder are referring to in the 'chief concern' of the criminal law being to prohibit behaviour that is a 'serious wrong'. See note 7. Feinberg, Husak and Simester also advocate the need for 'wrongdoing'.

¹⁷ R A Duff, 'Towards a Modest Legal Moralism' (2014) 8 (1) Criminal Law and Philosophy 217, 218.

society, so long as consensus can be reached on what is 'harmful' and what makes a 'public wrong'.¹⁸

Attempting to sidestep these moral dilemmas, Husak perhaps adopts the most pragmatic and philosophically simple approach, the *ultima ratio* principle, which advocates that criminal law should only be resorted to when there is no other way to deal with the problem. This is because the criminal law is different and '...must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed.'¹⁹ But even here the question of identifying what is a 'problem' (or in other words 'harm') and what is not remains and the principle was certainly disregarded in the criminalisation of forced marriage where successive government reports and interested parties supported various alternatives, including immigration restrictions, education and the strengthening of civil remedies as the most effective means of prevention.²⁰

Renteln makes an attempt to consider the harm principle specifically in the context of multiculturalism suggesting that individuals should have the right to follow cultural traditions unless these '...cause irreparable physical harm to others' and that '...in the absence of any threat of serious harm liberal democracies should not interfere with cultural traditions.'²¹ If defining 'harm' is difficult what is 'irreparable' or 'serious' harm, especially outside of the physical

¹⁸ T Hornle, 'Rights of Others in Criminalisation Theory' Chapter 9 in Simester, Bois-Pedain and Neumann (n 10) 180.

¹⁹ Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24 (2) Oxford Journal of Legal Studies 207, 230.

²⁰ See discussion in section 3.3 below.

²¹ Renteln (n 7) 19.

Loeb is critical of Renteln for her failure to recognize the consent of victims of harm, questioning whether this diminishes '...the dignity of the cultural members as full actors and legal subjects.' Elizabeth Loeb, 'Reviewed Work: The Cultural Defense by Alison Renteln' (2005) 78 (1) Anthropological Quarterly 297, 303.

domain? Renteln engages with this difficult question in asking how we separate acceptable and unconscionable traditions.²² Whilst she is open to both Poulter's human rights framework (if a cultural tradition violates a human right then it should not be permitted)²³ and Parekh's 'dialogue device', she is critical of the latter. Interpreting Parekh's dialogical approach as the need for '...a minority spokesman who will engage in dialogue with representatives of the majority about cultural practices that offend 'operative societal values'...[and] explain how the tradition is authoritative, central to the way of life of the ethnic minority group and, in general, desirable' and thus based in offence to majoritarian values she perhaps misinterprets what Parekh is trying to achieve through dialogue and she adheres firmly to her 'harm principle', that is the principle of 'irreparable physical harm' discussed above so that understandings of harm in a multicultural context remain undeveloped.²⁴

This leads to the second question. What or who is the criminal law protecting?²⁵ Hornle sees the potential objects of protection as being either collective (moral values or the legal order, for example) or individual. The Wolfenden Report seems to focus on the individual but in the aim of 'preserving public order and decency' there is cognition of collective harm too. In this thesis the emphasis is on the individual as we search for the deepest understanding of the relationship

²² Renteln (n 7)

²³ Sebastian Poulter, 'Foreign Customs and the English Criminal Law' (1975) 24 (1) *International & Comparative Law Quarterly* 136,140.

²⁴ Renteln (n 7) 216. Renteln is quoting B Parekh, 'Minority Practices and Principles of Toleration' (1996) 30 *International Migration Review* 251, 265.

Renteln can be criticized here firstly for her interpretation of Parekh whose ideas around dialogue are discussed in depth in Chapter 4 and secondly for her reliance on bounded majority and minority cultures. She also goes on to define irreparable harm as death or permanent disfigurement, a limited and perhaps dated interpretation.

²⁵ Hornle suggests that clarifying the 'thing' that we are seeking to protect should be the first question for the theorist. T Hornle, 'Rights of Others in Criminalisation Theory' Chapter 9 in Simester, Bois-Pedain and Neumann (n 10).

between culture and legal responsibility, for true blameworthiness, in each and every unique case. It makes sense therefore to embrace liberalism with its emphasis on the individual but in the field of the socio-legal perhaps collective harm (or the potential for collateral collective harm if we do not pursue the protection of the individual) and individual harm are not necessarily so distinct. What we are faced with here is the ongoing communitarian-liberal debate in political theory.²⁶ Communitarian critics of liberal theory, such as Taylor, recognize that ‘...liberal theory is committed to an abstract, a-contextual, dissociated, ‘atomistic’ conception of self which is both completely unrealistic and ethically debased, in being estranged from its social environment and the fabric of interpersonal relations woven into and enriching real lives.’²⁷ In other words, even if we prioritise the individual we cannot ignore his social, including his cultural, context. This deviates from Kant’s classic non- communitarian statement where the criminal law should reflect ‘...the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.’²⁸ In the culture-responsibility relationship we can never veer too far towards the abstract individual because we are always mindful of his cultural context.²⁹ If we agree that we are concerned with prevention of harm to the individual, what, pertaining to the individual are we protecting him from? There are theorists who believe that we are protecting the *rights* of the individual in preventing harm; there are those that believe that we are protecting

²⁶ Communitarianism emphasises the importance of community in social and political life and moves away from overly individualistic conceptions of the self.

<<https://plato.stanford.edu/entries/communitarianism/>>

accessed 21st September 2018.

²⁷ C Taylor, ‘Cross Purposes: The Liberal-Communitarian Debate’ in Nancy L Rosenblum (ed) *Liberalism and the Moral Life* (Cambridge MA, Harvard University Press 1989).

²⁸ Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor (ed) Cambridge University Press 1996).

²⁹ This is explored more fully in considering the attribution of responsibility below and in particular in relation to the relational critique of responsibility.

an individuals' *quality of life*.³⁰ In essence we are protecting an individuals' liberty so that the individual is '...the primary unit of ethical concern'³¹ but as a modification to liberal theory perhaps we can contemplate the individual and his autonomy (considered in the wider sense of Raz's autonomy which adds to Kant's intelligent moral agent the social opportunities to 'live your life according to your own lights') as a whole within his unique social and cultural context and bear in the mind the risk of collective harm if we allow harm at the individual level.³²

Applying liberal criminal theory in a multicultural world is never going to be easy because, as raised though not fully resolved by Renteln, Poulter, Parekh and others, how can the 'harm principle' accommodate competing values? There is the conflict between criminalising wrongs that infringe liberty and the liberals' '...existential commitment to pluralism and tolerance in matters of faith thought and conscience' that should preclude criminalisation of, inter alia '...unorthodox lifestyle choices.'³³ Matravers makes a strong statement against criminalisation in arguing that '...a liberal state in circumstances of pluralism ought not to criminalise- or ought otherwise to make space for- (at least some) practices that 'belong' (in some sense or other) to the various cultures and conceptions of the good of its citizens.'³⁴ However, Wells and Quick point out that there is a 'political

³⁰ Hornle and Persak (2014) respectively in Chapters 9 and 12, Simester, Bois-Pedain and Neumann (n 10).

³¹ P Roberts in Simester, Bois-Pedain and Neumann (n 10) 331.

³² Joseph Raz, *The Morality of Freedom* (Oxford, Clarendon 1986) 369.

³³ P Roberts in Simeseter, Bois-Pedain and Neumann (n 10) 338.

³⁴ M Matravers, 'Responsibility, Morality and Culture' Chapter 5 in Kymlicka Larnestedt and Matravers (n 2) 89. It is assumed that the reference to 'pluralism' here is a reference to cultural pluralism. The phrase 'conceptions of the good of its citizens' is borrowed in section 2.2 on the understandings of the concept of culture.

This view is supported by Crowder '...where there is reasonable disagreement over the merits of different cultural practices, there would appear to be a prima facie case for liberal toleration.' George Crowder, *Theories of Multiculturalism: An Introduction* (Polity Press 2013) 41.

impulse' to 'pass a law against it' whenever a social problem appears.³⁵ When it comes to multiculturalism we also have to be mindful to differentiate the '...politician's honest reliance on remote harm arguments and cases where 'remote harm' serves to rationalize proposals which are driven by resentment against certain groups.'³⁶ This takes us back to the phenomena of 'moral panics' and the creation of 'suspect communities', a 'sub-group of the community that is singled out for state attention as being 'problematic'.³⁷ To be workable we do have to try to avoid entering the moral dimension and, like Matravers, Renteln argues for maximum accommodation questioning why minorities should have to justify their cultural traditions when the dominant culture does not have to.³⁸ Once again, it is dialogue that can help us to find a way through these conflicts and in Chapter 4 the work of Parekh and political philosophers committed to a dialogical approach will be explored further.

Even outside of the multicultural arena the harm principle has its' critics, with Roberts identifying both its incompleteness and indeterminateness, incomplete because it '...offers no rationale for criminal prohibitions that are not concerned with protecting liberal values' and indeterminate because' ...it seldom offers comprehensive or unequivocal guidance to policy makers, legislators, judges, lawyers or other criminal justice practitioners and officials who aspire to principled decision making when confronted with difficult choices in their professional

³⁵ Wells and Quick (n 6) 12.

³⁶ Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90 J Crim L & Criminology 109, 186.

³⁷ Christina Pantazis and Simon Pemberton, 'Restating the case for the 'suspect community' A Reply to Greer' (2011) 51 (6) The British Journal of Criminology 1054.

This builds on Hillyard's 1993 thesis on the Irish as a suspect community arguing that since 2001 Muslims are designated as the 'enemy within' and the 'principal suspect community'.

³⁸ Renteln (n 7) 18.

lives.’³⁹ It is attacked too for being ‘consequentialist’, a ‘...future oriented view of what is blameworthy about a certain act. The notion of harm necessarily has this forward looking character.’⁴⁰ Criminalisation (discussed in the context of ‘cultural offences’ in section 3.3) in turn is necessarily forward looking. On the other hand the attribution of responsibility is always backward looking. The attribution of responsibility is the second ‘purpose’ of the criminal law that we have identified and the research question at the heart of this thesis, *how should the criminal law of England and Wales respond to the relationship between culture and legal-responsibility?*, is central to the quest for just attribution in a multicultural world and so is not addressed here .

The third purpose is punishment. The Criminal Justice Act 2003 S142 lists the punishment of offenders, the reduction of crime, the reform and rehabilitation of offenders, the protection of the public and reparation as ‘purposes of sentencing’. Von Hirsch and Roberts are critical of S142 for its ‘smorgasbord’ approach which does not prioritise any one aim over another.⁴¹ Yet retributivism is clearly understood to be the dominant ideology in the criminal justice system of England and Wales today. This goes back to Kant’s orthodox subjectivism which ‘...accords individuals the status of autonomous moral agents who, because they have axiomatic freedom of choice, can fairly be held accountable and punishable for the rational choice...they make.’⁴² In other words, moral agents who choose

³⁹ P Roberts in Simester, Bois-Pedain and Neumann (n 10) 345.

⁴⁰ *ibid* 174.

⁴¹ Andrew Von Hirsch and Julian V Roberts, ‘Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions.’ (2004) *Criminal Law Review* 639, 642.

⁴² Dennis (n 4) 237.

to commit crimes are 'deserving' of punishment. For Kant the only thing that matters is the agent's 'act' and he must receive his 'just deserts' for carrying out that act and infringing the autonomy of the other.⁴³ This standard model of punishment does not seem to allow for individual, including cultural, accommodation, not least because it embraces proportionality so that persons convicted of comparable offence should receive comparable punishment. But retributivism and its emphasis on proportionality can be challenged in a way that may allow for culture to influence punishment.

In Chapter 2 we looked at Norrie's re-examination of Kant's classic orthodox subjectivism in the context of responsibility but Norrie's relational challenge extends too to retributivism as a basis for punishment. In *Law, Ideology and Punishment* Norrie points out that the revisionist 'English Hegelianism' of the late nineteenth century that extended into the philosophy of punishment until the 1930's, rejected retributivism as practically useless, backward looking and cruel.⁴⁴ This was because it was based on liberalism's abstract individual. In *Punishment, Responsibility and Justice* Norrie furthers this in stating '...if punishment remains a valid phenomenon within a relational approach it must be reconciled with an understanding of the ways in which others, including potentially the punishing agency, are also to blame.'⁴⁵ He rejects the modern revisionist attempts of other twenty first century theorists because ultimately they

⁴³ Immanuel Kant, *The Metaphysical Elements of Justice Part I of the Metaphysics of Morals* Indianapolis (The Library of Liberal Arts 1964) 331.

⁴⁴ Alan W Norrie, 'Law, Ideology and Punishment' In *Law, Ideology and Punishment* (Springer, Dordrecht 1991) Chapter 5.

An influential thinker in the challenge to Kantian thinking around retributivism was A.C. Ewing but he did acknowledge the 'deep rootedness' of 'desert' in our ethical thought. A C Ewing, *The Morality of Punishment: With Some Suggestions for a General Theory of Ethics* (London, Kegan 1929).

⁴⁵ Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (Oxford, Oxford University Press 2000) 14.

retreat to Kantian philosophy and the Kantian individual who has autonomy and control and is a responsible choosing being.⁴⁶ Engaging in particular with Moore, who sees retributivism as the heart of Anglo-American criminal law, Norrie criticizes his 'emotivist theory of punishment' based on the blameworthy individual, a choosing being and formal legal subject whose actions are judged in isolation from the substantive moral context in which she acts.⁴⁷ Norrie is critical too of Duff's '...dialogic and communicative view of punishment which embraces the individual and her community' because although it can be described as communitarian it favours the community and relies on the right of the community to retribution.⁴⁸ Norrie offers instead, in line with his 'entity relational standpoint' an idea that '...links the agent dialectically with the social and moral context of her actions.'⁴⁹ Applying this to retribution Norrie is aware of accusations of deconstructionism and that if he is to argue so forcefully against retributivism he needs to find an alternative basis for punishment. Norrie's work is well reasoned and compelling, and not simply because it may in time be adapted to make room for the culture-responsibility relationship (both in the context of guilt and punishment), but because modern socio-legal thinking is leading us more and more to question the feasibility of the abstract individual.

Wilson seems to offer an adaptation to Norrie's relational approach in recognising that '...occasionally liberal thinking about criminal justice is prepared to confront

⁴⁶ For example: Antony Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge, University Press 1998); Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford, Oxford University Press 2010).

⁴⁷ Moore (n 45) 29.

This critique of Moore is found in Norrie, *Punishment, Responsibility, and Justice* (n 44) 94.

⁴⁸ Antony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford 1990).

This critique of Duff is found in Norrie, *Punishment, Responsibility, and Justice* (n 44) 118.

⁴⁹ Norrie, *Punishment, Responsibility, and Justice* (n 44).

this notion of relational responsibility when the moral identity of the subject is patently too fragile to sustain the weight of responsibility that retributive justice presupposes.’ He looks at the perpetrators of the James Bulger killing, a case example used too by Norrie to justify relational responsibility.⁵⁰ But when is a subject ‘too fragile’ to bear that burden? Is a culturally driven defendant or a defendant with a culturally different moral outlook sufficiently ‘fragile’? Wilson does not really further the relational aspects of this and perhaps his reasons for moving away from retributivism are closer to Tonry’s ‘deep disadvantage’ mitigation where ‘...judges and juries should have greater leeway to acquit defendants on the basis of deep disadvantage and that judges should be encouraged to mitigate sentences for that reason when they believe it appropriate to do so.’⁵¹ Tonry’s focus is really the question ‘can deserts be just in an unjust world?’ Although most of the debate about a ‘social adversity defence’ centres on the particularities of sentencing within the US criminal justice system it has support in the world of legal philosophy from Hart, who in discussing defences states that we ‘...should incorporate as a further excusing condition the pressure of gross forms of economic necessity.’⁵² It also centres largely on economic disadvantage though Tonry refers directly to ‘subcultural pressures’ to commit offences as part of that ‘deep disadvantage’.⁵³ No one seems to take culture itself as a factor of ‘deep disadvantage’ perhaps because there might be implicit in that

⁵⁰ William Wilson, *Central Issues in Criminal Theory* (Oxford and Portland, Hart Pub 2002) 56. Norrie refers to this case in *From Law to the Beautiful Soul* where he argues that ‘...the situation calls for a form of judgment that can unite appreciation of social and political environment with individual agency.’ Alan Norrie, *Law and the Beautiful Soul* (London, Glasshouse Press 2005) 57.

⁵¹ M Tonry ‘Can Deserts be Just in an Unjust World?’ Chapter 8 in Simester, Bois-Pedain and Neumann (n10)

⁵² H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, Oxford University Press 1968) 51.

⁵³ M Tonry, ‘Can Deserts be Just in an Unjust World?’ Chapter 8 in Simester, Bois-Pedain and Neumann (n 10), 155.

a hierarchy of cultures, a kind of cultural relativism. Tonry summarises a number of ways in which theorists have reconciled 'deep disadvantage' with retributively based punishment but his own way through is to adopt a limiting retributivist position and recognize 'deep disadvantage' as a mitigating factor in sentencing so that the offender's lesser moral culpability is recognised. If we substitute 'culture' for 'deep disadvantage' and borrow Tonry's ideas on this we may have a means of accommodating culture coherently and systematically, where its true relationship to responsibility has been established at the guilt/innocence stage, within the criminal justice system.

More broadly, there is other academic opinion that argues against retributivism as a justification for punishment. The 'Justice Without Retribution Network', for example, is a collaboration between the universities of Ghent, Aberdeen and Cornell and its most recent conference explored the impact of neurobiological determinism on retributive punishment.⁵⁴ Ashworth and Horder argue that '...courts have tended to adopt a much looser notion of responsibility at the sentencing stage than at the liability stage.'⁵⁵ This is because the substance of the criminal law itself needs to display strict standards whilst '... the exculpatory force of preceding or surrounding circumstances' is allowed sometimes in sentencing.⁵⁶ However, their meaning of responsibility here suggests not responsibility in its' strict sense, as described in Chapter 2 but responsibility as punishment at the sentencing stage. The extent to which culture can be considered part of these preceding or surrounding circumstances has yet to be

⁵⁴ Retribution Network' <<http://www.justicewithoutretribution.com/>> accessed 10th September 2018. The latest conference of this group was held April 2018 on the theme 'Neurobiological Determinism and Intuitions About Retributive Punishment'.

⁵⁵ Ashworth and Horder (n 5) 19.

⁵⁶ *ibid* 19.

explored by the criminal courts in any depth but, as will be seen in Section 3.3 below the *ad hoc* approach of the courts to culture in sentencing has resulted in some interesting decisions. Of course, Chapter 2 argued that it should indeed be a part of the surrounding circumstances.

To summarise, we have identified the overriding aim of the criminal law as being the maintenance of social order and this is achieved in three ways in the criminal justice process, criminalisation (for the purpose of preventing harm), the criminal trial (for the purpose of attributing responsibility) and sentencing following findings of guilt (for the purpose of punishment, the form of which may too reflect the attribution of responsibility). Each one of these purposes is challenged by the existence of culture as definitions of harm, disputed in moral philosophy, become ever more complex, retribution as a justification for punishment is questioned and most importantly we call for the attribution of responsibility to be reconsidered in the context of culture.

Principles, Values and Systemic Factors

Our criminal law consists of rules, both in statutory form and at common law and a number of hidden but underlying principles. Perhaps the fundamental principle or standard in western liberal democracies is the Rule of Law. Much has been written around the concept and its application but, originally conceived as limit to the power of the sovereign, in essence the idea is that the law must be publicly declared, with prospective application and there must be generality, equality and

certainty.⁵⁷ In *The Rule of Law* Bingham neatly identifies and summarizes eight principles of governance including (2) questions of legal rights should be resolved by the law and not by the exercise of discretion (3) the law should apply equally to all except where objective differences justify differentiation.⁵⁸ Put simply he suggests that we always need generality and certainty but perhaps equality becomes a more open concept in the reference to 'objective differences justifying differentiation' and this is encouraging in the context of culture. The culture-responsibility relationship challenges the Rule of Law and, more broadly, Raz recognizes that one of the theoretical challenges of multiculturalism is '...how to combine the truth of universalism with the truth in particularism.'⁵⁹ Does Bingham's interpretation of the equality requirement of the Rule of Law with its 'objective differences' proviso encompass this recognition or truth of particularism? Raz suggests that, deriving from Aristotle, the universal and particular can be complementary rather than antagonistic and in a multicultural world we are simply asking for 'a new moral sensibility'.⁶⁰ This seems to resonate with Kahn's ideas. He argues that the Rule of Law is 'socio-legal', it is not '...a matter of revealed truth nor of natural order. It is a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of

⁵⁷ Thomas Hobbes in *Leviathan* '...to rule by words requires that such words be manifestly made known; for else they are no laws : for to the nature of laws belongeth a sufficient and clear promulgation, such as may take away the excuse of ignorance; which in the laws of man is but of one only kind and that is proclamation or promulgation by the voice of man'

Dealing with public declaration, in the Pitcairn case Lord Woolf made the following statement '...it is a requirement of almost every modern system of criminal law that persons who are intended to be bound by a criminal statute must first be given actual or at least constructive notice of what the law requires. This is a requirement of the rule of law which in relation to criminal law reflects the need for legal certainty.' *Christian and Ors v The Queen* [2006] UKPC [40].

Generally and surprisingly, the criminal courts in England and Wales have at times allowed deviation from this standard for the benefit of those who may claim no notice of laws- see Section 3.3 for discussion of decided cases.

⁵⁸ The 8 principles are summarised and accessible on The Bingham Centre for the Rule of Law website <<https://binghamcentre.biicl.org/schools/ruleoflaw>> accessed 24th April 2018.

⁵⁹ Joseph Raz, 'Multiculturalism' (1998) 11 (3) Ratio Juris 193,194.

⁶⁰ *ibid* 205.

its individual members', including of course the multicultural criminal.⁶¹ These ideas make way for a Rule of Law that is more flexible than perhaps traditionally thought. Sarat and Kearns say that 'law in theory knows no culture and recognizes no identity' but as we saw in Chapter 2 the link between culture and law is inescapable and Cotterrell and Rosen are convincing in their arguments as to why this is so.⁶² As Cotterrell states 'what was once taken for granted as law's uniform cultural foundation, and so did not need generally to be mentioned in legal analysis, has now become explicit and problematic.'⁶³ This is perhaps narrower than his assertion that law exists in 'specific times and places' and that therefore for legal scholarship to be realistic '...it must be in touch with law's changing socio-political conditions.'⁶⁴ Nonetheless multiculturalism and the ensuing cultural mix must be part of this wider socio-political domain. It's not about legal pluralism or individualised justice but about how culture and its relationship with legal responsibility can be accommodated within that law. Norrie (in arguing that motive is a more just marker in the attribution of responsibility than intention) makes a distinction between equality at the guilt stage and equality at the sentencing stage. He acknowledges that individual particularity threatens equality under the Rule of Law '...but the administration of such equality through formal legal categories at the conviction stage is so morally inadequate that it can only survive on the basis that individuality is allowed in through the back door of

⁶¹ Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, University of Chicago Press 1999) 6.

⁶² Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (Ann Arbor, University of Michigan Press 1995) 4.

⁶³ Roger Cotterrell, 'The Struggle for Law: Some Dilemmas of Cultural Legality' (2009) 40 (4) *Journal of Law and Society* 373, 384.

⁶⁴ Roger Cotterrell (2012) Queen Mary University of London, School of Law, Legal Studies Research Paper N0. 126/2012 *Socio-Legal Studies, Law Schools and Legal and Social Theory* 2 <<http://ssrn.com.abstract=2154404>> accessed 15th August 2018.

mitigation.⁶⁵ It is questionable whether there should be a 'back door' in a just society and if the sentencing stage is the 'right' place to accommodate motive then this should be made explicit.⁶⁶ Renteln argues that the equal application of the law requires us to focus on the actor as well as the act and the motive as well as the intent.⁶⁷

When it comes to generality and certainty Wells and Quick refer back to McBarnet's scepticism about the ability of the Rule of Law to generate 'objective determinations' of law and argue that although the law's ideology is grounded in the Rule of Law its practice cannot necessarily live up to the ideology because 'truth' is arrived at via 'the power of cultural assumptions' which shape the interpretation of evidence.⁶⁸ Therefore '...law is storytelling' and outcomes are unpredictable as the law deals with ambiguities, distortions and indeterminacies in coming to judgments because the criminal law is based in '...historical forces external to law itself.'⁶⁹ In this way we can see some space within the laws foundations for movement to accommodate a culture-responsibility relationship because today's multicultural era will become tomorrow's 'historical force'.

It would be wrong to consciously move away from a commitment to generality, equality and certainty but perhaps these standards can be achieved with careful

⁶⁵ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge, Cambridge University Press 2001) 226.

⁶⁶ There is no general mitigating factor of motive but it can provide personal mitigation in specific crimes, for example the Sentencing Guidelines on mandatory life sentence for murder allows personal mitigation if the offender believed that the killing was an act of mercy.

<<https://www.cps.gov.uk/legal-guidance/sentencing-mandatory-life-sentences-murder-cases>> accessed 15th September 2018.

⁶⁷ Renteln (n 7) 167.

⁶⁸ Wells and Quick (n 6) 77 quoting too D McBarnet, *Conviction: The Law, the State and the Construction of Justice* (Cambridge, Palgrave Macmillan 1981).

⁶⁹ *ibid* 126.

and creative thought about how to accommodate the culture-responsibility relationship in contemporary criminal law and criminal justice. Returning to the three disparate cases discussed in section 1.1, they demonstrate a particularist approach but not a considered approach. In fact, in the 'Pitcairn Case' the 'cultural critique' offered by the media was never given as much space in the legal arguments.⁷⁰ They are simply reactive responses to specific phenomena deemed 'cultural'. Somehow there is a feeling that 'justice' is missing. Dauvergne writes of the new understandings that migration may bring to sovereignty and the rule of law in globalizing times⁷¹ which reinforces Fitzpatrick's view that the '...law, as the rule of law, has to be ever-responsive and indeterminate, capable of extending to the infinite variety which constantly confronts it.'⁷²

There are a number of other principles and values within the criminal law that could be explored here. Norrie refers to these as 'liberal values' and 'requirements' and includes broad concepts such as accessibility and fairness in his list of what these could encompass.⁷³ Ashworth and Horder call these 'aspirations'.⁷⁴ This is an attractive label that captures the ultimately non-binding nature of these principles and values but perhaps undermines their strength. Some are particularly relevant to the culture-responsibility relationship and these will be examined in turn. In the House of Lords judgment in *Woolmington v DPP*

⁷⁰ The cultural critique is identified by Power.

Helen Power, 'Pitcairn Island: Sexual Offending, Cultural Difference and Ignorance of the Law' (2007) *Criminal Law Review* 609, 629.

⁷¹ Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 (4) *The Modern Law Review* 588.

⁷² Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, Cambridge University Press 2001) 2.

⁷³ Norrie (n 44) 1.

⁷⁴ Ashworth and Horder (n 5) 81. They include a list from (a)- (v) of these 'aspirations', 22 in total, but here we need to explore a limited number in the context of the culture-responsibility relationship.

in 1935 the 'golden thread' of English law, the presumption of innocence, was clearly established.⁷⁵ The *Woolmington* case itself centered around the *mens rea* of a husband who shot and killed his wife although he had only intended to show her a gun which he meant to use to kill himself. The act of killing was not in dispute but his state of mind was and Lord Sankey made it clear that it is always for the prosecution to prove the guilt of the defendant. This is relevant in criminal trials where the culture of the defendant may be relevant to *mens rea*, in the search for Lernerstedt's 'true blameworthiness' not least because of the moral panics that can be associated with the 'other'.

Another principle that needs raising is *ignorantia legis neminem excusat*, ignorance of the law is no excuse, because as we saw in section 2.1 it is sometimes argued that a defendant should not be responsible because he does not know that his actions contravene the criminal law of England and Wales. There is no legislative statement to the effect that ignorance of the law is no excuse but it comes from Blackstone and is reiterated in common law.⁷⁶ Ashworth and Horder state that the maxim is too strong and indeed there have been cases where ignorance of the law has led to a defence in a cultural context.⁷⁷ In *R v Bailey*⁷⁸ and *R v Byfield*⁷⁹ defendants in both cases were acquitted on charges of having sexual intercourse with girls under the age of 16 because it was 'normal' for such relations to take place in the cultures from which they came and they had not had time to become acculturated. In *Alhaji*

⁷⁵ *Woolmington v DPP* [1935] UKHL 1.

The House of Lords overturned the principle set out in *Fosters Crown Law* 1762 that where a defendant has caused the death of another this will be presumed murder unless the defendant can prove otherwise.

⁷⁶ Blackstone's Commentaries 1753 (4 BI Comm) 24.

⁷⁷ Ashworth and Horder (n 5) 218.

⁷⁸ *R v Bailey* [1964] CLR 671.

⁷⁹ *R v Byfield* [1967] CLR 378.

*Mohammed v Knott*⁸⁰ the Court of Appeal revoked a care order (in care proceedings following the marriage of a 13 year old Nigerian girl to a 26 year old Nigerian man) on the basis that what would be repugnant to an English girl was 'entirely natural' for a Nigerian girl. Rattansi dismisses these instances as '...evidence of a culturally relativist tendency in court judgments in the UK in the 1960's and 1970's' but states that the tide has turned against '...such irresponsible cultural relativism.'⁸¹ Renteln's 'cognitive case' (discussed in section 2.4) completely disregards the principle and the defendants sought to rely on ignorance of the law in the 'Pitcairn Case' where there was a suggestion that they did not understand the meaning of 'sexual offences' under the 1956 Sexual Offences Act and there were arguments as to whether the Act had been adequately promulgated on the island.⁸² Austin states that the principle is 'an assertion without normative force'⁸³ and that makes the way for Husak and Von Hirsch to argue that the courts should be allowed to assess '...the moral legitimacy of the defendant's belief in ignorance'.⁸⁴ However, this is qualified so that the courts should not make this allowance in cases where the defendant knows his conduct is injurious. This raises the idea that knowledge of the criminal law is part of the *mens rea* but Gardner makes a distinction between a defendant knowing what the law is and being able to find out.⁸⁵ Ashworth, in a later article, takes a liberal view in finding the doctrine not only unsustainable but

⁸⁰ *Alhaji Mohammed v Knott* [1969] 1QB 1.

⁸¹ Ali Rattansi, *Multiculturalism: A Very Short Introduction* (Oxford, Oxford University Press 2011) 54.

⁸² *Christian and Ors v The Queen* [2006] UKPC 47 (30 October 2006).

⁸³ John Austin, *Lectures on Jurisprudence, or, The Philosophy of Positive Law* (5th edn, Robert Campbell (ed), vol1, London, J Murray 1885) 482.

⁸⁴ D Husak and A Von Hirsch 'Culpability and Mistake of Law' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Oxford, Clarendon 1993).

⁸⁵ J Gardner, 'Wrongs and Faults' in A P Simester, *Appraising Strict Liability* (Oxford, Oxford University Press 2005) 69.

'preposterous'.⁸⁶ There is thus uncertainty about its standing and we have reached a stage where clear guidance from the courts would be extremely helpful in the ongoing development of the culture-responsibility relationship. There is scope here for clarity in the arena of multicultural policy where we can question the relationship between knowledge (or deemed knowledge) of the law and multicultural rights such as citizenship.

This brings us to the ongoing conflict between objectivism and subjectivism in criminal law. The *actus reus* of each specific offence is a precondition for criminal liability. Generally speaking, other than where causation is in question, it is a concept that attracts little controversy. But, to satisfy the demands of a retributivist approach to criminal justice, offences need a *mens rea* to establish fault and in turn liability (and to satisfy the correspondence principle the *actus reus* and the *mens rea* must coincide in time). The criminal law relies on common law definitions of states of mind such as intentionally, recklessly, maliciously, willfully, fraudulently, dishonestly and knowingly and thus subjectivity enters the law as courts try to establish what was in a particular defendant's mind. (It should be noted here that the criminal law of England and Wales does not consider motive in establishing the fault element).⁸⁷ Yet objectivity informs that subjectivity as legal standards are laid down, usually at common law, to help the courts determine whether or not these states of mind existed at the time of the offence.

⁸⁶ Andrew Ashworth, 'Ignorance of Criminal Law and Duties to Avoid it' (2011) 74 (1) *Modern Law Review* 1, 1.

⁸⁷ Renteln's work on the 'cultural defence' is strongly rooted in the idea of 'motive' and one of the criticisms of that work addressed here is that it is too broadly conceptual to meaningfully accommodate the specific criminal law of the jurisdiction of England and Wales. Norrie argues that the '...focus on intention excludes the motive of those at the margins of society and those whose principal values the existing order wishes to marginalise' but that motive is more central to human agency. Norrie, *Crime Reason and History* (n 64). However, motive may be admitted at the 'safer' stage of sentencing so that the effects of that are controlled by judicial discretion.

The test for oblique intention, for example, asks if an outcome was (objectively) virtually certain and if the defendant (subjectively) appreciated that and the test for recklessness asks if a defendant (subjectively) foresaw a risk but took it anyway when to do so was unreasonable (objective) in circumstances known to him (subjective).⁸⁸ This seems to verify what Ashworth and Horder identify as a 'loosening and tightening' in the objective/subjective.⁸⁹ But they also argue that the courts are fearful of subjectivism as they seek not to lower standards, something that has perhaps been seen recently in the reworking of the definition of dishonesty where the second (subjective) limb of the *Ghosh* Test was removed by the decision in *Ivey*.⁹⁰ Wells and Quick argue that '...the tribunal is effectively constructing the standard against which the defendant is judged: the legal process goes on to legitimize that standard as objective and neutral'.⁹¹ Broadly, a more subjective approach makes more room for culture; a more objective approach limits its potential ambit. This is illustrated well in the loss of control defence (discussed in detail in section 3.3 below) with S54 (1)(c) of the Coroners and Justice Act 2009 providing that where there is a loss of control (a question of fact but established subjectively) the defence may be relied upon when '...a person of the defendant's sex and age with a normal degree of tolerance and self-restraint in the circumstances of the defendant might have acted in the same way.' There is a 'subjective' leeway in the words 'in the circumstances of the defendant'. Can the words be stretched to include the defendant's cultural

⁸⁸ *R v Woollin* [1999] 1 AC 82 (Stephen Leslie).

This is known as Cunningham recklessness (*R v Cunningham* [1957] 2 QB 396) and the test was affirmed in *R v G* [2004] 1 AC 1034.

⁸⁹ Ashworth and Horder (n 5) 229,

⁹⁰ *R v Ghosh* [1982] EWCA Crim 2.

Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2017] UKSC 67.

However, *R v G* [2004] 1 AC 1034, in confirming subjective recklessness as opposed to the Caldwell/Lawrence objective recklessness perhaps goes against this.

⁹¹ Wells and Quick (n 6) 113.

circumstances? This has not been tested since the new loss of control defence became law.

In looking at the purpose of the criminal law earlier in this section the prevention of harm was identified as one of three purposes leading to the overall aim of maintaining social order. In practical terms harm is prevented through the criminalisation of harmful behaviours. The harm principle thus informs the limits of criminalisation. Generally we follow a principle of minimum criminalisation and although we saw earlier the emphasis in liberal thinking on individual autonomy in decisions around criminalisation, that is balanced against welfare concerns so that collective goals are considered too in the criminalisation process. Matravers argues that ‘...a liberal state in circumstances of pluralism ought not to criminalise- or ought otherwise to leave space for- (at least some) practices that ‘belong’ (in some sense or other) to the various cultures and conceptions of the good of its citizens.’⁹² Yet we will see in section 3.3, for example the hasty and ineffectual criminalisation of forced marriage, despite the well documented suggestions from those from within affected communities to tackle the issue through alternatives to criminalisation.

Of the relevant systemic factors to be considered, there is the role of the judge. There has long been debate about whether judges make or interpret law. In the 21st Pilgrim Fathers Lecture Lady Hallet looks back to Sir Francis Bacon who ascribed to judges the minimalist role of simply deciding the law (his views were in opposition to those of Sir Edward Coke who stated, in *Bonham’s case* in 1610

⁹² M Matravers, ‘Responsibility, Morality and Culture’ Chapter 5 in Kymlicka Lernerstedt and Matravers (n 2) 89.

that judges can override parliament and thus make law).⁹³ Thus there is adherence to 'declaratory theory' with the role of the judge confined to the interpretation and application of laws rather than their creation.⁹⁴ In accordance with Montesquieu's doctrine of the separation of powers the judiciary must be independent and the role of the judge is to interpret the law fairly and to apply it impartially.⁹⁵ However, says Freeman, this is a 'hollow pretence' because '...judges cannot divorce themselves from the pattern of values which is implicit in the society or group to which they belong and no amount of consciously applied impartiality or judicial lack of passion will succeed in eliminating the influence of factors of this kind.'⁹⁶

Webber affirms this in recognising a 'decline of legal positivism and recognition of normative pluralism in judicial decision making'⁹⁷ but it is questionable as to whether such 'normative pluralism' exists in reality and indeed whether it reflects our multicultural world. Shabani sees instead a 'normative model of integrative adjudication.'⁹⁸ This means perhaps a move away from the judge who is bound by the constitution, legislation and precedent towards decision making based on society's norms. Shabani summarises this as being '...essentially a process of social hermeneutics, grounded in the relationship between moral theories and experience in which judges should strive for a synthesis of the contending moral

⁹³ *Thomas Bonham v College of Physicians* [1610] 8 Co. Rep. 107 Court of Common Pleas.

⁹⁴ For an explanation of Declaratory Theory see Allan Beever, 'The Declaratory Theory of Law' (2013) 33 (3) *Oxford Journal of Legal Studies* 421.

⁹⁵ Montesquieu, *The Spirit of the Laws* Cambridge (Anne M Cohler, Basia Carolyn Miller and Harold Samuel Stone (tr), Cambridge University Press 1989).

⁹⁶ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, London, Sweet and Maxwell 2014) 262.

⁹⁷ J Webber, 'A Judicial Ethic for a Pluralistic Age' Chapter 4 in Omid A Payrow Shabani (ed), *Multiculturalism and Law: A Critical Debate* (Cardiff, University of Wales Press 2007) 67.

⁹⁸ Shabani (n 96) 7.

considerations.⁹⁹ Both Webber and Shabani recognise that this leaves room for contention and that judicial outcomes may therefore be ‘provisional’ but the idea is that this way forward avoids claims of bias and arbitrariness. Webber asks the question ‘...how can one legitimately insist upon common standards? How can one establish a normative order, in a society marked by radical disagreement, on what those standards should be?’¹⁰⁰ He says that judges can merely make an ‘appropriate response’ because it is not possible to identify ‘...a fully agreed set of values from which to deduce all necessary judgments’ and this means that there will always be disagreement.¹⁰¹ Is what Webber is suggesting a radical rethinking of judicial decision making or is it what happens anyway, in reality, without such practices being acknowledged?. The analysis in section 3.3 below suggests the latter. Surprisingly, there has been some guidance on questions of culture and race, albeit from the Employment Appeal Tribunal. In *Bradford Hospitals NHS Trust v W Al-Shabib* Judge Reid QC said:

‘Whilst it may sometimes be legitimate for a tribunal to take into account differences in behaviour which reflect racial and cultural differences [there must be]...some evidential basis for them, frequently in the form of expert evidence. For a tribunal to assume that a particular ethnic group has a specific characteristic for example, that they are given to use emotive language is fundamentally wrong, even if the assumption is made for benign purposes.’¹⁰²

⁹⁹ *ibid* 7.

¹⁰⁰ *ibid* 82.

¹⁰¹ *ibid* 82.

¹⁰² [2002] WL 31050525 [21].

Here A’s membership of the Trust’s gym was revoked. A claimed that the revocation was racially motivated. The Employment Tribunal made a finding of discrimination and the Trust appealed. The appeal was allowed. The Tribunal was wrong in making a connection between A being treated unreasonably and a finding of discrimination. Interestingly the assumption of A having some specific characteristic ‘in the absence of some evidential basis’ implies that evidence could be adduced of that characteristic.

This is constructive in its oblique reference to the unacceptability of essentializing and important in legitimising the recognition of racial or cultural differences as an explanation for differences in behaviour. In 2013 the President of the Family Division gave guidance about how the judge should approach the 'enormous challenges' of our largely secular and religiously pluralistic society. Munby LJ advised that it is not for the judge to weigh one religion against another and that all are entitled to equal respect but he qualified this by saying that this is so where religions are 'legally and socially acceptable' and not 'immoral or socially obnoxious' or 'pernicious'. However, he acknowledged that there is no 'bright line' to demarcate the limits of the reach of the secular law.¹⁰³ The obvious question arises. Why are the judges of the criminal courts not addressing these issues?

Lacey states that '...working out- as a matter of social science as much as legal philosophy- the appropriate balance between fairness to individually situated defendants and the goals of contemporary criminal law remains one of its most urgent challenges.'¹⁰⁴ In this section we have looked at the purpose of the criminal law and at those principles, values and systemic factors that provide the law with its strength and foundations. In addition to the challenging questions that the culture-responsibility raises for traditional ideas around the purpose of the criminal law, the Rule of Law is pushed to its limits by the culture-responsibility relationship and the objective/subjective boundaries are pushed much further towards the subjective than perhaps feels comfortable. But with the political will, there is space for accommodation. Although we identified the endemic cultural

¹⁰³ Munby LJ in keynote address to Law Society Family Law Section First Annual Conference November 2013. Reported in *Law Society Gazette* 4th November 2013 6.

¹⁰⁴ Lacey, N. (2014) 'Community, Culture and Criminalisation' Chapter 3 in Kymlicka, W., Lernerstedt, C. and Matravers, M. *Criminal Law and Cultural Diversity* (Oxford, Oxford University Press 2104) 65.

bias of the judiciary in section 2.4 this is not necessarily a barrier to allowing the culture-responsibility relationship into the judicial consciousness and as the review of the Judiciary in section 3.4 shows the Judicial College seem to be ahead of the game in policy terms as evidenced in the provisions of the Equal Treatment Bench Book.¹⁰⁵ The next step is to thematically search the criminal law (section 3.3) and the criminal justice system (section 3.4) for evidence of the presence of and engagement with culture in general and the culture-responsibility relationship in particular.

¹⁰⁵ <www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-v15.08.18.pdf> accessed 5th October 2018.

3.3 The Criminal Law

In this section traditional defences, cultural offences, decided cases and sentencing decisions and sentencing law will be thematically examined as we seek to understand how the substantive criminal law has engaged with culture.

Traditional Defences

Whilst the theoretical rationale for the existence of defences in criminal law is disputed, broadly speaking, defences emerge from the denial of responsibility.¹⁰⁶ Traditionally defences have been divided into justifications and excuses but Clarkson and Keating recognise an additional category of 'exemptions'.¹⁰⁷ Ashworth and Horder adopt the division between the defendant who did not have the capacity to choose the course of action taken so that he can deny his responsibility for the crime of which he is accused (relying on infancy, insanity, automatism) and the defendant with capacity to choose who was a responsible moral agent and should be judged '...according to the standard of what we ought reasonably to expect of a person in that situation.'¹⁰⁸ In this latter case defendants are accepting responsibility but 'claiming an excuse on the ground that their response to a testing situation lived up to expectations in a normative sense.'¹⁰⁹ Culture therefore could be relevant to *excuse* where there is an argument that

¹⁰⁶ Norrie presents his own arguments around defences against the arguments of both Duff and Moore in Chapter 5 'Individualising Blame'. Norrie, *Punishment, Responsibility, and Justice* (n 44).

¹⁰⁷ H M Keating, S R Cunningham, T Elliott and M A Walters, *Clarkson and Keating: Criminal Law* (8th edn, London, Sweet & Maxwell 2014) 304.

Justifications include necessity (where the harm threatened is greater than the harm caused) and consent; excuses include mistake, duress, loss of control, intoxication and necessity (where the harm threatened is equal to the harm caused) and exemptions include insanity, diminished responsibility, automatism and lack of age.

¹⁰⁸ Ashworth and Horder (n 5) 228.

¹⁰⁹ *ibid* 228.

capacity is reduced by culture or to *justification* where the defendant has still lived up to (perhaps culturally different) 'normative expectations'. We do need to question the basis upon which those expectations are normative because, as seen in section 2.4, we need to be able to be answerable to claims of individualised justice. As Black points out, '...acknowledging that something in an accused's cultural background might justify an acquittal for otherwise criminal behaviour seems to be a step down the path to individualised justice which corrupts the equal protection that should be offered by the criminal law. In short, it threatens anarchy.'¹¹⁰

How far can traditional defences in the criminal law of England and Wales be adapted to embrace the defendant who lacks capacity due to his culture or who has acted according to a morally different normative expectation? A few writers have addressed this question directly. Golding asks how the 'cultural defence' fits into the standard scheme of justifications and excuses.¹¹¹ As discussed above, broadly, accommodation of the multicultural criminal within the traditional criminal law defences lies in the subjectivity or objectivity of each individual defence. Taking loss of control, diminished responsibility and insanity as examples, because they are perhaps the most likely defences to interact with the concept of

¹¹⁰ Vaughan Black, 'Cultural Thin Skulls' (2010) 60 UNBLJ 186, 196.

¹¹¹ M Golding, 'The Cultural Defence' (2002) 15 (2) Ratio Juris 146,158.

Golding presents the argument that there should be a cultural defence to negate or mitigate criminal acts where carried out '...under a reasonably good faith belief in their propriety based on the actor's cultural heritage or tradition.'

culture we can consider how far they can accommodate the culture-responsibility relationship.¹¹²

The Coroners and Justice Act 2009 abolished the old defence of provocation and replaced it with the defence of loss of control, a partial defence to murder that reduces a murder conviction to one of voluntary manslaughter. There must now be a subjective loss of control caused by a 'qualifying trigger' and a requirement that '...a person of the defendant's age and sex with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have reacted in the same way'.¹¹³ In the law on loss of control it is possible to see some evidence of direct engagement with culture. In fact, Dick argues that provocation was originally a 'cultural defence', based on cultural norms about women as property and 'honourable' reactions to adultery.¹¹⁴ S 55(6) of the Act excludes a 'considered desire for revenge' as a qualifying trigger. The Law Commission Report that led to the reform of the law expressly considered honour killings and in paragraph 5.25 stated that such killings were 'likely' to include a strong motive for revenge.¹¹⁵ Furthermore, in 2009 the Ministry of Justice published its response to the reform proposals and in paragraph 56 stated that 'Honour Killing cases will not satisfy the requirement that circumstances were of an extremely grave character and caused a justifiable sense of being wronged'.¹¹⁶ It is

¹¹² Indeed, provocation is raised in 4 cases discussed below and diminished responsibility in another 3.

¹¹³ S54 (1) (a) (b) and (c) Coroners and Justice Act 2009 respectively.

¹¹⁴ Caroline Dick, 'A Tale of Two Cultures: Intimate Femicide, Cultural Defences, and the Law of Provocation' (2011) 23 (2) Canadian Journal of Women and the Law 519, 544.

¹¹⁵ Law Commission, *Murder, Manslaughter and Infanticide* (LAW COM No 304, 2006)

<http://www.lawcom.gov.uk/app/uploads/2015/03/lc304_Murder_Manslaughter_and_Infanticide_Report.pdf> accessed 1st September 2018.

¹¹⁶ Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law, Summary of Responses and Government Position* (Response to Consultation

encouraging that both the Law Commission and The Ministry of Justice gave thought to these cultural issues.

Dogan questions whether the 2009 Act is flawed in assuming that all ‘honour’ killings are based on a desire for revenge and identifies three different types of ‘honour’ killing with only the third, labelled as ‘cultural’, being qualitatively different from other kinds of murder.¹¹⁷ As will be seen below, courts in England and Wales are generally reluctant to accept cultural evidence in murder cases and it seems that ‘honour’ is not raised by the defence but rather by the prosecution. However, Phillips looks at four cases involving ‘honour’ killing and finds that culture was relevant to provocation in one case when it was introduced as a defence at re-trial and the Court of Appeal found that victim’s illicit affair ‘...would be deeply offensive to someone with your background and religious beliefs.’¹¹⁸ The new loss of control defence has not been tested in the context of a culturally motivated murder or more specifically an ‘honour’ killing.¹¹⁹ Whilst the 2009 Act is clear that sexual infidelity is excluded as a qualifying trigger for the purpose of establishing loss of control the Court of Appeal took a grey line in allowing appeals from men convicted of the murder of unfaithful wives who had had not been able to rely on the loss of control defence at trial.¹²⁰ Now where sexual infidelity is ‘...integral to

CP(R) 19/08, 14 January 2009)

<<http://webarchive.nationalarchives.gov.uk/20100512140907/http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf>> accessed 1st September 2018.

¹¹⁷ Recep Dogan, ‘The Dynamics of Honour Killings and the Perpetrators’ Experiences’ (2016) 20 (1) Homicide Studies 53.

¹¹⁸ *R v Shabir Hussain* [1997] EWCA Crim 2876.

The cases discussed by Phillips here are not included in the case analysis below because they were all heard before 2000.

Anne Phillips, ‘When Culture Means Gender: Issues of the Cultural Defence in the English Courts’ (2003) 66 (4) Modern Law Review 501.

¹¹⁹ Although in *Re Naz* [2011] EWHC 2850 (QB) religious beliefs were raised at trial (though not on appeal) in the context of provocation, but the defendant was convicted of murder.

¹²⁰ S55 (6) c Coroners and Justice Act 2009.

R v Clinton, R v Parker, R v Evans [2012] All ER (D) 73 (Jan)

and forms part of the essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsection 55 (3) and (4) the prohibition does not operate to exclude it'.¹²¹ This judicial widening of what counts as the qualifying trigger may in time have implications for 'honour' killing cases.

More generally it is interesting to trace the development of provocation in case law. Prior to 1957 provocation was a common law defence, a 'concession to human frailty' but based on the objective reasonable man.¹²² In *R v Lesbini* the court ruled that no account should be taken of an anti-Semitic slur which provoked the defendant but would not provoke an ordinary man who was not Jewish.¹²³ Section 3 of the Homicide Act 1957 required two elements for a defendant to rely on the defence of provocation. Subjectively, the court had to be satisfied that he had been provoked into losing self-control. Objectively, the court needed to evaluate whether the provocation was enough to make a reasonable man do as he did taking into account everything said and done and the effect it would have on a reasonable man. Lord Diplock defined a reasonable man in *DPP v Camplin* as '...an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.'¹²⁴ The Privy Council decision in the 1997 case of *Luc Thiet Thuan v R* reaffirmed this objective standard but qualified it in allowing the personal characteristics of age and sex to be taken into account in assessing the 'reasonable man'.¹²⁵ This case is directly

¹²¹ *ibid* [39].

¹²² *AG for Jersey v Holley* [2005] UKPC 23 [3] (Lord Nicolls).

¹²³ *R v Lesbini* [1914] 11 Cr App R 11.

¹²⁴ *DPP v Camplin* [1978] AC 705 [717].

¹²⁵ *Luc Thiet Thuan v R* [1997] AC 131.

relevant to the culture-responsibility relationship because the defendant was a Chinese man who claimed, unsuccessfully, that his girlfriend's mocking his sexual ability was more insulting to a man from his culture making his loss of temper reasonable. The departure from this objective standard in *R v Morgan Smith* which '...involved a significant relaxation of the uniform, objective standard adopted by Parliament [in S3 Homicide Act 1957]' in stating that the defence of provocation should be interpreted with '...sufficient sensitivity to individual difference to individual defendants' was judged as erroneous in *AG for Jersey v Holley* and the latter case placed objectivity firmly back in the legal framework.¹²⁶

If the legislature intended an objective test in S54(1) (c) of the 2009 Act and the courts are committed to developing that objectivity is there room for the culture-responsibility relationship within the traditional defence of loss of control? Do the words 'in the circumstances of the defendant' allow for an element of subjectivity? The *Clinton* decision might suggest so with the black and white prohibition on sexual infidelity as a qualifying trigger in S55(6)(c) being given a grey interpretation but the analysis of decided cases in section 3.3 suggests differently. Gardner is insightful here for he recognized in the *Smith* decision the implications for 'today's cosmopolitan social conditions' where '...an increasingly mobile populace creates an increasingly fragmented social and cultural space with a corresponding fragmentation of standards that are expected of people and regarded as proper.'¹²⁷ Gardner identifies 'enough pluralistic space'¹²⁸ in the

¹²⁶ *R v Smith (Morgan)* [2001] 1 AC 146.
AG for Jersey v Holley [2005] UKPC 23 [22] (Lord Nicholls).

¹²⁷ John Gardner, *Offences and Defences* (Oxford, Oxford University Press 2007) Chapter 8 'Provocation and Pluralism'.

¹²⁸ *ibid* 156

defence of provocation even though he was writing after the *Holley* decision. The decision in *R v Shabir Hussain*, however, is anomalous in that Hussain was able to rely on the defence of provocation at re-trial after running over his sister in law whilst she was waiting for her partner on the grounds, as stated by Phillips above, that the affair was offensive to someone of his 'background and beliefs'.¹²⁹ Perhaps the absence of the word 'culture' is significant.

Diminished responsibility is also a partial defence to murder. The defendant must be suffering from an abnormality of mental functioning caused by a recognized medical condition and that recognized medical condition must be listed in the latest American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ('DSM').¹³⁰ Diminished responsibility was raised as a defence in two 'honour' killing cases in 2014. In *R v Ahmed al-Khahib* the defendant claimed that the *djinn* (a demonic spirit in Islamic folklore) had commanded him to bury his wife and in *R v Jahangir Nazir* the defendant sought to rely on severe depression as a recognized medical condition in establishing diminished responsibility. The defence was rejected in both cases.¹³¹

¹²⁹ *R v Shabir Hussain* [1997] EWCA Crim 24 Hussain was convicted of the murder of his sister in law in 1995, a crime he denied. He appealed against conviction on the grounds of false identification and introduced the defence of provocation at retrial. The judge at retrial acknowledged that the sister in law's affair '...would be deeply offensive to someone with your background and your religious beliefs' and stated that '...something blew up in your head that caused you a complete and sudden loss of self-control'. His original life sentence was reduced to 6 ½ years.

¹³⁰ S2 Homicide Act 1957 as amended by Coroners and Justice Act 2009.

This is the latest edition-American Psychiatric Association (2013) *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.) Arlington, VA: American Psychiatric Publishing.

¹³¹ *R v Mohammed al- Khahib* Manchester Crown Court 2014

R v Jahangir Nazir Manchester Crown Court 2014

Diminished responsibility was also rejected as a defence in an earlier 'honour' killing case and although the defendant went on to appeal against conviction this was on the basis of a wrongful jury direction on joint enterprise.

At first there seem to be fewer cultural implications for the defence of insanity. The law on insanity in England and Wales still comes from The 1843 M'Naghten Rules. The defence requires that the defendant is suffering from a defect of reason caused by a disease of the mind. Unlike the defence of diminished responsibility it does not rely on medical reference tools. The insanity defence has always worked on common sense understandings of what 'insane' may look like. In a 2013 paper the Law Commission proposed an alternative to insanity 'not criminally responsible by reason of a recognised medical condition'.¹³² Interestingly (and in contrast to their earlier recommendation on reform to the law on diminished responsibility) they specified that 'recognised medical condition' is a term of art to be interpreted by the court and not related to diagnostic materials. This is because it is (and always has been) a question of *mens rea* with insanity needing a complete lack of capacity to be successfully pleaded.

Davis argues for recognition of 'cultural insanity' where a defendant may not be insane within legal definitions but insanity should be available as a proxy for a 'cultural defence' simply because a defendant lacks *mens rea*.¹³³ This is controversial, akin to Renteln's 'volitional case' where the defendant was compelled to act according to culture. More helpful however is Davis's knowledge of the DSM and how this has adapted to take account of cultural influences in mental health.¹³⁴ Extending these developments to law she argues that the DSM could provide courts with helpful guidelines for contextualizing cultural issues in

¹³² Law Commission, *Insanity and Automatism* (Law Com, June 2013)

<<https://www.lawcom.gov.uk/project/insanity-and-automatism/>> accessed 1st September 2018.

¹³³ Alexa Davis, 'In Defence of Cultural Insanity: Using Insanity as a Proxy for Culture in Criminal Cases' (2015) 49 *Columbia Journal of Law & Social Problems* 387.

¹³⁴ American Psychiatric Association (2013) *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.) Arlington, VA: American Psychiatric Publishing.

psychiatric diagnoses. In fact DSM V includes cultural criteria for the diagnosis of mental disorders (although it carries a warning about its use in forensic settings) and reflects the American Psychiatric Association's effort to improve treatment of cultural issues in diagnosis. It now recognizes 'cultural concepts of distress'.¹³⁵ Prior to this DSM IV recognized 'culture bound syndrome'¹³⁶ and Parzen comments that claiming this would be likely to lead to insanity at the time of the act and therefore a defence.¹³⁷

We can see that culture has gained a foothold in the consciousness of law makers and there is theoretical scope within these traditional defences to accommodate culture but as the next sections show there seems to be an embedded reluctance to admit culture to the practice and policy of the criminal law.

¹³⁵ These include Cultural Syndrome, Cultural Idiom of Distress and Cultural Explanation or Perceived Cause (DSM IV appendix).

¹³⁶ DSM IV included 'culture bound syndrome' for the first time, described as 'recurrent, locality-specific patterns of aberrant behaviour and troubling *experience* that may or may not be linked to any particular diagnostic category in DSM IV'.

¹³⁷ Micah David Parzen, 'Towards a Culture-Bound Syndrome-Based Insanity Defence' (2003) 27(2) *Culture, Medicine and Psychiatry* 131.

Legislation

Theories of criminalisation and the limits of the criminal law relate back to questions raised earlier in this chapter firstly about the purpose of the criminal law and secondly about the laws' principles and values. We need to review the recent creation of 'cultural offences' in order to achieve a full understanding of the approach of the criminal law to responsibility and culture. As seen above the 'harm principle' forms the basis for decisions to criminalise behaviour as legislatures decide what amounts to harm and arguably wrongdoing but Ashworth and Horder remind us that '...the frontiers of criminal liability are not given but are historically and politically contingent'.¹ In other words, notions of harm are fluid and the criminal law responds accordingly. This is of course evident where 'harm' takes on a cultural or multicultural dimension. Early legislative approaches to different cultures were based on a 'rule and exemption' approach, for example the Criminal Justice Act 1988 prohibits the carrying of knives and other dangerous weapons but exempts knives carried for 'religious purposes'.² These exemptions are grounded in the idea of group rights. More recently we have seen the creation of 'cultural offences' a phenomenon that contributes to what Duff has identified as a 'crisis of criminalisation' where behaviour outside the normative values of the majority is made criminal and where we need to assess the value judgments

¹ Ashworth and Horder (n5) 23

² S139(5)(b) Criminal Justice Act 1988.

behind criminalisation.³ Van Broeck is one of the few writers to focus on the idea of the 'cultural offence'.⁴ His suggested definition is

'...an act by a member of a minority culture which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation.'⁵

Van Broeck is looking to establish a 'cultural offence' in individual cases, firstly by asking if the defendant was subjectively motivated by culture, secondly through objectifying this by asking if members of the defendant's cultural group agree and thirdly by comparing the defendant's culture with the dominant culture to reach a decision on whether a 'cultural offence' has been committed. Perhaps it is a testament to our beginning to think in a different way but Van Broeck's definition can no longer be workable. Yes, the focus of Van Broeck's 'cultural offence' is on the individual but we have moved away from the idea of an offender *belonging* to a 'minority culture' (although there is a whole criminological literature on deviance within different cultures and sub-cultures, beyond the scope of this thesis) and beyond the understanding of cultures, minority and dominant, as bounded.

In recent years two high profile 'cultural offences' have emerged in legislation. Female circumcision, now more commonly referred to as Female Genital

³ Antony Duff, *Answering For Crime: Responsibility and Liability in the Criminal Law* (Oxford, Hart Publishing 2007).

Baker too gives a comprehensive argument against criminalisation in his 2011 book *The Right Not to be Criminalised: Demarcating Criminal Law's Authority* based on arguments around the constitutional limits of the criminal law as a result of human rights (Ashgate, Farnham).

⁴ Jeroen Van Broeck, (2001) 'Cultural Defence and Culturally Motivated Crimes (Cultural Offences)' (2001) 9 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 1.

⁵ *ibid* 5.

Mutilation (FGM), could historically have been dealt with using the catch all tools of the criminal law, notably the Offences Against the Person Act, or managed as a safeguarding issue under the Children Act 1989. It was made a specific criminal offence by the Prohibition of Female Circumcision Act 1985.⁶ The later Female Genital Mutilation Act 2003 made the offence more serious in increasing the maximum sentence from 5 to 14 years as the rhetoric surrounding the offence changed with the move from ‘circumcision’ to ‘mutilation’, something Bibbings recognizes as ‘value loaded’ because the latter word conveys a disgust not inherent in ‘circumcision’.⁷ Recent research from Equality Now and City University reports that 103,000 women who had undergone FGM were living in England and Wales in 2011, with the implication that their own daughters (144,000 girls born to these mothers between 1996 and 2011) are in turn at risk of being subjected to FGM.⁸ FGM has recently received prominence following the ‘Girl Summit’ which took place in the UK in June 2014 and where there were consensus resolutions on forced marriage and FGM.⁹ For many years there was only one prosecution in England and Wales for offences relating to FGM and the defendant, Dr Dhanuson Dharmasena was acquitted on 4th February 2015, leading to support groups questioning why the law is ineffective.¹⁰ New provisions (with support of the Royal College of Nursing and the British Medical Association)

⁶ Prohibition of Female Circumcision Act 1985. Section 1 made it an offence (a) to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person; or (b) to aid, abet, counsel or procure the performance by another person of any of those acts on that other person’s own body. The Act has now been replaced by the 2003 Female Genital Mutilation Act.

⁷ L Bibbings, ‘Female Circumcision: Mutilation or Modification’ in Jo Bridgeman and Susan Millns (eds) *Law and Body Politics: Regulating the Female Body* (Dartmouth 1995) 151.

⁸ <https://www.city.ac.uk/_data/assets/pdf_file/0004/282388/FGM-statistics-final-report-21-07-15-released-text.pdf> accessed 18th June 2018.

⁹ This was part of the 2014 Foreign and Commonwealth Office Human Rights and Democracy Report which related largely to the 800 year anniversary of the signing of the Magna Carta and aimed to show that the principles embodied there, equality before the law and the accountability that comes from that, are still alive today.

¹⁰ <<http://www.justiceforfgmvictims.co.uk/the-report/>> accessed 20th January 2018.

have now been added to strengthen the 2003 Act. The law now provides for extra territorial liability, lifelong victim anonymity and parent/guardian liability for failure to protect a child from FGM.¹¹ A case against a Bristol father accused of allowing his 6 year old daughter to undergo FGM collapsed in February 2018 after the Crown Court judge ordered the jury to acquit because of a lack of evidence.¹²

The 2003 Act was further amended in 2015 by the addition of the availability of an FGM Protection Order. National Statistics from the Family Court state that since July 2015 233 applications for FGM Protection Orders were made with 220 orders being granted and for the period January to March 2018 15 applications for orders were made.¹³ Perhaps it is too soon to conclude that the civil system provides more effective protection for girls (and thus prevents more harm) than the criminal justice system. Whilst the numbers of FGM Protection Orders issued is encouraging, the caution of the criminal justice system in proactively engaging with FGM prosecutions is arguably echoed in the civil system. The ruling of the

¹¹ The new law is found in sections 70-75 of the Serious Crime Act 2015 and came into force 3rd May 2015. The background to the passing of the new law is as follows-

- House of Commons Home Affairs Committee. Female Genital Mutilation: The Case for National Action Plan- Second Report of 2014-15 Session 3rd July 2014

<<https://publications.parliament.uk/pa/cm201415/cmselect/cmhaff/201/201.pdf>> accessed 1st September 2018.

- Government Response published 9 December 2014 CM8979

<<https://www.parliament.uk/documents/commons-committees/home-affairs/Govt-Response-FGM-abuse-unchecked.pdf>> accessed 1st September 2018.

- Follow up Report 14 March 2015

<<https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2010/female-genital-mutilation-follow-up/>> accessed 1st September 2018.

¹² ¹² Reported in *the Guardian* (23rd February 2018)

<<https://www.theguardian.com/society/2018/feb/23/uk-fgm-trial-father-failed-case-intolerable-pressure>> accessed 18th June 2018.

¹³ Ministry of Justice, Family Court Statistics Quarterly, England and Wales, January to March 2018

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720100/FCSQ_January_to_March_2018.pdf> accessed 1st September 2018.

judge in *London Borough of Barnet v MFABCD* (by their Guardian) as to whether or not child A (who was living with foster parents under an interim care order) had undergone FGM was based on three days of evidence from, among others, 2 social workers, pediatricians with expertise in FGM, psychologists, school workers and a child protection officer. The ruling ran to 19 pages and the judge finally decided at paragraph 139 that A had undergone a procedure to her genitalia, likely to be Type IV FGM but that ‘...there is no evidence to suggest that A is at risk of suffering a further procedure of FGM.’¹⁴ FGM is high on the political agenda with a further Select Committee Report published in September 2016 and a governmental response published in December 2016 in which the government reinforced its commitment to eradicate FGM.¹⁵ The law, both criminal and civil needs to live up to the political rhetoric.

If the dominant political and legal discourse tells us that FGM lies somewhere on a scale from distasteful to abhorrent we may be reluctant to entertain alternative social constructions surrounding it. Bibbings asks whether FGM is mutilation or modification and argues that it is no ‘worse’ than other forms of cosmetic surgery, which western women may appear to have autonomy in choosing. However, she questions that autonomy as being compromised as a result of false consciousness.¹⁶ She is of course overlooking the issue of ‘whose autonomy?’ bearing in mind that FGM is often a procedure chosen by women for their infant daughters. American cultural anthropologist Schweder uses the word ‘alteration’ rather than mutilation and presents findings from a number of ethnographic

¹⁴ *London Borough of Barnet v MFABCD* (by their Guardian) 2016 WL 07840583 [140].

¹⁵ Female Genital Mutilation: Abuse Unchecked (CMND 9375) The Government Response to the Ninth Report From the Home Affairs Select Committee Session 2016-17 HC 390.

¹⁶ L. Bibbings, ‘Female Circumcision: Modification or Mutilation’ in Jo Bridgeman and Susan Millns (eds), *Law and Body Politics: Regulating the Female Body* (Dartmouth 1995) 151 - 170. 185

studies that view FGM as a positive coming of age experience in the psychological, spiritual, social and physical sense. He counteracts both the feminist objection to FGM (pointing out that ritual 'alteration' is also carried out on males) and the allegations of patriarchy (on the basis that FGM is usually upheld within the patriarchy). He claims that health risks have been exaggerated and are empirically unsubstantiated and that there are no grounds for imposing Western aesthetic norms on communities.¹⁷ But like Bibbings he gives little time to the issue of the autonomy of the young. Few Western multiculturalists are swayed by these arguments, for example Parekh whose firm and unequivocal rejection of female circumcision also displays his commitment to universalism rather than cultural relativism.¹⁸

Despite the availability of a court order preventing the marriage of those at risk of being forced to marry under the Forced Marriage (Civil Protection) Act 2007 the conservative government made the decision to criminalise forced marriage in June 2012. Sections 120 (which creates the offence of breaching a forced marriage protection order (FMPO)) and 121 (which creates the offence of forcing someone to marry) of the Anti-Social Behaviour Crime and Policing Act 2014 came into force on 16th June 2014. On 10th June 2015 the first (and only) conviction for the offence of forcing someone to marry under S121 was secured.¹⁹ Statistics released on 16th March 2018 revealed that during 2017 the Forced Marriage Protection Unit gave advice or support in 1196 cases (a decrease of

¹⁷ Schweder, R. 'What About FGM? And Why Understanding Culture Matters in the First Place' Chapter 11 in *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* eds Schweder, R., Minow, M. and Markus, H. (New York, Russel Sage Foundation 2002).

¹⁸ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke, Macmillan, 2000) 50.

¹⁹ The unreported case was heard at Cardiff Crown Court and received widespread media attention and commentary.

19% on 2016 figures of 1428 although that does not necessarily reflect a decrease in the prevalence of forced marriage).²⁰ Between January and March 2018 there were 58 applications for forced marriage protection orders with 55 granted.²¹ On 3rd May 2016 MP for Bradford West Naz Shah put a written question to the Attorney General asking how many prosecutions there were for forced marriage in 2014 and 2015.²² The Attorney General's written answer of 10th May 2016 is reproduced in full below.²³ Despite the initial figures indicating 45 or 46 prosecutions annually for offences 'associated with forced marriage' the statement does not give the number of convictions. A recently published protocol between the CPS and NCCP²⁴ on 'honour' based violence/abuse and forced marriage gives prosecution figures for 2015/16 and shows that there were 90 cases referred from the police to the CPS and 'flagged' with 53 prosecuted, 32 of those successfully (60.4%). This compares with 5 prosecutions under S121 (perhaps more truthfully stated the prosecution of 5 defendants in 2 cases) which were unsuccessful due to the victims withdrawing support. These are interesting

²⁰Foreign & Commonwealth Office, *Forced Marriage Unit Statistics 2017* (16 March 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/730155/2017_FMU_statistics_FINAL.pdf> accessed 1st September 2018.

²¹Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, January to March 2018* (28 June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720100/FCSQ_January_to_March_2018.pdf> accessed 1st September 2018.

²² Parliamentary written question number 36316 <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-05-03/36316/>> accessed 1st September 2018.

²³ The Crown Prosecution Service (CPS) collects information to show the number of defendants prosecuted for offences relating to forced marriages identified by way of a monitoring flag applied to the case record. The flag is applied where any offence of threatening behaviour, violence or abuse has been carried out in the context of a forced marriage. During the financial year 2014-15 the CPS prosecuted 45 defendants in England and 46 defendants nationally (England and Wales) for offences associated with forced marriage.

²⁴ (14th December 2016) <<https://news.npcc.police.uk/releases/crown-prosecution-service-and-npcc-launch-new-honour-based-violenceabuse-and-forced-marriage-protocol>> accessed 1st May 2018.

numbers. A long line of governmental reports considering the forced marriage issue documents both the shift in the situating of forced marriage from the violence against women paradigm (under early labour government responses) to the cultural paradigm (under the later coalition government) and the shift from the belief that criminalisation would not be helpful (in 2000, 2005, 2008) through to criminalizing breaches of the FMPO (2011) to the announcement on 8th June 2012 that ‘...there were strong arguments both for and against the creation of a new offence, however, listening carefully to all views we have decided to make forcing someone to marry a criminal offence.’²⁵ Had the government listened carefully to ‘all views’? Support for this criminalisation was by no means universal with independent research by Gill casting doubt on the validity of the claim in the government’s 2011 eConsultation that 54% of those consulted were in favour of the offence of forcing someone to marry.²⁶ Does the failure of S121 add weight to the argument that creating and attempting to prosecute ‘cultural offences’ just does not work? Those most affected by forced marriage had a different view which points strongly to the fact that we need dialogue.

Honour Based Violence (HBV) is not a crime in its own right but prosecuted under the general provisions of the criminal law, notably murder for ‘honour’ killings and the Offences Against the Person Act 1861 for offences that do not lead to killing. It is arguable that the new law on coercion and control could be used to prosecute HBV cases where the ‘violence’ is less obviously physical and more

²⁵ These documents are:

Downing Street Press Release (8th June 2012)

<<https://news/forced-marriage-to-become-criminal-offence>> accessed online 1st May 2018.

²⁶ Aisha K Gill, ‘Forced Marriage Legislation Survey: Report Findings, University of Roehampton’ (2011) Family Law Journal Online.

psychological or emotional.²⁷ Despite the lack of a specific offence of committing HBV there is a government commitment to ending 'so called HBV' or 'honour based abuse'.²⁸ In 2017 MP Nusrat Ghani introduced a private members bill in the House of Commons, the Crime (Aggravated Murder of and Violence Against Women) Bill 2017. After the First Reading (31st January 2017) the Second Reading was set for 24th March 2017 but the Bill was withdrawn. The concept of aggravated murder was always going to be problematic but the Bill was far reaching in its ideas including the prosecution for aggravated murder and aggravated domestic violence in cases involving 'honour' and the power to bring prosecutions where alleged crimes have taken place outside the jurisdiction (consistent with recent forced marriage and FGM legislation).²⁹ The Welsh Assembly have taken a broader approach to the problem of HBV with the passing of the Violence Against Women Domestic Abuse and Sexual Violence (Wales) Act 2015 on 10th March 2015 which requires the production of local and national strategies for tackling gender based violence, domestic abuse and sexual violence. In notes to the Act 'honour based violence' is specifically listed as a form of gender based violence.³⁰ Interestingly this legislation is ahead of its

²⁷ S76 Serious Crime Act 2015 which states that a person is guilty of an offence if he repeatedly or continuously engages in coercive or controlling behaviour towards another who is personally connected and he knows or ought to know that that behaviour will have a serious effect on the other. Coercive or controlling behaviour is not defined in the statute but the government published guidelines as to what constitutes coercive control in September 2012 Home Office, *Statutory Guidance Framework: Controlling or Coercive Behaviour in an Intimate or Family Relationship* (5 December 2015)

<<<https://www.gov.uk/government/publications/statutory-guidance-framework-controlling-or-coercive-behaviour-in-an-intimate-or-family-relationship>> accessed 28th September 2018.

²⁸ HM Government, *Ending Violence Against Women and Girls (VAWG) Strategy 2016-2020* (March 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522166/VAWG_Strategy_FINAL_PUBLICATION_MASTER_vRB.PDF> accessed 1st September 2018.

²⁹ <<https://services.parliament.uk/bills/201617/crimeaggravatedmurderofandviolenceagainstwomen.html>> accessed 1st September 2018.

³⁰ Note 43 '...an example of gender based violence...is a type of so-called honour based violence where people suffer violence, threats of violence or harassment as a result of the

counterpart at Westminster where the Preventing and Combatting Violence Against Women and Domestic Violence (Ratification of Convention) Act, whose purpose is to allow ratification of the Istanbul Convention, received royal assent on 27th April 2017.³¹ The long awaited draft Domestic Violence and Abuse Bill is expected in the autumn of 2018.³²

It is interesting that HBV, as a separate and specific crime, lies outside of the legislation. Whilst the framing of the response to HBV within the violence against women paradigm is sometimes questioned (men are victims and women are perpetrators too) we need to be wary of placing 'harmful' traditions and practices within the cultural context and of seeing such practices as culturally sanctioned aberrations from the norm. Roy, Ng and Larsi highlight the misperception that harmful practices are linked to certain cultures and Dustin and Phillips argue that just because something is statistically more prevalent in one group than another it does not make it a 'cultural practice'.³³ Begikhani, Gill and Hague document a recent change in social attitudes and policy responses to HBV, significant in the re-labelling of 'honour' as 'dishonour' (degrading to perpetrators rather than victims) but more so in the reconceptualisation of HBV as a community based

perception that they have caused disgrace or dishonor to the family or community where the perceived disgrace or dishonor arises from values beliefs or customs relating to gender or sexual orientation.'

³¹ The Act was introduced in response to the Istanbul Convention, a Council of Europe Convention and obligations under international law to combat violence against women. This has now been ratified by 32 of the original 46 EU signatories to the Convention.

³² A consultation on the Bill was launched on 8th March 2018 and closed on 31st May 2018. The results of that consultation are awaited

<<https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/>><https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/>
Accessed 1st August 2018.

³³ Sumanta Roy, P Ng and Ikamara Larsi, (2011) 'The Missing Link: A Joined Up Approach to Addressing Harmful Practices in London' (2011) End Violence Against Women <www.endviolenceagainstwomen.org.uk> accessed 1st August 2018.

Moira Dustin and Anne Phillips, 'Whose Agenda is it? Abuses of Women and Abuses of Culture in Britain' (2008) 8 (3) *Ethnicities* 8(3) 405.

and interpersonal form of violence. However, they continue to situate HBV within the violence against women framework, as HBV aimed at men is still gendered as it is motivated by perceived transgression of male/female relationships and women involved in perpetrating HBV (usually as accomplices) ‘...subscribe powerfully to the socio-cultural norms and traditions that discriminate against them.’³⁴ The patterns in the cases involving ‘honour’ killings reviewed in section 3.3 certainly support this view. It is arguably more just to move HBV away from a cultural framework to avoid the perception that it is related to the non-western for as Bordieu recognised 30 years ago ‘honour’ ‘...emerges from a constellation of interpersonal exchanges.’³⁵ Therefore ‘honour’, a bit like culture, does not have one definition but differs country to country, community to community and family to family which is why ‘...each unique social and cultural context should be evaluated to determine how and why specific ‘honour’-based practices have arisen.’³⁶ This is perhaps why the Crime (Aggravated Murder of and Violence Against Women) Bill 2017 could never gain a footing as a realistic legislative goal.

Relating these specific practices to theories of criminalisation, in 1789 Bentham advised us not to punish ‘...where it must be inefficacious, where it cannot act so as to prevent the mischief’.³⁷ In the cases of FGM and forced marriage criminalisation has not eradicated the mischief and the perpetrators are not being punished, perhaps because as Ashworth and Horder argue ‘...the main determinants of criminalisation continue to be political opportunism and power,

³⁴ Nazand Begikhani, Aisha Gill, Gill Hague with Kawthar Ibrahim, *Honour Based Violence: Experiences and Counter Strategies in Iraqi Kurdistan and the UK Kurdish Diaspora* (Farnham, Routledge 2016).

³⁵ Bordieu (1977)

³⁶ Nazand Begikhani, Aisha Gill, Gill Hague with Kawthar Ibrahim (n 170).

³⁷ Jeremy Bentham, *An Introduction to Principles of Morals and Legislation* (Kitchener, Ontario, Batoche 1781) chapter 3.

both linked to the prevailing political culture of the country.’³⁸ There is an argument that perhaps follows Husak’s *ultima ratio* principle, that alternatives to criminalisation should be exhausted, for example, civil remedies. Civil remedies came first in the case of forced marriage. In the case of FGM the civil remedy came after the criminal one. In both cases the civil remedy has a greater impact on ‘efficaciousness’. As Sager says ‘...epistemic concerns and the principle of equal liberty require that we be slow to judge the unfamiliar and that we take a hard look at our own factual beliefs and normative judgments’ before we condemn the beliefs or practices of others.’³⁹ This ties in with Lernerstedt’s caution against the use of forward looking objective rules to try to change things when we simply need to take a defendant as he is.⁴⁰

Decided Cases

Fisher states that ‘much...judicial energy continues to be expended over the role of culture in the law.’⁴¹ A review of the cases analysed here does not support that view, at least in the criminal law, either in terms of the quantity of cases considering culture or the quality of the engagement between the criminal courts and the concept of culture. We will see in Chapter 4 how our multicultural population has changed and grown, particularly since the beginning of the twenty first century, with a commensurate increase in the number of defendants from

³⁸ Ashworth and Horder (n 5) 39.

³⁹ L Sager, Chapter 8 in Richard A Shweder, Martha Minow and Hazel Rose Markus (eds) *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (New York, Russell Sage Foundation 2002) 173.

⁴⁰ C Lernerstedt, ‘Criminal Law and Culture’ Chapter 2 in Kymlicka, Lernerstedt and Matravers (n 2) 19.

We need to be mindful of the question of whether ‘cultural offences’ are ethically sound in principle.

⁴¹ James Fisher, ‘The Role of Morality in Cultural Defence Cases: Insights from a Dworkian Analysis’ (2013) 1 *Birkbeck Law Review* 281, 301.

different cultural backgrounds, yet it seems that the criminal courts have addressed the issue of culture in few cases since 2000. A lecture by Lady Hallett entitled 'Being a Judge in the Modern World', which drew on the inaugural academic programme of the Judicial College in 2013-14, identified several challenges for modern judges. None related to culture, cultural diversity or multiculturalism.⁴²

Renteln undertakes a review of cases involving cultural conflict across different jurisdictions (though largely in the US) which, she claims, is successful in illustrating '...the ubiquity and extraordinary variety of disputes involving diverse cultural traditions'.⁴³ Renteln is critical of her own methodology, claiming that her conclusions provide an overview rather than scientific findings. This review, it is hoped, adopts a more scientific approach. As explained in Chapter 1 a search was made for cases decided under the general criminal law (excluding the 'cultural offences' of forced marriage and FGM) in the criminal courts of England and Wales at Crown Court level or above since 2000 in which culture was raised at any point. The search was limited in time to tie in with understandings of twenty first century multiculturalism in the United Kingdom and to keep the focus on the 'current approach' of the criminal law and criminal justice system. The cases selected therefore exclude some notable earlier cases discussed elsewhere in the thesis.⁴⁴ It also excludes summary cases tried at Magistrates Court level

⁴² 21st Pilgrim Fathers Lecture 3rd November 2014 printed in *Plymouth Law and Criminal Justice Review* 2015.

These included (i) increased judicial review claims as a result of devolution, European Union Law and the Human Rights Act 1998 (ii) the modern judge as case manager (iii) leadership and management outside the courtroom (iv) modern technology (v) communication and relations with the public and (vi) extra curricula judicial comment following the abolition of the Kilmuir Rules by Lord Mackay in 1987.

⁴³ Alison Dundes Renteln, *The Culture Defense* (Oxford, Oxford University Press 2005) 6.

These cases are listed at note 35.

⁴⁴ These include

which would not normally be reported. A search was made on the Westlaw database using the search term 'culture'. Many hundreds of cases were found because of the multiple meanings of 'culture', including mainly the 'culture' of different organisations, 'cultural rights' and 'culture' in the context of the arts world. Those hundreds of cases were reviewed and most rejected so that 23 cases remained. These were added to after finding media reports of 9 'honour' killing cases following a general search for criminal cases involving 'culture'. There may of course be other cases but the list is believed to be comprehensive. The backgrounds to and outcomes of these 32 cases are set out in the Annex A.

Whilst there are a number of ways in which the cases could be ordered Part 1 of the Annex A begins by listing the 9 of the 32 cases that did not go on to appeal, coincidentally all 'honour' killing cases reported in the media. There is obviously more judicial comment available in the 23 cases that went on to appeal, and these follow in the list in order of seriousness of offence from the most to the least serious. Beyond this categorisation it is difficult to know how to utilise most effectively the information within the case reports to ascertain the approaches of the courts to culture. A starting point is the quantitative breakdown of the 32 cases into type and number of offence which simply shows the spread of offences involving a cultural element:

R v Bailey [1964] CLR 671
R v Byfield [1967] CLR 378
R v Shabir Hussain [1997] EWCA Crim 2876
Luc Thiet Thuan v R [1997] AC 131
R v Bibi [1980] 1 WLR 1193
R v Kiranjit Ahluwalia [1992] 4 All ER 889
R v Zoora Gulum Shah [1998] EWCA Crim 1441
R v Shabir Hussain [1997] EWCA Crim 2876 [2011]

Table (1) Type and Number of Offence in Crown Court Trials

Murder	17
Attempted Murder	1
Rape/ Sexual Assault	6
Offences under Offences Against the Person Act 1861	1
Fraud	2
Dangerous Driving	1
Drug related offences	2
Harassment	1
Child Cruelty	1

However, as the aim of this part of section 3.3 is to achieve a deep understanding of the approach of the courts to culture (together with a doctrinal analysis of how the criminal law itself engages with culture) we need to look far beyond the quantitative to build a more complete picture.⁴⁵ Here it was decided to search for various themes within the criminal trial process. Building a picture of the gender of both defendants and victims within these cases involving culture is useful because it is within the feminism/multiculturalism paradigm that the 'cultural defence' (and perhaps now the culture-responsibility relationship) meets its strongest opposition. It is also helpful to identify the proportion of guilty and not guilty pleas and the engagement of both the prosecution and defence with culture in framing those pleas. Analysing judicial engagement with culture is of course essential and finally a deeper understanding of the grounds of appeal in the 23 cases that went on to appeal is sought. There is an attempt to separate issues of substantive law and procedure (discussed here) and sentencing (discussed in

⁴⁵ In places simple statistics are given by way of summary/comparison.

the next part of this section). Full case references are given in the Annex A so the cases are referred to by name only in this section 3.3.

Firstly, looking at the gender of the defendants, both of the fraud cases involve female defendants. Of the more serious crimes only in *R v Khatun* do we find a female defendant acting alone (in the murder of her husband) for in the murder cases of *R v Athwal and Athwal*, *R v Ahmed* and *R v Naz* and the child cruelty case of *R v Sebastian Pinto and Others* the female defendants are charged jointly with male family members.⁴⁶ Therefore we find female defendants in a total of 7 cases (3 acting alone and 4 acting jointly) and male defendants in a total of 29 cases (25 acting alone and 4 acting jointly). The percentage of female and male defendants across our 32 cases is thus 19% and 81% respectively and if we leave aside the number of cases where there are joint male/female defendants (4) the percentage of female defendants decreases to 12%. On both calculations there appears to be a far lower percentage of female defendants in cases involving 'culture' than the percentage of women throughout the criminal justice system more generally, shown by government statistics to be 27%.⁴⁷ When it comes to the gender of victims, the number of cases involving female victims far outweighs the number of cases involving male victims. If we consider the 5 cases involving fraud, dangerous driving and drugs as 'victimless' crimes, of the remaining 27 cases 22 involve female victims and 5 involve male victims meaning

⁴⁶ This ties in with the findings of Begikhani, Gill and Hague that women involved in 'honour crimes' are usually accomplices to men. Begikhani, Gill and Hague (n 34).

⁴⁷ These statistics come from Ministry of Justice, *Statistics on Women and the Criminal Justice System 2015, A Ministry of Justice Publication under S15 Criminal Justice Act 1991* (24th November 2016).

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/572043/women-and-the-criminal-justice-system-statistics-2015.pdf> accessed 17th September 2018.

that 92.5% of victims in cases involving culture are female. Again, this is a far higher percentage than that across the criminal justice system more generally where government statistics show an equal divide between male and female victims.⁴⁸ Whilst we are considering the gender of defendants/victims in a relatively small number of cases here and so must be wary of theoretical generalization, the cases analysed are the only cases available on the established selection criteria and so the quantitative findings are in some ways definitive. These findings bring the feminist concerns about making allowances for culture (raised in section 2.4) straight back to mind because these numbers do indicate a high prevalence of male defendants and female victims in cases involving culture.

Moving on to guilty and not guilty pleas, of the 32 cases analysed here 31 (97%) of cases involved not guilty pleas meaning a guilty plea rate of 3%.⁴⁹ Generally in the Crown Court the guilty plea rate is 67%.⁵⁰ Whilst provocation (all relevant cases were heard before the introduction of the loss of control defence in the Coroners and Justice Act 2009) and diminished responsibility were raised in 7

⁴⁸ *ibid.*

The above publication relies on the British Crime Survey 2015 and makes the following statement in its Executive Summary, p10. 'According to the Crime Survey of England and Wales, there was no statistically significant difference in the proportion of women and men that were victims of crime in 2015/16. Women were less likely than men to think that the CJS is fair and more likely to believe that crime is rising. Women were more likely to have been subject to abuse as children, particularly sexual assault. They were less likely to be victims of violent crime in general, but much more likely to be victims of sexual assault or domestic violence—and female homicide victims were far more likely than their male equivalents to have a current or former partner be the principal suspect for their death.'

⁴⁹ The case involving a guilty plea was *R v Ashtiaq Ashgar*, called a 'white' honour killing case by the media because the victim was a white girl, a girlfriend of the defendant who threatened to reveal her relationship with the defendant to his family.

⁵⁰ 67% is the latest figure from the Ministry of Justice, *Criminal Court Statistics for the Period January to March 2017* (29th June 2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/623096/ccsq-bulletin-jan-mar-2017.pdf> accessed 17th September 2018.

cases (4 and 3 of the murder cases respectively, discussed below), traditional defences were not raised in the remaining 25 cases (other than in *R v Goren* where the defendant raised self-defence, a plea that was not accepted because the attack was pre-meditated and made in revenge). We know that a 'cultural defence' as such could not be raised, so what exactly were the defendants basing their not guilty pleas on? Culture itself was raised by the defence in relation to guilt in several of the cases. For example 'westernisation', 'shame', 'promiscuity' and 'sexual jealousy' were each raised as 'reasons' for the killing in the murder cases and cultural background was raised not just as mitigation in sentencing but as an influencing factor in relation to guilt in 2 of the 4 marital rape cases. In *The Queen on the Application of Mohammed v Nursing Midwifery Council* the defendant claimed that in the Yoruba culture the wife must obey her husband in all things which is why she had committed fraud and in *R v Zaynab Hamza, R v Sabina Ahmed*, two women claimed that although they were not sisters it was 'normal' in their culture to refer to one another as sisters and so they had not been dishonest for the purposes of S1 Fraud Act.

'Honour', on the other hand, was not raised by the defence in a single case. Of the 17 murder cases in this analysis 14 involved an 'honour killing'. 'Honour' was also relevant in the attempted murder case (*R v Khan (Adeel)*), and in the S18 Offences Against the Person Act case (*R v Goren*). This means that in 16 (50%) of the cases 'honour' was presented as a factor in the crimes committed but, and this is significant, it was raised by the prosecution as a driving force for the defendants committing the crimes that they did. In *R v Mohammed Mujibar Rahman, R v Mamnoor Rahman and R v Chomir Ali* prosecuting counsel said '...their relationship brought shame and dishonor on the family. That drove the

accused...to murder Arash to vindicate the family's honour'.⁵¹ In *R v Yones* the prosecution said that the victim '...was murdered because she loved the wrong person, in her family's eyes. It was an 'honour killing' to protect the perceived status of the family and to mark their disapproval'.⁵² 'Honour' and the emotions associated with it might then be said to be inherently indefensible, a weapon for the prosecution in proving guilt rather than for the defence in maintaining innocence. Therefore, if the culture-responsibility relationship is to be fairly considered, it is important to separate notions of 'honour' from notions of culture. We explored the resistance to the 'cultural defence' earlier in this thesis but if there is a perception that culture and 'honour' are one and the same then resistance to the culture-responsibility relationship is likely to be difficult to overcome. Despite the not guilty pleas the defendants in all 32 cases were found guilty of the crimes with which they were charged, a 100% conviction rate which only confirms the resistance of the courts to allow culture as any form of defence.⁵³

That said, we do see evidence of trial judges acknowledging (though not necessarily engaging with) culture in a number of cases. In *R v Mohammed Rahman*, *R v Mamnoor Rahman*, *R v Chomir Ali* the trial judge identified a 'cultural divide' between Bangladeshi born parents and British born children and in *R v Ahmed* the trial judge said '...a desire that [the victim] understood the

⁵¹ *R v Mohammed Mujibar Rahman, Mamnoor Rahman and Chomir Ali* Oxford Crown Court 4th November 2005.

⁵² *R v Yones* [2007] EWHC 1306 (QB).

⁵³ Latest figures from the Crown Prosecution Service show an overall conviction rate of 80% at Crown Court level. Prosecution Service Key Performance Measures 2017-2018.

Excel spreadsheet available online

67% is the latest figure from the Ministry of Justice, *Criminal Court Statistics for the Period January to March 2017* (29th June 2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/623096/ccsq-bulletin-jan-mar-2017.pdf> accessed 17th September 2018.

cultural heritage from which she came is perfectly understandable, but an expectation that she lived in a sealed cultural environment, separate from the culture of the country in which she lived was unrealistic, destructive and cruel.⁵⁴ In *R v Gurmeet Ubhi Singh* the cultural dimension was played down. The defendant's inability to accept his daughter's western lifestyle was explained by his being an 'old fashioned' father who thought his children should do what he wanted. Unfortunately, the judges do not go on to explore the relationship between these observations and the law.

In the cases where provocation and diminished responsibility were raised as defences to murder the trial judges seemed to engage more readily. In *R v Faqir Mohammed* the defence asked the jury to take account of the defendant's 'strongly held religious and cultural beliefs' (that sex outside marriage is a sin) and to weigh these against evidence from his children that he was a violent man in deciding whether he had been provoked. The jury found that he had lost his temper (leading to him killing his daughter after finding her in her bedroom with her boyfriend) but had not lost control and the defence of provocation was not allowed. In *Re Sze-Hua Tai* the defence asked that provocation be considered in the light of his cultural background because an assault on a man by his wife in China was considered a great insult (his wife had prodded him with a plank and thrown tea in his face). His defence of provocation was rejected. In *Re Naz* the victim was murdered by her brother after he learnt of her pregnancy which he claims caused a 'sudden and temporary loss of control' because of his religious beliefs. His defence failed with the trial judge saying that the case was '...a horrific

⁵⁴ *R v Ahmed*
Chester Crown Court 3rd August 2012.
Evans J at trial.

example of outdated and misplaced family pride'. In all cases the jury was unable to make the connection between cultural background or beliefs and loss of control. A similar outcome was apparent in each of the 3 cases where the defendant pleaded diminished responsibility. The claim that the *djinn* (a demonic spirit in Islamic folklore) had commanded the defendant to bury his wife in *R v Ahmed Al-Khahib* did not convince the jury that the defendant was suffering from an 'abnormality of mental functioning' and the defendant's severe depression in *R v Jahangir Nazir* was not severe enough to be a recognized medical condition because of his 'mental agility' after the killing. In *R v Nazir* the defendant pleaded diminished responsibility on the basis that his sister was resisting an arranged marriage but once again the plea was rejected. This means that although we see room, at a theoretical level, for culture within the traditional defences (identified earlier in this Section 3.3), those defences cannot be said, in practice, to be opening up to embrace culture.

In a limited number of cases trial judges have engaged with culture in the procedural realm. In *R v Khatun* the defendant claimed that she had stabbed (and killed) her husband due to 'cultural tensions' but the trial judge excluded expert evidence on cultural issues because he found that such assistance was not required. Similarly, in *R v Sebastian Pinto and Others* the trial judge dismissed the evidence of a 'cultural profiling expert' (as seen in section 1.1) on the basis that it looked like a 'cultural horoscope'. Conversely, in *Crawford v CPS*, where the defendant was found guilty of harassing his former wife, the court engaged with culture in a unique way in taking culture into account in its findings on credibility and this, claimed the defendant, amounted to subconscious stereotyping, which is why he appealed.

Moving on to appeals, 23 out of 32 cases were appealed. Of the 23 cases appealed, 9 were appeals against conviction, 11 were appeals against sentence and 3 were appeals against both conviction and sentence. Of the total of 12 appeals against conviction 6 engaged directly with culture. We referred in Chapter 1 to the 'Pitcairn Case' and the issues of culture set before the Privy Council.⁵⁵ In *R v Khatun* appeal was made on 3 grounds, the third being that the 'trial judge was wrong to exclude expert evidence as to K's cultural background...' but the Court of Appeal found that the trial judge was entitled to find that no expert evidence was required and the appeal was dismissed. The Court of Appeal did engage with culture in relation to conviction in the *Pinto* case acknowledging that two of the defendants did hold the deluded belief that the victim was possessed but the Court did not go as far as allowing that deluded belief to influence guilt (although as will be seen below their sentences were reduced). In *The Queen on the Application of Mohammed v Nursing Midwifery Council* the appellant appealed on the basis that the court had not placed sufficient weight on the influence of the Yoruba culture in reaching their decision. The case of *Crawford v CPS* elicited some interesting comments on appeal. The High Court accepted the appellant's submission that the Crown Court had been wrong to refer to his culture because it meant '...that a person of the appellant's culture would have a less ready understanding of what amounted to harassment than a white person. This was condescending, unjustified and unfair and assumed that the culture of the defendant pre-disposed him to act in certain ways.' Here we see implicit reference to essentializing and agency and this is ruled 'unfair'. The

⁵⁵ *Christian and Ors v The Queen* [2006] UKPC 47.

decisiveness in this is helpful but there seemed to be a missed opportunity for a deeper judicial exploration of the issues involved.

The one appeal linking culture to the traditional defence of provocation, *Re Sze-Hua Tai*, created the perfect scenario for the appeal court to explore the relationship between cultural background and provocation but the Court of Appeal said that whilst the defendant's cultural background '...mitigated the criminality of the conduct a little' the minimum term of 12 years should remain as mitigating circumstances had been properly addressed at trial.⁵⁶ This seems like a wasted opportunity. A summary of other cases is set out in the note below.⁵⁷ For the sake of completeness, the appeals in all 6 of these other cases were dismissed too meaning that in our group of 12 cases there was not one successful appeal against conviction.

The findings of this case analysis of Crown Court decisions can be summarized in the following 10 points:

⁵⁶ Here the defendant appealed under Paragraph 3 Schedule 22 to the Criminal Justice Act 2003 for a review of the minimum term of his sentence on the basis that his defence of provocation should have been considered in the light of his cultural background.

⁵⁷ Below is a summary of those cases where there was an appeal against conviction but where no connection with culture was acknowledged in the appeals. In *R v Faqir Mohammed* the defendant appealed on a point of law-that the test for provocation applied during trial (that in *Smith (Morgan)*) was wrong and that the later test in *Holley* should have been applied (an interesting appeal as surely the *Smith (Morgan)* test with its subjective bent would have been more favourable towards this defendant). The Court of Appeal found that the jury would have reached the same verdict in any event and dismissed the appeal. In both *R v Taylor* and *R v Andrews* the arguments before the Court of Appeal centered more around the Rastafarian religion and the use of cannabis as a defence in the former case and the prohibition on its use as a breach of Article 9 of the European Convention on Human Rights in the latter case. In *R v Nazir* the appeal revolved around the direction given by the trial judge to the jury on 'joint enterprise' and in *R v Mahmood* the appeal was based on fresh evidence from the defendant's sister. Finally in *R v Goren* the Court of Appeal would only look at the issue of severity of sentence and not at the defence based around the appellant's political beliefs.

- The culture-responsibility relationship is a gendered dilemma with a higher than average number of male defendants and a higher than average number of female victims.
- Female defendants rarely act alone in cases involving culture (here in one case, 3%)
- There is a very low guilty plea rate (3% compared with the average of 67% at Crown Court level).
- There is a very high conviction rate (100% compared with an average of 80% at Crown Court level).
- 'Honour' is a factor in 50% of cases but is never raised by the defence.⁵⁸
- Culture is not recognized in the context of the traditional defences of provocation and diminished responsibility.
- Judges acknowledge culture but do not allow it to influence their directions to the jury and do not allow it as evidence in deciding guilt.
- There is a high appeal rate 72%.
- 100% of appeals against conviction are dismissed.
- The appeal courts only engaged with culture in 6 cases (50%)

Tentative conclusions about the engagement between culture and legal responsibility in the criminal courts will be drawn in section 3.5 when the analysis of sentencing decisions, sentencing policy and the response of the criminal justice system to issues of culture is complete.

Sentencing

The 9 cases not appealed all involved 'honour' killings and there are no sentencing remarks available for these cases.⁵⁹ Of the remaining 23 cases a total

⁵⁸ As stated earlier the 9 cases not appealed all involved 'honour' killings. If conclusions are possible from such a small number of cases it may be suggested that the culture-responsibility relationship is self-limiting- in heinous crimes such as these the defendants did not dare to appeal their sentences, all mandatory life sentences for murder but ranging from the recommendation that life be served in *R v Rahan Arshad* where the defendant killed his wife and 3 children (and claimed his wife had killed the children) to a minimum term of 14 years in where the defendant was 16 at the time of the murder in *R v Manmoor Rahman*.

⁵⁹ All of the comments here relate to the total of 14 cases involving appeals against sentence because unfortunately sentencing remarks were not published for any of these 9 cases that were not appealed. A Freedom of Information Act 2000 request to the Ministry of Justice asked the

of 14 appeals against sentence were heard. The appeals were dismissed (or leave to appeal not granted) in 10 of those 14 cases. Looking firstly at the 4 cases where the sentence was changed, in only one case was there an increase in sentence (*Re AG Ref (No. 66 of 2010)*). This deserves comment because the trial judge had indicated that the defendant, who came from an 'African culture', had been influenced by his culture in raping his wife. The Attorney General's reference was allowed on the basis that the sentence was unduly lenient and the Court of Appeal said that cultural background should be irrelevant in sentencing '...particularly for a defendant who had lived in the UK for some years and knew his actions were unacceptable.' There is oblique reference to acculturation (as there was in *Re AG Ref (No 1 of 2011)* which followed shortly afterwards) and the sentence was increased from 7 to 11 years. In fact, the Court of Appeal seems to have shown most resistance to cultural factors being taken into account in mitigation in the 4 appeals in marital rape cases with the firm statement that '...no man, whatever his background race or creed has the right to rape his wife.'*(R v MA)*. This is definitive and therefore helpful.

following question: 'What criteria do you use for deciding whether or not to publish judgments, rulings and sentencing remarks on your website and Twitter?' The reply is as follows:

Publication of judgments, rulings or sentencing remarks is undertaken by the Judicial Communications Office on behalf of the judiciary. These are published on the Judiciary website, and highlighted through Twitter, if the nature of the media or legal profile of a case suggests it would be helpful. The majority of cases are publicised because of the actual or predicted level of media interest. In some instances, however, the Lord Chief Justice or another senior judge might flag a case as one that gives specific guidance on legal issues such as sentencing. Publication of sentencing remarks from Crown Court cases is again generally governed by the level of media interest, but will also depend on them being available to us: it is important to note that not all judges have full written script of the remarks they make at the time the sentence is handed down.

It seems extraordinary, given the level of the media interest in the 9 'honour' killing cases reviewed here, that sentencing remarks were not published in any one of them. We do not know therefore whether or not culture was raised in mitigation at the sentencing stage.

In 3 cases sentences were reduced. In *R v Cooper (Justin Shane)* Cooper appealed against a custodial sentence of 9 months following a dangerous driving conviction on the grounds that he was a member of a devout religious community and prison would cause him 'greater upset than normal' and that he may be excluded from his community upon release from prison. His appeal was dismissed on the basis that 'many people from different backgrounds, whether they be religious, cultural or ethnic would have particular difficulty coping with imprisonment and the court would have considerable difficulty distinguishing between members of different groups on that basis.'⁶⁰ Although the appellant's custodial sentence was not reduced his driving ban was reduced from 2 to 3 years.

We have already considered the case of *R v Sebastian Pinto and Others* which involved charges of child cruelty based on *kindoki*. Two of those convicted raised successful appeals against sentence with the Court of Appeal finding that a maximum sentence should be passed only in 'truly exceptional cases'. Here it was held that the appellants were not acting maliciously and inflicting harm gratuitously but in the deluded belief that the child was possessed by spirits and whilst this did not provide mitigation it was possible 'to conceive of worse cases involving prolonged cruelty.' Their sentences were reduced to 8 years.

The sentence was reduced too in *R v Goren* with the Court of Appeal saying that a revenge attack of the kind carried out here should always attract a long sentence but that 7 years was too severe and therefore this was reduced to 5

⁶⁰ Mr Justice Roderick Evans, Recorder of Cardiff, Sitting as judge of CACD. EWCA [2003] Crim 2259 paragraph 21.

years. Although counsel for the appellant argued that the victim's beliefs were a 'moral outrage' in the defendant's community the Court of Appeal stated that the sole question before them was one of severity of sentence. In each of these 3 cases there is a manifest reluctance to really begin to engage with the cultural issues at stake and to consider their effect on responsibility. Yet somehow there is a 'reason' for reducing the sentences. If there is a sense that outcomes are just there is a concern that they are arrived at circuitously. There is a sense that culture is evaded.

We can see further reluctance to engage with culture in the appeals against sentence that were dismissed. The appeal courts did not engage with culture at all in 4 of the cases even though 2 of these involved high profile 'honour' killings.⁶¹ In *Re Siva Kumar* the trial judge identified the defendant's cultural background as the only mitigating factor in sentencing, noting that the family had come from Sri Lanka to escape civil war. On appeal these mitigating factors were accepted on the basis that the appellant would find his time in custody harder to bear because of cultural and linguistic unfamiliarity with those around him (although the appropriate minimum term of 17 years remained). This is in marked contrast to the remarks in *R v Cooper (Justin Shane)*. In *R v Sze Hua Tai*, where cultural background was raised in the context of provocation the appeal court ruled that '...it mitigated the criminality of the conduct a little' (although the minimum term of 12 years was to remain as mitigating circumstances had been properly

⁶¹ For the sake of completeness these are *R v Yones*, where the term of 14 years for the 'honour' killing of the appellants daughter set by the trial judge was agreed, *Re Naz* where the term of 17 years imposed on the victim's mother for her 'honour' killing was agreed, *R v A* where the appeal against a 14 year sentence for marital rape with a recommendation that the defendant serve 8 years was dismissed and *R v Zaynab Hamza and Sabina Ahmed* where appeal against a 9 month sentence on 9 counts of fraud was dismissed.

addressed at trial). And so we see 2 cases here (*Re Siva Kumar* and *Re Sze Hua Ta*) where culture is recognised by the appeal courts as a mitigating factor yet the appeals against sentence are dismissed. Outcomes and reasoning are in direct contrast with the 3 cases (above (*R v Cooper (Justin Shane)*, *R v Sebastian Pinto and Others* and *R v Goren*) where appeals are allowed and sentences reduced but whilst culture is clearly present it is not acknowledged as relevant to the sentencing appeals.

The Court of Appeal did consider culture a little more closely in *R v Khan (Adeel)* but made it clear that it was only doing so because the appellant had been 17 when convicted of attempted murder and the question was whether he had been put under 'substantial or tangible pressure' from an older person but 'a vague appeal to cultural pressure' could not assist even a child and so the 15 year sentence was to stand. The final case to be considered is *R v Jamal Muhammed UI Nasir*, particularly interesting because it was the culture of the young victims of sexual assault by UI Nasir that was an 'aggravating factor' justifying his sentence of 7 years.⁶²

How then can we summarise the findings from this analysis of appeals against sentence involving culture?

- 10 out of 14 appeals against sentence dismissed (71%).
- Appeal courts engaged with or recognized culture at some level in 10 out of 14 cases.

⁶² UI Nasir was refused leave to appeal by a court of 6 judges after a single judge had previously refused leave. The victim's father was concerned about future marriage prospects for his daughters and the harm to the victims was aggravated by the impact of the crime on the girls and their families within their community. The Court of Appeal was not explicit in how its decision fits into the sentencing guidelines.

- 3 cases where appeal against sentence was successful and cultural reasons acknowledged but other reasons for reduction given.
- 2 cases where cultural background recognized as mitigation.
- Long sentences not reduced on appeal for marital rape and oblique reference to acculturation.

Again, conclusions will be considered in section 3.5. Whilst sentencing is by its very nature approached on a case by case basis we do see unacceptable idiosyncrasies here, a lack of consistency in the treatment of culture in sentencing decisions. Recalling that the understanding of responsibility arrived at in section 2.3 includes not just the attribution of responsibility at the guilt stage but the degree of responsibility deemed just in the disposition of those found guilty, clear guidance on the effect of culture on ‘responsibility’ at the sentencing stage is essential.

It would be helpful here to assess the extent to which current sentencing laws provide adequate guidance on issues of culture.⁶³ The introduction of Sentencing Guidelines has been considered in many countries but it is only the jurisdictions of the US and England and Wales that have adopted formal guidelines. The Sentencing Guidance Council was established in 2003 (the Sentencing Council since 2010) with guidelines being introduced by the Coroners and Justice Act

⁶³ Sentencing law generally is considered to be in need of reform in England and Wales. In July 2017 the Law Commission published its draft Sentencing Code and a period of public consultation ended on 26th January 2018. The Law Commission Final Report was published in the summer of 2018 and a draft bill is now in Parliament. Law Commission, *Draft Sentencing Bill* <<http://www.legislation.gov.uk/ukdpub/2017/sentencing-bill/contents>> accessed 5th October 2017.

On 26th July 2017, David Ormerod, the Law Commissioner running the reform project, explained in *The Independent* that the code is an attempt to consolidate the law on sentencing that currently runs to 1300 pages and is ‘overwhelmingly complex’ in one document.

<<https://www.independent.co.uk/news/uk/home-news/law-commission-sentencing-law-consultation-simplified-streamlined-courts-judges-delays-errors-a7861896.html>>

The code does not seek to replace the individual published Sentencing Guidelines but to set out the general principles of sentencing law. Ormerod explains that in the year to 30th September 2016 1.2 million offenders were sentenced and there were 4241 appeals against sentence and 4072 applications to the Court of Appeal for leave to appeal against sentence.

2009 and now, under S125 of that Act every court must follow any sentencing guidelines that are in force.⁶⁴ According to Ashworth and Roberts, sentencing guidelines in England and Wales have produced no attention from scholars but Padfield has engaged, arguing that there is little sense of what the guidelines are meant to achieve and little idea of how judges actually sentence.⁶⁵ In general, individual guidelines give a starting point for sentence and then there are specific aggravating or mitigating factors that need to be taken into account in increasing or reducing the sentence from that starting point. In addition there is the possibility of a defendant raising personal mitigation although there is no entitlement to it.⁶⁶ (It is important to note the distinction between mitigating factors in relation to specific offences and personal mitigation although more recent guidelines tend to include one list for 'factors reducing seriousness or relating to personal mitigation.'). The guidelines are intended to be developed over time and in relation to specific offences but they do appear to be being implemented slowly. There are now 33 sets of 'definitive guidelines' currently in publication and there

⁶⁴ According to Ashworth and Roberts the purpose of the guidelines is to reduce disparity in sentences and to accurately project prison numbers. Prior to 2009 there was much discretion in sentencing. The Alverston Memorandum of 1901 set out a 'Memorandum of Normal Punishments' and later on in the twentieth Century it was the job of the Court of Appeal to give guideline judgments on sentencing in the context of suitable cases. The Crime and Disorder Act 1998 created a Sentencing Advisory Panel to provide advice to the Court of Appeal but this depended on a suitable case coming before the Court of Appeal and the Court did not need to heed the advice of the Panel. In 2003 the Sentencing Guidelines Council was established, a body that could issue guidelines after receiving advice from the Sentencing Advisory Panel and then in 2010 the Sentencing Council replaced that body. It is the job of the Sentencing Council to produce guidelines on a piecemeal basis on different offences over time. Andrew Ashworth and Julian Roberts, *Sentencing Guidelines: Exploring the English Model* (Oxford, Oxford University Press 2013).

⁶⁵ *ibid*,

N Padfield, 'Exploring the Success of Sentencing Guidelines' in Ashworth and Roberts 200. However, the Judicial College website is informative on the purposes of sentencing. Judicial College, *The Crown Court Compendium Part II: Sentencing* (June 2018)

<<https://www.judiciary.uk/wp-content/uploads/2018/06/crown-court-compendium-pt2-sentencing-june-2018.pdf>> accessed 1st September 2018.

⁶⁶ S166(1) Criminal Justice Act 2003 which makes provision for the person passing sentence to take account of any matters that 'in the opinion of the court are relevant in mitigation of sentence.'

is a claim that ‘...sentencing in this jurisdiction [has] entered a new era’.⁶⁷ It is of course necessary for us to question whether sentencing is fit for a multicultural era.

In 2004 the (then) Sentencing Guidance Council produced guidelines on ‘Overarching Principles: Seriousness’. These are still in force and intended to be used where no offence specific guidelines have been published. There are 22 aggravating factors (and 4 statutory mitigating factors but a separate list of 12 factors that may affect personal mitigation) and these include:⁶⁸

- The offence was racially or religiously aggravated
- The offence involved hostility towards a minority group
- The offence deliberately targeted vulnerable victims

Again, we can question whether there is oblique inclusion of culture here. As seen above in *R v Jamla Muhammed Raheem Ul Nasir* the Court of Appeal held that the shame of the victim was relevant in considering increasing a custodial sentence.⁶⁹ Commenting on this Gill and Harrison identify a backlash for example

⁶⁷ In 2018 6 sets of guidelines were published relating to child cruelty, manslaughter, intimidatory offences, terrorism, bladed articles and offensive weapons and domestic abuse. In 2017 there were 2 in relation to Reduction in Sentence for Guilty Plea and Sentencing Children and Young People. In 2016 these were relating to robbery, dangerous dog offences and the imposition of community and custodial sentences.

<<https://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=definitive-guideline&topic=&year=on>> accessed 20th January 2017

Ashworth and Roberts (n 198) 5.

⁶⁸ <https://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf> accessed 2nd May 2018.

The 4 mitigating factors are a greater degree of provocation than usually expected, mental illness or disability, youth or age and playing a minor role in the offence.

These overarching principles were of the first to be published by the (then) Sentencing Guidance Council in December 2004. https://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf

⁶⁹ *Regina v Jamal Muhammed Raheem UL Nasir* [2015] Royal Courts of Justice Strand, London, WC2A 2LL

<<https://www.judiciary.uk/wp-content/uploads/2015/09/r-v-ul-nasir-judgment.pdf>> accessed 30th September 2018.

from the NSPCC ('British Justice should operate on a level playing field and children need to be protected irrespective of cultural differences') and from Philip Davies MP who points out that it is unacceptable to say that sexually abusing Asian girls is more serious than sexually abusing white girls.⁷⁰ Gill and Harrison say that it raises the question of how courts should deal with cases where cultural religious or ethnic factors are not as easily identified as relevant. In relation to the culture-responsibility relationship it would be illogical to argue that we should be considering the culture of the defendant but not the victim. If responsibility is to be diminished or understood in the context of its relationship to culture then should not the effect of crimes also be understood in the cultural context? That way too the culture-responsibility relationship cannot be seen merely as an easy route to leniency- it becomes a two way process. This of course has implications for equality.

In June 2018 the Sentencing Council opened a consultation on new 'General Guidelines' to be used where there are no offence specific guidelines in force.⁷¹ Draft guidelines were produced and the balance of aggravating factors (23) and mitigating factors (17) remains similar to that in the 2004 'Overarching Principles'

⁷⁰ A Gill and K Harrison, (2017) 'Ethnic and Religious Origin as an Aggravating Factor in Sentencing Sexual Offences' (2017) *Journal of Sexual Aggression*

<<https://www.tandfonline.com/doi/abs/10.1080/13552600.2016.1267271>>

accessed 30th September 2018.

Comments of Philip Davis reported in *The Times* (18th September 2018)

'Molesting Asian girls deserves a longer sentence'

<<https://www.thetimes.co.uk/article/molesting-asian-girls-deserves-a-longer-sentence-6g3kt6bp025>> accessed 1st October 2018.

⁷¹ The consultation closed on 11th September 2018. It is the aim of the Sentencing Council to update all guidelines by 2020. The Council has identified certain serious or high volume offences for which there are no guidelines in force and these new General Guidelines are intended to cover those offences.

<<https://www.sentencingcouncil.org.uk/offences/item/general-guideline-sentencing-offences-for-which-there-is-no-definitive-guideline-for-consultation-only/>> accessed 30th September 2018.

but mitigating factors now include both 'factors reducing seriousness or reflecting personal mitigation' and the list given is said to be 'not exhaustive'. There are two previously unseen mitigating factors that are noteworthy. Firstly, 'activity previously legitimate.' Explanatory notes say that this could be due to a change in the offenders circumstances or a change in regulations. The obvious question is 'previously legitimate where and when?' And of course 'legitimate' is not the same word as 'legal'. Secondly, 'limited awareness or understanding of the offence'. Explanatory notes say that this could include the offender not understanding the 'significance' of the offence. There is no obvious connection with culture in these two mitigating factors but could they apply to an offender who views his actions as 'culturally legitimate' or whose altered moral viewpoint leads him not to understand the significance of his offence?

Three new sets of guidelines came into effect in 2016 and two in 2017 although 2018 has seen some momentum with the introduction of 6 sets of guidelines, the latest being Definitive Guidelines on Child Cruelty, due to come into effect on 1st January 2019.⁷² This guideline is particularly significant as it includes a distinct and specific set of guidelines for the offence of failure to protect a girl from FGM. It is practice for the Sentencing Council to hold an open consultation prior to the drafting and publication of new guidelines and in the case of the child cruelty consultation although no specific questions were asked on FGM 'most respondents' were supportive of the introduction of guidelines for this offence.⁷³

⁷² *Definitive Guidelines on Child Cruelty* (September 2018)
<<https://www.sentencingcouncil.org.uk/publications/item/child-cruelty-definitive-guidelines>>
accessed 19th September 2018

⁷³ There were a total of 43 respondents but no specific number given for 'most' and only the barristers who responded (3) commented that there is no need for guidelines on FGM because of the lack of successful prosecutions.

One respondent stressed the need to take cultural background into account but the Sentencing Council felt this could be covered by the low culpability provisions. The new FGM guidelines do not include direct reference to culture but one of the factors 'reducing seriousness or reflecting personal mitigation' is that the offender is 'particularly isolated with limited access to support.'⁷⁴ That sounds very much like another back door route to 'culture'.

These new FGM guidelines are not alone in overlooking culture. Not surprisingly there is no direct reference anywhere to culture within the provisions of the Coroners and Justice Act 2009 or within the remaining 32 published guidelines, although once again perhaps we can tenuously establish indirect reference.

Murder, sexual offences and domestic violence are those offences most closely related to the culture-responsibility relationship and sentencing guidelines show no consistency in their engagement with culture. Guidelines on the Determination of Minimum Term in Relation to Mandatory Life Sentence are set out in Schedule 21 of the Criminal Justice Act 2003. Factors that may increase the seriousness of the offence may resonate in cases where there is a cultural element. For example,

- V is vulnerable due to age.
- Mental or physical suffering, including sexual maltreatment, humiliation or degradation inflicted on V before death.
- Abuse of position of trust or power.
- Established evidence of community impact.

⁷⁴ *Definitive Guidelines on Child Cruelty* (September 2018) p18
<<https://www.sentencingcouncil.org.uk/publications/item/child-cruelty-definitive-guidelines>>
accessed 19th September 2018

Interestingly, and perhaps a corollary, there is an aggravating factor of 'blame wrongly placed on others'.

- Racially or religiously aggravated.⁷⁵

Updated guidelines in relation to domestic abuse were published in February 2018 and came into force on 24th May 2018.⁷⁶ They provide a definition of domestic abuse as ‘presently used by the Government’ and point out that the Government definition includes so-called ‘honour based abuse’, FGM and forced marriage. Paragraph 5 of the guidelines states that ‘...care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio-economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.’ This comes close to culture, including some of those elements that we identify as being part of culture in section 2.2 of this thesis (ethnicity, religion, belief) yet the previous guidelines on domestic abuse referred to the victim’s particular vulnerability for ‘...cultural, religious, language, financial or other reasons’ as an aggravating factor whereas the new guidelines refer simply to the victim’s ‘particular vulnerability.’⁷⁷ This was the only direct reference to culture in the (then) 27 published sentencing guidelines, albeit the culture of the victim, and it is has disappeared.⁷⁸ Recognising ‘honour’ based abuse, FGM and forced marriage as being within the government definition of domestic abuse

⁷⁵ As defined in S28 Crime and Disorder Act 1998.

⁷⁶ <<https://www.sentencingcouncil.org.uk/publications/item/overarching-principles-domestic-abuse-definitive-guideline/>> accessed 3rd May 2018.

⁷⁷ Paragraph 3.7 Previous Domestic Violence Guidelines.

⁷⁸ A search for ‘culture’ on the Sentencing Council website returned one result and that related to the culture of the criminal justice system. As a general criticism of the Sentencing Council the guidelines on manslaughter deal only with voluntary manslaughter and still refer to the law of provocation under the Homicide Act 1957. However, new guidelines on manslaughter are due to come into effect in October 2018. These deal separately with unlawful act manslaughter, gross negligence manslaughter, loss of control and diminished responsibility. In the last case ‘belief that the killing was an act of mercy’ is listed as a mitigating factor. This relates back to earlier comments on motive.

but furthering the recognition of those crimes within the context of sentencing seems like a wasted opportunity. Obviously we now know that FGM guidelines are included in the child cruelty guidelines but the question has to be asked, is this another case of 'hiding' culture away?

Looking at the balance between aggravating and mitigating factors, further analysis of the 33 published Sentencing Guidelines reinforces Cooper's views that there is an overemphasis on aggravating factors and seriousness and harm. Guidelines on mandatory life sentence for murder, sexual offences and domestic abuse, those most relevant to the culture-responsibility relationship, show a lack of balance between aggravating and mitigating factors-

Table (2) Aggravating and Mitigating Factors in Sentencing

Offence	Aggravating Factors	Mitigating Factors
Murder	20	8
Domestic Abuse	9	2
Sexual Offences	16	5

Cooper argues that the Sentencing Council is too victim focused and that guidelines should give much greater attention to personal mitigation as it is '...one of the most important elements of a just and fair disposition.'⁷⁹ He is critical of the

⁷⁹ J Cooper, 'Nothing Personal' Chapter 10 in Ashworth and Roberts (n 198) 157.
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Sentencing Council (and of the Court of Appeal which is responsible for guidance on sentencing where no specific guidelines exist) for emphasizing seriousness and harm rather than personal mitigation. He recognises a tension between the directive in Section 125 (1)(a) of the Coroners and Justice Act 2009 (that the court must follow sentencing guidelines) and the Court of Appeal guidance in case law that sentencing decisions should be made 'in the interests of justice'. Cooper relies on research from the Prison Reform Trust that gathers empirical evidence and finds a correlation between personal mitigation and lighter sentences and argues that '...the importance of personal mitigation goes beyond that of the direct impact of sentencing on the defendant.'⁸⁰ In diminishing the role of personal mitigation to such an extent it is not only the offender who may be punished inappropriately but it is also society as a whole that will suffer'.⁸¹ Despite Cooper's pleas and further research by Lovegrove who analysed the findings of the Victoria Law Foundation in Australia which identified 45 personal mitigating factors as reducing culpability in cases heard between 2004-2006 Cooper argues that the Sentencing Guidelines marginalize personal mitigation.⁸² The Sentencing Council state that their aim is 'public confidence' but Cooper argues that '...the Sentencing Council appear to have decided that the public expect punitive responses to offending, ones based on culpability and harm. The real expectation is one of a pursuit of fairness and justice and this must include a

⁸⁰ Jessica Jacobson and Mike Hough, 'Mitigation: The Role of Personal Factors in Sentencing', Prison Reform Trust

<<http://www.prisonreformtrust.org.uk/uploads/documents/FINALFINALmitigation%20-%20small.pdf>> accessed 1st October 2018

⁸¹ J Cooper, 'Nothing Personal' Chapter 10 in Ashworth and Roberts (n 198) 159.

For example, personal mitigation might reveal that a non-custodial sentence is better for rehabilitation. Pre-sentence reports, claims Cooper, are 'harm-centric' and do not focus on rehabilitation and reform. Personal mitigation in cases involving culture could arguably led to a deeper understandings of the motives of others and provide the opportunity for mutual cross-cultural education.

⁸² Austin Lovegrove, 'Proportionality Theory, Personal Mitigation and the People's Sense of Justice' (2010) 69 (2) Cambridge Law Journal 321.

central role for personal mitigation.’⁸³ Public attitudes towards sentencing are important and well researched. Roberts *et al* carried out a large scale empirical study to assess public attitudes to sentencing and concluded that ‘...it is important to ensure that there is an appropriate relationship between public opinion and sentencing practice.’⁸⁴ That research showed that the public have high levels of support for personal mitigation but that there is judicial reluctance to consider it. Cooper recommends that the Sentencing Council produce a definitive list of factors that could be used in personal mitigation and the argument here is that ‘cultural factors’ should be included on that list.

Bakalis and Sage argue that religion is a useful example to explore mitigation especially in the context of Articles 9 and 14 of the European Convention on Human Rights (ECHR).⁸⁵ The Prison Reform Trust highlights the need for more consideration of how and to what extent religion should be taken into account at the sentencing stage ‘...without this, sentencing outcomes are likely to vary between judges and thus to threaten the principles of fairness which we expect from our criminal justice system.’⁸⁶ It concluded that judges are reluctant to take religion into account in sentencing but that they do need to comply with Articles 9 and 14 of the ECHR. However, it did identify three types of personal mitigation recognised by judges in relation to religion:

⁸³ J Cooper, ‘Nothing Personal’ Chapter 10 in Ashworth and Roberts (n 198) 164.

⁸⁴ Julian Roberts, Mike Hough Jessica Jacobsen and Nick Moon, ‘Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis’ (2009) 11 Criminal Law Review 771.

⁸⁵ Chara Bakalis and Peter Edge ‘Taking Due Account of Religion in Sentencing’ (2009) 29 (3) Legal Studies 421.

⁸⁶ Jacobson and Hough (n 80) .

- Previous good character can relate to culpability and membership of a religious group may be evidence of good character.
- A defendant is less likely to offend in future.
- A defendant may have a problem with specific type of punishment, for example, coping with a custodial sentence as seen in *Re Siva Kumar*.

More recently sentencing remarks in the case of *R v Darren Osbourne*, better known as the ‘Finsbury Park Mosque Case’, confirmed that there should be no defence or even mitigation in cases of ‘murder done for the purposes of advancing a political, religious, racial or ideological cause’ even if radicalization is claimed.⁸⁷ Osbourne was convicted of murder and attempted murder with a recommendation that he serve 43 years.

Generally there is a cry for policy makers and the Sentencing Council to make clear what mitigating factors can be taken into account in personal mitigation. The findings of this chapter add weight to that collective cry. On the basis that the 14 cases discussed in this section that resulted in appeal against sentence involve some cultural element it must be argued that due consideration of culture in our trial courts is essential. Lord Lane comments that sentencing is ‘...trying to reconcile a number of irreconcilable facts.’⁸⁸ To this should be added the plea that culture needs to be considered in the context of sentencing so that magistrates and judges might have clear guidance on the relationship between culture and both aggravating and mitigating circumstances and of course in

⁸⁷ Reported 2nd February 2018 and sentencing remarks issued by Mrs Justice Cheema Grubb. *R v Darren Osborne* <<https://www.judiciary.uk/wp-content/uploads/2018/02/r-v-osborne-sentencing-remarks.pdf>> accessed 10th March 2018.

⁸⁸ Lord Lane speaking extrajudicially in House of Lords Debate (HL Debates Vol 486, col 1295) quoted in Andrew Ashworth *Sentencing and Criminal Justice* (Cambridge, Cambridge University Press 5th Edition 2010) 41.

relation to personal mitigation. We are beginning to see a slow contextual recognition of culture in sentencing cases but this needs expanding.

3.4 The Criminal Justice System

This section seeks to examine the engagement between the institutions of the criminal justice system and culture. The journey of offenders in the criminal justice system is followed in turn through the stages of investigation (the Police) prosecution (the Crown Prosecution Service) and trial (the Judiciary).

The Police

The criminal justice system begins with the investigation of crime. Suspects may be arrested and held in custody prior to being charged. There are strict and detailed rules on detention and custody now set out in the 2015 National Police Chief's Council (NPCC) College of Policing Document on Detention and Custody.⁸⁹ There is a section on 'Equality and Individual Needs' and paragraph 5 deals with Religious and Cultural Needs. This document was updated in August 2015. The previous (2012) document stated that '...it is not permissible to treat a person less favourably because of their faith, belief or culture. The specific needs of a person are best determined by effective and respectful questioning...Religion culture or nationality should never be assumed.'⁹⁰ The current version has deleted this first sentence, perhaps because culture is not a characteristic protected by law under the Equality Act 2010 whereas, broadly, the 'faith and

⁸⁹ College of Policing, *College Releases New Guidance for Custody Officers and Staff* <http://www.college.police.uk/News/archive/August%202015/Pages/new_guidance_for_custody_officers_and_staff.aspx> accessed 19th August 2018.

⁹⁰ College of Policing, *Detention and Custody, Equality and Individual Needs* <<https://www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/equality-and-individual-needs/#religious-and-cultural-needs>> accessed 28th July 2018.

belief' are covered by religion. A former long list of 'additional needs' has also been significantly shortened to include just copies of religious texts, advice to Muslim detainees on the direction of Mecca (eg, a compass or mark applied to the eastern cell wall of one or more cells) and halal, kosher, vegetarian and vegan meal alternatives.⁹¹ We can see therefore a diminution in the emphasis on culture in the 3 year period from 2012 to 2015.

As well as guidance for custody the College of Policing have recently produced guidance on FGM (March 2015) and on Forced Marriage and HBV (June 2014).⁹²

⁹¹ *ibid*

The previous document included a long and detailed list of requirements including the following:

Custody managers should consider providing a separate room for use as a prayer room, or for detainees to receive official visitors such as local faith leaders. Arrangements should be made for providing:

- copies of the Koran, the Bible and the Torah (Islam requires that copies of the Koran be kept neat and wrapped securely away from contamination)
- advice to Islamic detainees on the direction of Mecca (eg, a compass or mark applied to the eastern cell wall of one or more cells)
- halal, kosher, vegetarian and vegan meal alternatives.
- Note: someone who is vegetarian on ethical grounds should have this belief respected in the same way as if they were vegetarian on religious grounds.

Religious considerations:

Custody staff should facilitate any reasonable requests wherever possible in respect of religious considerations, particularly:

- facilitating times of prayer, including the requirement of some faiths that various parts of the body are washed prior to doing so
- asking the person for their prayer times and informing them when they are due
- reading religious texts
- food and drink (food type and timing with regard to fasting)
- visits from local faith leaders
- prayer times.

Due respect should be given to all religious artefacts retained in custody offices for the use of detainees.

Prayer times. Members of the Islamic faith are required to pray five times daily, at times which vary according to the season. Custody officers should ensure that enquiries are made (eg, with local faith leaders) to establish those times in advance, so that interviews and meal times may be organised around them.

⁹² College of Policing, *Major investigation and public protection, Female genital mutilation* (March 2015) <<https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/female-genital-mutilation/>>

College of Policing, *Major Investigation and Public Protection, Forced Marriage and Honour Based Abuse* (June 2014) <<https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/forced-marriage-and-honour-based-violence/>>

Forced marriage is now to be treated by the Police as a form of HBV. In December 2015 HM Inspector of Constabulary reported on the response of the Police to HBV, broadly defined to include forced marriage and FGM.⁹³ The inspectors found a 'mixed picture' stating that the police service have '...some way to go before the public can be fully content that HBV is properly understood by the police and that potential and actual victims are effectively protected.' Part of the problem is that there is 'no strong evidence base on what works in policing to prevent harm and to protect victims.'⁹⁴ A victim engagement project, undertaken as part of the report, identified 'honour' as a critical fact because '...while HBV has features in common with domestic abuse and gender based violence ...it is the aggravating factor of perceived 'honour' that shapes the context of abuse.'⁹⁵ The report made a total of 14 recommendations to the Home Office, the NPCC, chief constables and the College of Policing, the overall aim being to eradicate 'honour' based abuse, forced marriage and FGM but made it clear that '...due respect must always be given to lawful cultural traditions and sensitivities but these should not be barriers behind which desperate people are imprisoned.'⁹⁶ The challenge, once again, is balancing these competing demands. The time frame for the implementation of these recommendations was March, June or December 2016. It is not clear whether these have been successfully implemented. The Metropolitan Police have produced a number of online fact

accessed 18th September 2018.

A recent change in reference from 'honour' to 'dishonour' in relevant literature is a positive step but the label HBV is used here to reflect policy and practice.

⁹³ 'The Depths of Dishonour: Hidden Voices and Shameful Crimes'

<<https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/the-depths-of-dishonour.pdf>>

Accessed 1st October 2018.

⁹⁴ *ibid* [5.9].

⁹⁵ *ibid* 14.

⁹⁶ *ibid* 6.

sheets in relation to various crimes including HBV.⁹⁷ These are accessible and informative and perhaps satisfy Recommendation 4 which requires awareness raising. The NCCP national strategy for eradicating HBV, forced marriage and FGM pre-dated the HMIC Report.⁹⁸

In 2015 Mulvihill *et al* carried out research on the experiences of victims of HBV reporting to the police.⁹⁹ This is based on a framework of interactional justice, a concept that measures a victim's feelings of being respected and informed, which in turn are related to feelings of self-worth and belonging.¹⁰⁰ Researchers found that empathy and validation are critical in the first contact with police. 20 in the research sample of 36 participants were happy with their initial encounter but only 9 out of 36 were happy with the reporting experience overall.

With regard to FGM The Metropolitan Police have also set up 'Project Azure', a response to FGM advocating a coordinated drive to eradicate FGM through prevention, protection, partnership and prosecution yet there is ongoing criticism of the Metropolitan Police for not securing a successful FGM prosecution and in

⁹⁷ <https://safe.met.police.uk/crimes_of_honour/get_the_facts.html> accessed 5th October 2018.

⁹⁸ Commander Mak Chishty, *Honour Based Abuse, Forced Marriage and Female Genital Mutilation*, NPCC (December 2018)

<<https://www.npcc.police.uk/Publication/Final%20NPCC%20HBA%20strategy%202015%202018December%202015.pdf>> accessed 5th October 2018.

⁹⁹ N Mulvihill, G Gangoli, A Gill and M Hester, 'The Experience of Interactional Justice for Victims of 'Honour'-Based Violence and Abuse Reporting to the Police in England and Wales', (2018) *Police and Society*

<<https://www.tandfonline.com/doi/full/10.1080/10439463.2018.1427745>> accessed 20th September 2018.

¹⁰⁰ These in turn relate to interpersonal justice and informational justice, based on the framework of interpersonal justice developed by Laxminarayan *et al* and referred to in Murphy, K & Barkworth J, 'Victim Willingness to Report Crime to Police: Does Procedural Justice or Outcome Matter Most?' (2014) 9 (2) *Victims and Offenders* 178, 182-184. The focus of interactional justice is thus different from distributive justice, which is concerned with fairness, and from procedural justice.

particular for not knowing where in their jurisdiction that FGM takes place.¹⁰¹ The Police have taken other initiatives to tackle 'cultural crime'. Project Violet is the response of the Metropolitan Police to witchcraft or 'faith based child abuse'. There is also a National Action Plan to tackle abuse linked to faith or belief which identifies the main challenge as working with communities and faith leaders and raising awareness and encouraging reporting.¹⁰² However, there seemed to be momentum around faith based abuse back in 2012, perhaps as a result of the Victoria Climbié case and these earlier initiatives do not seem to have been updated.

Although the Forced Marriage Unit, set up in 2012, is a joint initiative between the Foreign and Commonwealth Office and the Home Office the Police are committed to the eradication of forced marriage.¹⁰³ Individual forces seem to have adopted protocols on forced marriage and taken measures to make reporting as easy as possible.¹⁰⁴ There is criticism that the Police have been too timid in tackling forced marriage leading to media comments such as '...the answer to tackling [forced marriage] lies in forcefully entering ghettoized, backward communities.'¹⁰⁵ Perhaps this seems shocking but there is a need to

¹⁰¹ <<https://www.independent.co.uk/news/uk/crime/met-police-fgm-32-years-no-conviction-where-happen-female-genital-mutilation-a7616536.html>> accessed 5th August 2018.

¹⁰²The National Working Group on Child Abuse Linked to Faith or Belief, *National Action Plan to Tackle Child Abuse Linked to Faith or Belief* (14th August 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/175437/Action_Plan_-_Abuse_linked_to_Faith_or_Belief.pdf> accessed 5th August 2018.

¹⁰³ <https://safe.met.police.uk/crimes_of_honour/consequences_and_the_law.html> accessed 5th October 2018.

¹⁰⁴ For example, Greater Manchester Police have set up various 'Advice Centres' including one on HBV that includes forced marriage. Greater Manchester Police, *Forced Marriage*, <<http://www.gmp.police.uk/live/Nhoodv3.nsf/section.html?readform&s=F9AE08C3D47F28C380258091004C6F8B>> accessed 5th October 2018.

¹⁰⁵ *Independent* (24th April 2016.)

avoid accusations of the kind of misplaced political correctness that, it is argued, led to the Rotherham scandal and the failure to protect victims of abuse.

Crown Prosecution Service (CPS)

‘Cultural crime’ is placed within the CPS’s violence against women and girls strategy which in turn lies within the human rights framework recommended by the United Kingdom’s strategic priority for the CPS and one of nine identified mission critical projects. A CPS pilot launched in July 2007 whose purpose is to identify and monitor forced marriage and honour crimes and to inform development of national guidance and training for prosecutors and this flagging system has continued so that forced marriage and Honour Based Violence crimes are identified as a separate category.¹⁰⁶ There is also CPS guidance on forced marriage and Honour Based Violence with revised guidance being published on 28th June 2018.¹⁰⁷ In its Tenth Annual Report on Violence Against Women and Girls figures show that there were 200 HBV flagged cases in 2016/17.¹⁰⁸ There are 136 ‘charged’ cases and from these there are 90 convictions and 81 unsuccessful outcomes. The statistics do not make for easy interpretation, possibly because some incidents are charged in a number of

<https://www.independent.co.uk/voices/forced-marriage-happens-in-the-uk-because-police-are-scared-of-being-labelled-racist-a6998296.html>

accessed 5th October 2018.

This comment comes from Yasmin Choudhury who was taken to Pakistan at the age of 7 and witnessed the forced marriage of a 17 year old girl. The interesting question is whether her views carry more validity because of her own cultural background.

¹⁰⁶ (June 2014) <<https://www.cps.gov.uk/legal-guidance/honour-based-violence-and-forced-marriage>> accessed 5th October 2018.

¹⁰⁷ *Revised Guidelines* (28th June 2018) <<https://www.cps.gov.uk/legal-guidance/honour-based-violence-and-forced-marriage>> accessed 5th October 2018.

¹⁰⁸ (November 2017) <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_0.pdf> accessed 5th October 2018.

different ways. Looking specifically at forced marriage there were 56 referrals to the CPS (90 in 2015/16) with 44 prosecutions and 32 convictions giving a conviction rate of 72.7%. We know that there has only been one successful prosecution for the offence of forcing someone to marry under S121 of the Anti-Social Behaviour Crime and Policing Act 2014 and so these convictions must be for other offences relevant to forced marriage though 'flagged'. The figures are thus misleading but looking behind them does not disguise the fact that S121 of the Anti-Social Behaviour Crime and Policing Act is inefficacious. When it comes to FGM clearly there are no figures to report with the CPS acknowledging that mandatory reporting obligations on health professionals under the Serious Crime Act has not increased the number of prosecutions although it has led to an increase in safeguarding measures through the family courts and the issue of FGMPO's.

The CPS came under attack recently for not prosecuting 'honour' crimes for fear of causing unrest in Asian communities but retaliated with an explanation of its approach to charging.¹⁰⁹ 'The CPS makes charging decisions in every instance without sway to political correctness or any other outside influence. Our role is to examine the evidence, decide whether it is sufficient to present to a jury, and then prosecute if it is in the public interest to do so'.¹¹⁰ There seems to be a huge willingness on the part of the CPS (and the Police) to work towards eradicating these crimes and towards combatting violence against women and girls more

¹⁰⁹ <<http://www.telegraph.co.uk/news/2016/11/07/cps-afraid-to-tackle-honour-crimes/>> accessed 20th January 2017.

¹¹⁰ *The Telegraph* (11th November 2016)

<http://www.cps.gov.uk/news/latest_news/cps_response_to_daily_telegraph_claims_on_honour_based_violence/> accessed 20th January 2017.

A version of the letter that appeared in *The Telegraph* on 11th November 2016 defending the claims made above.

generally but as argued in section 3.3 the emphasis on 'cultural crime' within the legislative arena cannot be considered the best way forward. In the 2016/17 Report the director of the CPS called for further training for prosecutors in 2017/18 on 'harmful practices'.

The Judiciary

In February 2010 the Advisory Panel on Judicial Diversity reported to the Lord Chancellor and made 53 recommendations for achieving a diverse judiciary. The Judicial Diversity Taskforce was set up with a view to ensuring implementation of the recommendations and this has now been replaced by the Judicial Diversity Forum. The Judicial Appointments Commission was set up in April 2006 under the Constitutional Reform Act 2005 with a view to ensuring a fair and transparent process for selecting candidates for judicial office. Part of its remit is '...to have regard to the need to encourage diversity in the range of persons available for judicial selection.'¹¹¹ To assist in this the Crime and Courts Act 2013 has a tipping point provision that allows cultural diversity to be taken into account for the purposes of increasing judicial diversity when two applicants are in all other ways of equal merit. The judiciary is becoming more diverse. Focusing on ethnic diversity Judicial Diversity Statistics for 2018 show that 7% of court judges and 11% of tribunal judges are of BME origin.¹¹² In the case of court judges this percentage is only slightly below that of the working age general population.¹¹³ There are now over 100 members of the 'Diversity and Community Relations

¹¹¹ <<https://www.judicialappointments.gov.uk/>> accessed 5th October 2018.

¹¹² BME is an acronym for Black and Minority Ethnic and includes all non white people.

¹¹³ 12th July 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf>> accessed 5th October 2018.

Judiciary' (DCRJ) whose remit is to dispel myths surrounding the judiciary and to act as a link between the courts and local communities on a voluntary basis so that there is increased public confidence in the legal system and so that outdated perceptions of the judiciary are challenged. This DCRJ network was originally set up to work with BME communities but it works now with all under-represented groups.¹¹⁴

However, there is not necessarily a direct correlation between a diverse judiciary and diversity of views. The recent 'fracking case' which has led to calls for judicial review on account of the severity of the sentences passed is significant for the comment of the judge Robert Altham who felt unable to suspend the sentences because the offenders had no hope of rehabilitation as '...each of them remains motivated by an unswerving conviction that they are right.'¹¹⁵ There is an argument for ensuring that this newly diverse judiciary is adequately trained in diversity issues.

Since the Constitutional Reform Act 2005 the Lord Chief Justice has responsibility for training the judiciary in England and Wales. The Judicial College was set up in 2011 with a view to undertaking this training.¹¹⁶ The most recent

¹¹⁴ Information obtained from Courts and Tribunal judiciary, *Diversity and Community Relations Judiciary* <<https://www.judiciary.gov.uk/you-and-the-judiciary/judiciary-within-the-community/diversity-and-community-relations-judiciary/>> accessed 28th May 2018.

¹¹⁵ Reported in *Independent* (2nd October 2018)
<<https://www.independent.co.uk/environment/fracking-protest-cuadrilla-preston-lancashire-drilling-simon-roscoe-blevins-richard-roberts-rich-a8562276.html>>

¹¹⁶ The previous director of training at the Judicial College was John Phillips. In a talk to judges from overseas given at the Supreme Court in May 2016 he explained that his job is to meet the training needs of judges. A 'Learning Needs Analysis' was carried out with 300 members of the judiciary of England and Wales (from a total of some 33,000 including 26,000 lay magistrates) and this showed a need for training to be individual and to focus on 'judgecraft' (rather than substantive law). There was no recognition of the need for training in diversity issues.

strategy document of the Judicial College outlines the vision, objectives and overriding principles of the College.¹¹⁷ The Vision is to be a ‘world leader in judicial education and training.’¹¹⁸ The governing principles set out what is included in judicial training.¹¹⁹ As well substantive law, evidence and procedure and the acquisition and improvement of judicial skills, training aims to cover ‘...the social context within which judging occurs’. ‘Social context’ is stated to include diversity and equality and the need to relate to and communicate with all manner of people from a variety of backgrounds with different needs capacities and expectations.¹²⁰

However, an analysis of the Judicial College Prospectus for 2018-19 shows that there is no reference whatsoever to culture and very little reference to equality and diversity.¹²¹ A review of judicial education and training in other countries prepared for the Judicial Studies Board in 2006 found that all the jurisdictions analysed offered training in ‘social context’ but this amounted to simply understanding the potential for discrimination.¹²² The 2018/19 Prospectus includes seminars on leadership and management and separate ones on case management. There is a general seminar for District Judges that includes ‘issues of bias and diversity’ and a general seminar for Deputy District Judges that

¹¹⁷Judicial College, *Strategy of the Judicial College 2018-2020* <<https://www.judiciary.uk/wp-content/uploads/2017/12/judicial-college-strategy-2018-2020.pdf>> accessed 18th September 2018.

This has not been significantly updated since the previous 2015-17 strategy document other than references to increased digitalization, withdrawal from the European Union and continuing austerity.

¹¹⁸ *ibid* Paragraph 11.

¹¹⁹ *ibid* Paragraph 13.

¹²⁰ *ibid* Paragraph 14.

¹²¹ Judicial College, *Prospectus April 2018- March 2019 Courts Judiciary* <<https://www.judiciary.uk/wp-content/uploads/2017/12/judicial-college-prospectus-courts-2018-2019.pdf>> accessed 5th October 2018.

¹²² Cheryl Thomas, UCL <http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf> accessed 28th May 2018.

includes content on domestic violence. There is one for judges on Sentencing which includes updates on new guidelines and on sentencing law and promises to look at ‘...sensitive and often difficult areas such as domestic violence, sentences involving defendants who are carers, defendants who are young, defendants who may have been trafficked and defendants with mental health problems.’ There is a gap crying out to be filled with ‘defendants with different cultural backgrounds.’ Those trafficked might of course have different backgrounds but they are singled out here because of the trauma of that trafficking.

The latest Equal Treatment Bench Book (ETBB) was published on 28th February 2018. It is a living document that is constantly updated, the latest amendments being made in August 2018. The aim is ‘...to increase awareness and understanding of the different circumstances of people appearing in courts and tribunals.’¹²³ It is a manual for good procedural practice at all levels in the criminal justice system and is, in contrast to other areas of the criminal justice system that we have examined, enlightened. It contains new sections on litigants in person, refugees, modern slavery, multicultural communication and Islamophobia and anti-Semitism. If judges adhered to the guidelines in this comprehensive document culture in the courtroom could become much less problematic. This is one of the few documents reviewed in this thesis that demonstrates a real understanding of culture, that is not afraid to count culture as among the tangible influences that make up our socially diverse world. Of course, it is only setting out requirements relating to culture in the procedural

¹²³ </www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-v15.08.18.pdf> accessed 5th October 2018.

realm and has no bearing on substantive law. Therefore whilst it does not impact directly upon the culture-responsibility relationship it is of great value as an illustrative example of how the criminal justice process can interact with culture.

As well as outlining what the approach of the judiciary should be to equality (raised in section 2.4) the ETBB recognises the endemic cultural bias in the legal system that we raised in section 2.4 stating that ‘...people perceive the words and behaviour of others in terms of the cultural conventions with which they are most familiar’ so that judges need an ‘...awareness of where a person is coming from in terms of background, culture, and special needs and of the impact of those on participation in the process.’ However, paragraph 28 of Chapter 1 lists those at a particular disadvantage in the legal process and whilst those from ethnic minority communities are included there is no mention of culture or cultural background and so there is some inconsistency around the inclusion of culture. The ETBB warns too against stereotyping with the words in paragraph 33 that stereotypes are ‘simplistic mental shortcuts’ and ‘often grossly inaccurate’ and ‘ignorance of the culture’s beliefs and the disadvantage of others encourages prejudice’ (paragraph 32). Most encouragingly of all the ETBB promotes intercultural communication so that judges in England and Wales have an understanding of, for example, the East Asian habit of ‘saving face’ and the South Asian narrative style of taking a long time to get to the point. We have seen how remorse, the most cited mitigating factor in sentencing, is culturally loaded and misconstrued as lacking in this context.¹²⁴

¹²⁴ H Maslen and J Roberts, ‘Remorse and Sentencing: An Analysis of the Sentencing Guidelines and Sentencing Practice’ Chapter 8 in Ashworth and Roberts (n 88) 164.

If the judiciary/judicial appointments committee see the need for diversity to be commensurate with the general population then it recognizes the *de facto* multicultural population. If the Judicial College issues guidance for judges on equal treatment of, *inter alia*, those from different cultural backgrounds in court then it too recognizes that there will be litigants in court with different cultural backgrounds. In the appeal of Shakeela Naz against sentence following conviction for the 'honour' killing of her daughter Rukhsana, counsel for the appellant referred to The Equal Treatment Bench Book, and warned against ethnocentric assumptions and the danger that a court might deploy '...their own assumptions to evaluate the behaviour of those whose cultural conventions are different to their own'.¹²⁵ The next step is the development of procedural rules to ensure adherence to the principles recognised in theory but not always followed in practice.

¹²⁵ Equal Treatment Bench Book 24.
Re Naz [2011] EWHC 2850 (QB).

3.5 Conclusion

The first aim of the Chapter was to gather evidence to support and advance the hypothesis that the culture-responsibility relationship has not been considered in practice or policy. The aim was achieved by searching thematically for the presence of culture and evidence of engagement with culture in both the substantive criminal law and the criminal justice system. Overall, there is a notable absence of reference to culture and minimal engagement between culture and the criminal law and the criminal justice system of England and Wales. It logically follows therefore that the culture-responsibility relationship has not been considered in the context of the practice and policy of the criminal law and criminal justice system of England and Wales.

Looking beyond this general conclusion we can see evidence of the following patterns:

- The criminal law has engaged most fully with culture in the creation of criminal offences, specifically the offences of FGM and forced marriage. Legislation creates a forward looking responsibility through criminalising harmful practices. It can therefore be said to widen the ambit of responsibility which is why these offences are relevant to the culture-responsibility relationship. Such laws are of universal application but they are clearly not directed at all members of society. Their implementation can challenge generally accepted understandings of the purpose of the criminal law and of criminalisation theory. Criminal legislation aimed at preventing and eliminating the perceived harm in FGM and forced marriage is ineffective.
- There is generally a much greater reluctance for the law to engage with culture in the realm of personal responsibility at the stage of establishing guilt. There is some scope within the loss of control defence to allow culture to be included in a subjective understanding of a litigant 'in the circumstances of the defendant.' Although the courts have not had the opportunity to explore this since the loss of control defence replaced the defence of provocation, in 3 of the cases reviewed the defence raised culture in the context of provocation and the courts did not respond. Judges at Crown Court and Appeal Court level have acknowledged culture

in a limited number of cases but do not allow it to influence their directions to the jury or to consider it as evidence in appeals against conviction.

- There is a lack of clarity about the procedure for admitting evidence relating to culture in the courts. This has resulted in courts dismissing culture and where evidence has been adduced of group practices the courts have not attempted to relate this to the individual defendant.
- At Crown Court level culture is more likely to be relied on by the prosecution than the defence. However, there is a lower than average guilty plea rate and a higher than average conviction rate which could suggest that defendants believe in their innocence without necessarily having any grounds in law for so doing.
- 'Honour' is never raised by the defence. It is construed very negatively by both the prosecution and by the judiciary.
- Judges do allow cultural evidence in mitigation at the sentencing stage and in appeals against sentence in a limited number of cases but there is no clear guidance from the Court of Appeal or from the Sentencing Council on this.
- Decisions on both guilt and sentencing are inconsistent and show a lack of clear reasoning.
- The interaction between culture and the criminal law in practice does seem to have implications for gender equality as we see a higher number of male defendants and a higher number of female victims in criminal cases involving culture than across criminal cases more generally.
- There is naturally a focus within the Police and the CPS on prosecuting HBV, FGM and forced marriage all of which are situated in the violence against women and girls framework and a strong commitment within both organisations to working together to bring about the eradication of these 'harmful practices'. However, the number of successful prosecutions does not reflect the commitment to combatting 'cultural crime'. In recent years the Police appear to have pulled back from considering culture in meeting the needs of offenders.
- There is notable reference to culture in policy documents relating to the Judiciary, particularly from the Judicial College. There is a commitment to creating a diverse Judiciary and to training the Judiciary in awareness of cultural difference. Whilst we can see greater diversity in the Judiciary this does not seem to be translating into a willingness to engage with culture in the courtroom.

The second aim of the Chapter was twofold, to begin to try to understand reasons for this absence of reference to culture and the lack of engagement between culture and the criminal law and to begin to answer the research question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* The evidence gathered from research for this Chapter indicates a reluctance to engage with culture, perhaps due to uncertainty possibly

even due to an immanent fear of culture. Furthermore, where there might be a willingness by the courts to consider culture as being in some ways relevant in a particular case there seems to be a tendency to admit culture 'through the back door' and so it is not openly acknowledged as being influential or being significant in any way in understanding a defendant's behaviour.

We can suggest reasons for this. As we saw in section 2.1 culture is not a protected characteristic for the purposes of the Equality Act 2010 and so whilst we are becoming used to seeing reference to the 9 groups now protected by equality legislation we are perhaps not comfortable with the unfamiliar, with the idea of culture. The current protected characteristics are comprehensible because they are either visible, self-identified or professed, objectively determined or a matter of record. Despite a shift in understandings of some of these characteristics in recent years, for example gender is now seen as a fluid social construction rather than simply as a binary that is biologically determined, society is or is becoming open to the need for equality for those possessing these characteristics. We can therefore ascribe them reasonably confidently to actors within the legal system. Culture is more nebulous. As we saw in section 2.2, it is an intangible complex whole with a myriad of meanings and we have brought forward an understanding of it that insists upon it being conceptualized as a construction unique to every individual, formed in each case through the acquisition, adoption or adaptation of that which the group has created, something that Bordieu would call an 'embodied culture'.¹²⁶ D'Hondt argues that culture is much more visible than other forms of social fragmentation but in the context of twenty first century multiculturalism culture is hard to identify, and it is

¹²⁶ Pierre Bordieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford, Stanford University Press 1990) 63.

therefore less comprehensible, perhaps less suitable for a policy legislative framework or for inclusion in a legal system.¹²⁷ Matravers states that it appears that '...the notion of culture is simply not robust enough to do the analytic and ethical work which much of the cultural defence literature sets for it.'¹²⁸ Moreover we are fearful of something that traditionally we have seen as belonging to 'the other' and in addition, political correctness disables us from attributing to others something that we do not fully understand. These are themes that will be returned to in Chapter 4 when we explore multicultural policy in the United Kingdom in the twenty-first century and search once again for evidence to support and advance the hypothesis that the culture-responsibility relationship has not been considered in policy and seek an explanation for that omission.

When it comes to beginning to answer the research question, as seen in section 3.2, we know that there is flexibility within the foundations of our criminal law to accommodate the culture-responsibility relationship. We can take two approaches here. We can look firstly to the patterns extracted from the evidence gathered in sections 3.3. and 3.4 to establish the reality of current practice which will give us an indication of the natural limits of the law at this moment, 'the general accord between [the law] and public conscience' that we identified in section 3.2 as being necessary for the law's inherent credibility.¹²⁹ We can use these patterns as a starting point and will carry them forward to Chapter 5. Secondly, we can ask 'how far should these boundaries be pushed?' The word

¹²⁷ S D'Hondt, 'The Cultural Defence as Courtroom Drama: The Enactment of Identity, Sameness and Difference in Criminal Trial Discourse' *Law and Social Enquiry* (2010) 35 (1) 67-98.

¹²⁸ M Matravers, 'Responsibility, Morality and Culture' Chapter 5 in Kymlicka Lernerstedt and Matravers (n 2) 50.

¹²⁹ John MacDonell, 'The Foundations of Criminal Law' (1912) 13 (1) *Journal of the Society of Comparative Legislation* 108,108.

'should' is deliberately chosen here because the outer limits of these boundaries should not be imposed through the cultural lens of the dominant majority but should be arrived at through meaningful dialogue as will be explained in detail in Chapter 4. And so turning back to the research question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?*, drawing on the findings of this Chapter and on the conclusions from section 2.4 we can suggest the following starting point:

- It is not possible to say with any certainty that culture can or cannot determine behaviour but there is a general perception that culture can, in the broadest of terms, 'influence' behaviour. We cannot therefore currently see space for culture as a justification or excuse, either as a standalone 'cultural defence' or within the traditional defences because the law's boundaries are not currently receptive to that idea. It is safest therefore, for now, to place culture at the sentencing stage in personal mitigation, where a pre-disposition or altered moral outlook may be construed as a motive in influencing behaviour. Although the criminal law does not recognize motive within the structure of *actus reus* and *mens rea* it has at times been recognized as mitigation in sentencing. Culture therefore seems to fit most naturally at the stage of personal mitigation in sentencing.
- Sentencing laws need to reflect clearly the admissibility of culture as a factor in personal mitigation in individual cases where it is established that culture has had an influence on behaviour.
- There need to be clear procedural rules within the law of evidence on how evidence of the effect of culture on behaviour should be introduced and considered in the courtroom.
- The Judiciary (and prosecution and defence lawyers) need specific training that goes beyond the stated aim in the ETBB of 'increasing awareness and understanding of the different circumstances of people appearing in courts and tribunals' on how to deal with cultural evidence in court.
- Honour should be excluded as a factor that is relevant to personal mitigation and it seems to be inherently indefensible.
- Courts should always consider the gendered implications of allowing culture as a factor in personal mitigation.

Each of these points will be developed further in Chapter 5. The analysis in Chapter 3 has thrown light upon a number of further issues that need elucidation through dialogue if the culture-responsibility relationship is to develop justly from

the starting point suggested here and these too will be returned to in Chapter 5. The suggestion here of situating the culture-responsibility relationship at the sentencing stage fits with Norrie's 'looser notion' of responsibility at this stage and is supported by the evidence gathered here from the criminal law and criminal justice system of England and Wales. However, the above suggestion is not prescriptive and dialogue may in time reveal a better place for the culture-responsibility relationship. As we saw at the beginning of the Chapter Cornell asserts that '...the stories that we tell to justify one state of legal affairs over another are just that, stories.'¹³⁰ It is sometimes important and just for culture to find its place in such stories.

¹³⁰ Drucilla Cornell, *The Philosophy of the Limit* (Farnham, Routledge 1992) 19.

CHAPTER 4

MULTICULTURALISM IN THE UNITED KINGDOM

*'There is much to be grateful for and proud of in the legal traditions of the United Kingdom. But it is important to ask whether the law is doing all it can to help us live with our differences.'*¹

4.1 Introduction

It is stated in Chapter 1 that the research question *how should the criminal law of England and Wales respond to the relationship between culture and legal responsibility?* needs to be addressed within two well-defined parameters. The second of these parameters is multiculturalism, as it exists uniquely and specifically within the socio-political system of the United Kingdom today. In Chapter 3 the emergence of culture as a constituent part of (and indeed constitutive of) the criminal law as a result of the social reality of multiculturalism and its relationship to the criminal justice system was examined in the context of the challenges that it brings to settled notions of individual legal responsibility. Demian states that '...culture as a form of evidence seems to have appeared on the legal horizon in the last twenty years because of the politicization of culture as a descriptor of difference-as-authenticity.'² Although she goes on to argue that culture is a 'legal fiction' and that multiculturalism is a 'red herring', because it is not culture itself that is revelatory but the effect that culture has on 'intentions', it

¹ Elizabeth Butler-Sloss G, 'Living with Difference: Community Diversity and the Common Good' (*The Woolf Institute*, Cambridge 7 December 2015)

<<https://www.woolf.cam.ac.uk/research/publications/reports/report-of-the-commission-on-religion-and-belief-in-british-public-life>> accessed 1st October 2018, 71.

² Melissa Demian, 'Fictions of Intention in the Cultural Defence' (2008) 110 (4) *American Anthropologist* 432, 433.

remains that were it not for the social reality of multiculturalism, the effect of culture on legal responsibility would not have emerged as a pressing and contemporary issue for justice in the criminal law of England and Wales. In an age of increasing awareness of the co-existence of different cultures we are called to question whether the standards, purposes, limitations and allowances of a criminal law fit for a mono cultural society are similarly fit for a multicultural one and in section 3.2 we established that the foundations of our criminal law are perhaps more able than we had previously thought to accommodate the potentially altered cultural situation of individuals comprising a multicultural criminal population within the criminal justice system of England and Wales. We are therefore considering how best to accommodate the culture-responsibility relationship, whose existence and importance we established in Chapter 2, within the legal system, and recognising that the criminal law and criminal justice system are situated within the wider domain of a multicultural reality . However, as we found in Chapter 3, we see in the criminal law and the criminal justice system itself a reluctance to engage with culture in general and an inconsistent approach to the culture-responsibility relationship in particular and so we need to examine whether recourse to multicultural policy and philosophy can help in answering the question *how should the criminal law of England and Wales respond to the relationship between culture and legal responsibility?*

The first broad aim of this Chapter is to generate a deeper understanding of the term 'multiculturalism' within the specific socio-political context of the United Kingdom and to establish that, as a society, we have not fully considered the implications of contemporary multiculturalism for law and justice and perhaps more pertinently multicultural policy has not considered the place of law, or at

least the criminal law. The second and narrower aim is to further the hypothesis that the culture-responsibility relationship, sitting as it does within the social reality of a multicultural society, remains a largely unexplored concern that, in the interests of justice, needs to be addressed with some urgency. This follows on from the conclusion reached in Chapter 3 that there has been an absence of consistent and coherent engagement between the culture-responsibility relationship and the criminal law and criminal justice system of England and Wales at both a practical and policy level and that there is stark evidence that the criminal law and the institutions of the criminal justice system continue to provide evasive solutions to skim the surface of how the fundamental issues involving culture should be addressed. The qualitative content analysis of the United Kingdom's policy on multiculturalism (as identified in Annex B) carried out and summarized in this Chapter further develops the hypothesis. It may also help us to understand why multiculturalism in the United Kingdom is largely understood in terms of race relations rather than cultural difference. We identified in Chapter 3 a seeming reluctance of the courts to engage with or to recognise culture and this lack of recognition of culture may extend too to multicultural policy. Race is much more comprehensible than culture and Panayi identifies an '...iron girder of racism and xenophobia' throughout the history of immigration into the United Kingdom. This can be seen especially towards the Irish in the nineteenth century, the Germans during the First World War, West Indians during the 1950s, Asians from the 1960's to 1980's, asylum seekers in the 1990s and currently Muslims where '...hostility towards outsiders, which usually focuses on one particular group at one particular time, remains constant'.³ Justice and hostility are arguably

³ Panikos Panayi, *An Immigration History of Britain: Multicultural Racism Since 1800* (Harlow, Longman Pearson 2010) 26.

mutually exclusive concepts and so we must be constantly aware of this 'othering' and suspicion in seeking just solutions.

The first aim of this chapter seems simple enough- to explore and seek further understanding of the term multiculturalism in the socio-political context of the United Kingdom today. Yet things are much more complex. This is largely because 'multiculturalism' is, like culture, multifaceted and dynamic and difficult to define and as Rattansi says, an '...acceptable definition of multiculturalism is notoriously elusive'.⁴ It is a word that has multiple interpretations. Firstly, it is a descriptive label. As Howarth and Andreouli state, in its simplest form multiculturalism is a 'demographic condition'.⁵ This understanding of the term is sometimes referred to as 'soft multiculturalism' and will be explored in section 4.2 where we consider multiculturalism as social reality.⁶ Secondly it is a policy. To further complicate things there are two possible interpretations of multiculturalism as policy. The first is where cultural minorities are thought of as distinct communities and where public policy encourages this distinctiveness and multiculturalism is promoted. This is sometimes referred to as 'state multiculturalism', a policy standpoint that is often criticized for being grounded in the group and leading to segregation. The second and broader interpretation is where policy is adopted to regulate or to respond to the 'demographic condition' of multiculturalism, although that policy may not necessarily be promoting

⁴ Ali Rattansi, *Multiculturalism: A Very Short Introduction* (Oxford, Oxford University Press 2011) 7.

⁵ Caroline Howarth and Eleni Andreouli, 'Has Multiculturalism failed? The Importance of Lay Knowledge and Everyday Practice' (2012) Institute of Social Psychology Research Paper, The London School of Economics and Political Science Publications
<https://www.researchgate.net/publication/265275514_%27Has_multiculturalism_failed%27_The_importance_of_lay_knowledge_and_everyday_practice> accessed 1st October 2018.

⁶ John Rex and Gurharpal Singh, 'Multiculturalism and Political Integration in Modern Nation States: Thematic Introduction' (2003) 5 (1) *International Journal on Multicultural Studies* 3, 4. 244

multiculturalism or 'state multiculturalism' (as understood in the first interpretation). This is what Parekh refers to as 'a normative response to that fact', that is, the fact of diversity and policy that may be promoting an alternative response to state multiculturalism, such as assimilation or integration.⁷ Modood provides a useful definition of multiculturalism in this second context as '...the recognition of group difference within the public sphere of laws, policies, democratic discourses and the terms of a shared citizenship and national identity'.⁸ These interpretations of 'multicultural policy' are used interchangeably by politicians, policy makers and academics, but it is the second wider meaning that is adopted in this chapter so that reference to 'multicultural policy' means all or any policy seeking to regulate the social reality of a culturally diverse populace. This is examined in section 4.3. Thirdly and finally, multiculturalism is a philosophy. In the *Stanford Encyclopedia of Philosophy* Song defines multiculturalism as '...a body of thought in political philosophy about the proper way to respond to cultural and religious diversity'.⁹ This body of thought is huge and will be explored in section 4.4 where political philosophy is called upon to enhance understandings of what multicultural justice looks like in the context of the culture-responsibility relationship. Section 4.4 engages with multicultural philosophy, in particular with dialogical theory, in the search for an understanding of justice grounded in multicultural thought within which suggestions for the ongoing development of the culture-responsibility relationship can be theoretically explored.

⁷ Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Basingstoke, Macmillan, 2000).

⁸ Tariq Modood, 'Multiculturalism' (2007) 67 *Polity* 51, 56.

⁹ The Stanford Encyclopedia of Philosophy

<www.plato.stanford.edu/archives/spr2014/entries/multiculturalism> accessed 1st October 2018.

Despite the challenges and complex interpretations of the term multiculturalism, it is essential to embrace it. Whether we are considering multiculturalism as social reality, policy or philosophy the culture-responsibility relationship is relevant across each of these multiple understandings. Despite the evolution of society in the United Kingdom into that of a multicultural one in the wake of population movement throughout history but especially since the middle of the twentieth century, the criminal law of England and Wales and multiculturalism (whether as social reality, philosophy or policy) have largely remained as bounded fields, their borders barely touching let alone interacting. Our multicultural society has changed in and around the criminal justice system and the criminal law so that the culture-responsibility relationship has been overlooked in policy, perhaps not even recognized as a point of possible tension in the first place, or even worse, consciously disregarded as just too difficult.

This Chapter will continue by exploring the social reality of multiculturalism in section 4.2 and by examining multicultural policy in section 4.3. Throughout the analysis of the criminal law and criminal justice system of England and Wales in the context of the culture-responsibility relationship in Chapter 3 we began to identify a sense of uncertainty about 'culture' and concluded that there was a widespread reluctance to engage openly with it. This theme will be developed throughout this Chapter where we identify another reluctance to engage, this time between multicultural policy, the law generally and legal responsibility in particular.

4.2 Multiculturalism as Social Reality

What then does multiculturalism look like in the United Kingdom today? To understand the nature of our multicultural society, perhaps different from that in postcolonial societies or in colonized states with an indigenous population, we need to understand a little about the history of migration to and from the United Kingdom. This will help us to form a picture of our unique multicultural makeup so that the suggested framework for the way forward for the culture-responsibility relationship within the criminal law can be responsive to and specific to the locale. The law too needs to be understood in the context of historical fact. As Cotterrell points out '...law only exists in specific times and places...most of the important theoretical questions about law are not at all timeless but very timely- they are issues about the way law is shaped, works and develops in specific historical contexts'.¹⁰

The History of Multiculturalism in the United Kingdom

Kymlicka and Banting correctly state that '...immigration is an enduring feature of Western societies; there have always been powerful forces that push and pull people across international borders.'¹¹ Panayi tell us that between 1800 and 2010 9 million people had moved to the United Kingdom.¹² Numbers of migrants peaked in 2015 with an annual net migration figure of 332,000.¹³ So it is only in relatively recent years that the United Kingdom has had to cope with such large

¹⁰ Roger Cotterrell, 'Socio-Legal Studies, Law Schools and Social Theory' (2012) Queen Mary University of London School of Law Legal Studies Research Paper No. 126/2012, 2.

¹¹ Kymlicka and Banting, The Multicultural Policy Index (10th December 2014) <<http://www.queensu.ca/mcp/>> accessed 1st September 2018.

¹² Panayi (n 3) 307.

¹³ Migration Watch UK, 'Net Migration statistics' (March 2018) <<https://www.migrationwatchuk.org/statistics-net-migration-statistics>> accessed 1st October 2018.

numbers of migrants.¹⁴ Migration Watch UK state that ‘...the massive increase in the level of migration since the late 1990’s is utterly unprecedented in the country’s history dwarfing the scale of anything that went before’.¹⁵ We need to understand the approach of the United Kingdom to these population movements in order to fully comprehend our multicultural society. We need to be able to offer a critique of accounts of and successive government responses to multiculturalism that do not appear to grasp the complete picture. For example Parekh asks us to rethink the national story but is criticized by Panayi for beginning it only in 1945 and seeing it only from an Asian perspective.¹⁶ This knowledge, which reinforces an interdisciplinary methodology, is also essential to give us the context within which to further a meaningful socio-legal analysis of the culture-responsibility relationship. It also further serves to reinforce the closeness between this wider realm of multiculturalism as social reality, as philosophy and as policy and the specific and narrow research question that this thesis seeks to address.

The United Kingdom is considered, at face value, to have a long tradition of toleration. The Toleration Act of 1689, passed only some 150 years after the 1534 Act of Supremacy, was the final Act of Parliament of the Reformation. It gave freedom of worship to non-conformist Protestants, with Locke famously commenting ‘I esteem that toleration be the chief characteristic mark of the true

¹⁴ The UN definition of a migrant is someone who moves to another country for at least 12 months

¹⁵ Migration Watch UK, ‘A Summary History of Immigration to Britain’ (Briefing Paper 6.1) <<https://www.migrationwatchuk.org/briefing-paper/48>> accessed 1st October 2018.

¹⁶ Panayi criticizes Parekh’s account of multiculturalism in the latter’s report *The Future of Multi Ethnic Britain* on the basis that he considers the situation from the viewpoint of Asian immigrants since 1945. However, the report is that of a Commission of more than 20 people ‘...with a long record of intellectual and political engagement with race related issues’ and so it clearly has a wider frame of reference, but note the reference to ‘race relations’ and not cultural diversity.

church'.¹⁷ Yet, some have questioned whether the 1689 Act really was a sign of toleration or a political move to unite conformist and non-conformist Protestants together against Catholics. There are other historical examples of surface toleration and accommodation hiding a more sinister political agenda. The Jew Bill of 1753 (later the Jewish Naturalisation Act) gave Jews the right to naturalisation upon application to Parliament, yet underlying this apparently liberal and accommodating concession was the recognition of the economic value of a small population of wealthy Jewish merchants in whose favour the Act was addressed. In any event the law was repealed in 1754 due to widespread opposition to its provisions. Rabin argues, supporting the theme that 'suspect communities' have been socially constructed throughout history, that the existence of 'threatening' outside groups in the eighteenth century was necessary in order to strengthen Anglican identity. 'The debate over the Jewish Bill suggests that the formation of a British identity in this period was dependent to some degree on the maintenance of a complex of negative stereotypes of religious error that embodied Jews, Muslims, Catholics...'¹⁸ In this way the 1753 Act and its repeal hid a deeper problem still relevant today and that is the floundering by the successive governments in matters of addressing other cultures or minorities and in attempting to define ideas of 'Britishness'. Yet these Acts of Parliament were an important part in the spread of liberal ideas following the Enlightenment and the democratic structures of Britain as a liberal democracy established during these years continue to play a central role in the process of migration. These

¹⁷ John Locke, *A Letter Concerning Toleration (Second Treatise of Government and A letter Concerning Toleration)*, Oxford World Classics, Oxford University Press, 1st Edition 2016 ed Mark Goldie).

¹⁸ Dana Rabin, 'The Jew Bill of 1753: Masculinity, Virility and the Nation' (2006) 38 (2) *Eighteenth Century Studies* 157,168.

formative years arguably saw the beginnings of British multiculturalism as a policy with the rights of Jews being recognized tentatively from the end of eighteenth century following the Enlightenment and they undoubtedly paved the way for Jews to campaign for full civil rights, the Jewish Association for the Removal of Civil and Religious Disabilities being formed with this as an agenda.¹⁹ The story is similar with Catholic Emancipation where a campaign for equal rights for Catholics led by pressure groups resulted in the 1829 Catholic Relief Act and that movement again set the scene for subsequent groups to seek equal rights. Panayi says that the Catholic Relief Act 1829 is the most significant legislation passed in favour of a minority group in the last 200 years on the basis that it recognised the concept of 'equal rights'.²⁰ Yet, nowhere in this early discourse on equal rights is there a corresponding exploration of equal responsibility.

At the end of the eighteenth century there were no restrictions on aliens entering the country but in 1793 the Alien Act was passed obliging aliens to register when coming into the country and giving the Home Secretary the power to deport 'suspicious aliens'. Perhaps this is an early example of the government using immigration as a tool to regulate 'outsiders' and any practices seen as undesirable. Such a practice has been seen in recent years in the amendment of Rule 277 of the Immigration Rules in 2008 which raised the age for marriage

¹⁹ Steven Wendehorst (ed), *The Emancipation of Catholics, Jews and Protestants: Minorities in the Nation State in Nineteenth Century Europe* (Manchester, Manchester University Press 1999).

²⁰ Panayi (n 3) 264. 'Catholic Emancipation inaugurated the liberal democratic era'. Fergus O'Ferrall, *Catholic Emancipation: Daniel O'Connell and the Birth of Irish Democracy* (Humanities Press International, 1985).

visas from 18 to 21 with the motivation of deterring forced marriage prior to the criminalisation of forced marriage in 2014.²¹

Mass migration to the United Kingdom began in 1841 with the influx of Irish fleeing the famines of the 1840s. This was in fact 'internal migration' as Ireland was at that time part of the United Kingdom. However, until the beginning of the twentieth century the United Kingdom took a *laissez-faire* approach to entry on immigration, its borders largely unregulated and open to all. This ended with the passing of the Alien's Act 1905 in response to the 'Jewish Question', which arose from a perception of 'Jewish criminality' and degenerating housing within the community of Jewish Eastern European immigrants who had begun to settle in the East End of London from the 1880's onwards. The immigrants were perceived to be engaging in the large scale trafficking of girls for prostitution.²² The Act imposed restrictions on the entry of 'undesirable' immigrants and allowed for the expulsion of those already here and again defined as 'undesirable'.²³ Knepper identifies this as an early episode of racial criminalisation in the criminal justice system.²⁴

²¹ The Supreme Court later ruled that the amendment to Rule 277 was not compatible with Art 8 (1) of the European Convention on Human Rights because it prevented parties in genuine marriages from living together and was therefore disproportionate as a means of dealing with the social evil of forced marriage (*R Quila and another*) v *Secretary of State for Home Department* [2011] UKSC 45). Migration Watch UK, 'A Summary History of Immigration to Britain' (Briefing Paper 6.1) <<https://www.migrationwatchuk.org/briefing-paper/48>> accessed 1st October 2018.

²² Documented by Paul Knepper, 'British Jews and the Racialization of Crime' (2007) 47 (1) *British Journal of Criminology* 61.

²³ 'Undesirable' was defined as:

- i needing support financially
- ii being a lunatic or idiot
- iii sentenced in a foreign country for a crime (not a political crime)
- iv already subject to an expulsion order.

²⁴ Knepper (n 22) Seen more recently through the creation of the offences of Forced Marriage and FGM as discussed in section 3.3.

Historians consider that the 1905 Act was largely unworkable as it required a whole scale bureaucratic infrastructure to enforce it that simply did not exist.²⁵ Pellow presents a table of immigrant traffic and inspection from 1906 to 1913 that shows that 7594 aliens were refused entry and an additional 2866 expulsion orders were made during these years.²⁶ This is out of a total of some 3.5 million who arrived on 'immigrant ships' during the same time period. The approach of government agencies to this Act demonstrates that policy was not about the settlement of immigrants following arrival in the United Kingdom but about controlling immigration because '...politically it has nearly always been an emotive issue, where liberal ideas of welcoming strangers have conflicted with a variety of fears about letting them in unrestricted'.²⁷ Yet, despite the overtones of the Act, Sacks sees the treatment of the newly arrived 'suspect community' as an example of successful integration effected by the long established and socially accepted British Jewish community who took the initiative in forming charitable committees to help the new immigrants to settle and to see the 'error' of their ways when contravening the norms of established British society.²⁸ Where was the United Kingdom government in the settlement of these new immigrants? It was the existing immigrant communities and the voluntary sector that was taking on the burden of settlement and nowhere was there any official statement of expectation of them on arrival. Again, we see evidence of recurring themes in policy in this early social reality of multiculturalism.

²⁵ The National Archives keep records of expulsion orders under S3 (1) A of the Act for some years but these are not available digitally.

²⁶ Jill Pellow, 'Communication: The Home Office and the Aliens Act 1905' (1989) 32 (2) *The Historical Journal* 369.

²⁷ *ibid* 378.

²⁸ Jonathan Sacks, *The Home We Build Together: Recreating Society* (London, Continuum International Publishing Group Ltd 2009).

Despite mass population movement as a result of the upheaval of two world wars the next fifty years were broadly characterized by a non-interventionist strategy regarding immigration.²⁹ One exception to this was the blatantly xenophobic legislation aimed at German people during and following the First World War.³⁰ The Aliens Restriction Act 1914 perhaps gives us the first evidence of the interaction between the criminal law and the responsibilities of aliens in relation to it. The power of the Home Secretary to expel aliens in the event of a criminal conviction in a foreign country was extended to allow expulsion for crimes committed after arrival in the United Kingdom. This included all crimes punishable by imprisonment including summary offences.³¹

Following the Second World War the government intervened in immigration matters again with the passing of the Polish Resettlement Act 1947 (under which 200,000 Polish immigrants arrived in five waves to supply labour in the post war years) and the British Nationality Act 1948 (under which immigrants from former colonies came to the United Kingdom in the 1950's and 1960's, although Crowder argues that the 1948 Act was put in place to allow white people from the Dominions to travel to and from the United Kingdom freely).³² The latter created

²⁹ For example, the resettlement of 250,000 Belgian refugees in 1914 following the outbreak of World War 1 (organised and administered by Non-Governmental Organisations) and the resettlement of 4000 Basque children in 1937 as a result of the Spanish Civil War (organised by voluntary organisations).

³⁰ For example the Aliens Restriction Act 1914 which required all foreign nationals to register with local police. The Aliens Restriction (Amendment) Act 1919 extended the emergency war time powers in the 1914 Act but the motivation was understood to be the desire to safeguard jobs for indigenous white people. Remarkably this 1919 Act was renewed annually until 1971 when it was repealed by The Immigration Act of that year.

³¹ S 3 (1) (d) Aliens Restriction (Amendment) Act 1919

The Secretary of State can make an expulsion order if '...it is certified to him by any court (including a court of summary jurisdiction) that the alien has been convicted by that court of any felony or misdemeanor or other offence for which the court has power to impose imprisonment without the option of a fine... and that the court recommend that an expulsion order should be made in his case either in addition to or in lieu of this sentence'.

³² George Crowder, *Theories of Multiculturalism: An Introduction* (Polity Press 2013) 22.

a 'Citizen of the United Kingdom and Colonies' for those born or naturalised in the United Kingdom or Colonies and allowed citizens of the Colonies the unrestricted right to reside in the United Kingdom.

As an aside here, the legislation relied on the complex notion of citizenship. The idea of citizenship (and this is almost exclusively construed as 'British citizenship' rather than citizenship of the United Kingdom or England and/or Wales) is complex due to its historical evolution from the idea of the subject (post 1066) who owed allegiance to the sovereign. The concept of citizenship was recognized by Blackstone on the basis of the principle of *jus soli*, a natural born subject being born within the dominion of the crown.³³ In his Citizenship Review of 2007 Goldsmith gives the example of the 1948 British Nationality Act, which creates the idea of Commonwealth Citizenship based on the British Nationality Status of Aliens Act 1914 which states that '...any person born within His Majesty's Dominions and Allegiances was a natural born British subject'.³⁴ The Act also relies on the principle of *jus soli*, extended to include British subjects throughout the Empire.

Returning to the 1948 British Nationality Act, underlying the apparent legislative welcome the political message was less warm. A Privy Council memo to the Foreign Office in respect of the 492 skilled workers from Jamaica arriving on *SS Empire Windrush* in June 1948 (their arrival being seen as a symbol of the success of the 1948 Act in drawing '...immigrants of good stock' to help rebuild a

³³ Blackstone's Commentaries, 4BI Comm 24 (1753).

³⁴ Lord Goldsmith QC, 'Citizenship: Our Common Bond' (The Goldsmith Report 2008) <<http://image.guardian.co.uk/sys-files/Politics/documents/2008/03/11/citizenship-report-full.pdf>> accessed 1st October 2018.

country devastated by war) recommended that ‘...no special effort be made to help these people ...otherwise it might encourage a further influx’.³⁵ There was definitely a political assumption of an assimilationist approach to the ‘dark stranger’ although as Winder goes on to point out, the government did not provide any political leadership for these immigrants, perhaps a missed opportunity in terms of providing a structured way forward and of considering notions of rights and responsibilities.³⁶ A report at the time included the following ‘...a large coloured community as a noticeable feature of our social life would weaken ...the concept of Englishness or Britishness to which people of British stock throughout the Commonwealth are attached.’³⁷

When the numbers of Colonial immigrants began to increase significantly by the beginning of the 1960’s this political message was reinforced and controls were successively introduced in the Commonwealth Immigration Acts of 1962 (under which, for example, proof that the immigrant had a job had to be shown) and 1968 (which introduced the requirement for the immigrant to have a ‘substantial connection with the United Kingdom’). By 1972 the distinction between Commonwealth and non-Commonwealth immigrants had been abolished and the scene was set for an attitude of suspicion and hostility towards all immigrants. This control in immigration was accompanied by a strong race relations agenda, with race relations being a central policy issue from the 1960’s until the 1980’s. This remained the case following what were termed the ‘black race riots’ of the

³⁵ Identified in Robert Winder, *Bloody Foreigners: The Story of Immigration to Britain* (London, Little Brown 2004).

³⁶ *Comes the Dark Stranger* is the title of a book by Patterson. H Patterson, *Comes the Dark Stranger* (London, Harper 1963).

³⁷ Royal Commission on Population 1944-1949 <<http://nationalarchive.go.uk/details/r/C13392>> accessed 1st September 2018.

1980's, with more anti- discrimination legislation being introduced following the Scarman Report and with an integration policy aimed at immigrants and families who had been in the United Kingdom for some time, not at the new flow of immigrants.³⁸

In addition to this Colonial immigration following World War Two there have been large numbers of refugees who began to arrive in waves immediately after 1945 when 91,151 displaced persons settled in the United Kingdom and, once again, provided labour.³⁹ The impact of European Union law on the free movement of persons is also hugely significant with the Migration Observatory at the University of Oxford noting a huge increase in net migration to the United Kingdom following the accession of the A8 countries to the European Union in May 2004.⁴⁰ Their total net migration figures for the period 2004-2012 are estimated at 423,000,

³⁸ For example Police and Criminal Evidence Act 1984 with its focus on fair policing and the establishment of the Police Complaints Authority in 1985.

The Scarman Report was commissioned by the UK Government following the Brixton Riots in 1981. Its terms of reference were to 'inquire urgently into the serious disorder in Brixton on 10-12 April 1981 and to report with the power to make recommendations'. It concluded that urgent action was needed to prevent racial disadvantage '...becoming an endemic, ineradicable disease threatening the very survival of our society'. It recommended recruiting more ethnic minorities to the police force and more community engagement between the police and racial minorities.

Integration: Mapping the Field

Report of a Project carried out by the University of Oxford Centre for Migration and Policy Research and Refugee Studies Centre contracted by the Home Office

Immigration Research and Statistics Service (IRSS). Stephen Castles, Maja Korac, Ellie Vasta, Steven Vertovec, 'Integration: Mapping the Field' (December 2002)

<<http://forcedmigrationguide.pbworks.com/w/page/7447907/Integration%3A%20Mapping%20the%20Field>> accessed 1st October 2018

³⁹ Panayi (n 3) 44. Figure of 91151 taken from p41. For example 30,000 from Iranian revolution of 1979, 15,000 from Vietnam as a result of Vietnamese War, 3000 from dictatorship of general Pinochet in Chile and 15,000 Kurds estimated numbers since 1800. (Irish 2.2million).

⁴⁰ European Parliament and Council Directive [2004/38/EC](#) of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives [64/221/EEC](#), [68/360/EEC](#), [72/194/EEC](#), [73/148/EEC](#), [75/34/EEC](#), [75/35/EEC](#), [90/364/EEC](#), [90/365/EEC](#) and [93/96/EEC](#).

The A8 countries are Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

although this figure is challenged by the Office for National Statistics as being underestimated by 346,000.⁴¹

Multiculturalism as Social Reality Today

As for the social reality of multiculturalism today, Howarth and Andreouli call for the adoption of a social psychological approach to assess the successes or failures of multiculturalism 'on the ground...otherwise academic and political discussions are in danger of being disconnected from real life experiences and actual intergroup relations' and multiculturalism is either seen in political terms as a failed project or in academic discussion where the focus is on institutional frameworks that advance cultural equality (as, for example in Kymlicka and Banting's work).⁴² In this way they are able to examine '...the lived realities of cultural diversity and the tensions that are associated with it'.⁴³ They envisage research where intergroup interactions in everyday life are empirically studied alongside macro-level theorisation of multicultural justice and citizenship.

Using Berry's acculturation framework and data from the *UK Household Longitudinal Study* and as part of the ESRC funded *Understanding Society* Project Nandi and Platt seek to analyse the degree of acculturation among

⁴¹ Figures from University of Oxford. 'The Migration Observatory' <<http://www.migrationobservatory.ox.ac.uk/briefings/migration-flows-a8-and-other-eu-migrants-and-uk>> accessed 12th February 2015.

In their 'Quality of Long-Term International Migration Estimates from 2001-2011' report published on 10th April 2014, the ONS has revised the total net migration estimates for 2001-2011; this suggests that the total net migration between 2001 and 2011 was underestimated by 346,000 net migrants. Office for National Statistics, 'Quality of Long-Term International Migration Estimates from 2001-2011' <[webarchive.nationalarchives.gov.uk/20160106010421/http://www.ons.gov.uk/ons/guide-method/method-quality/specific/population-and-migration/international-migration-methodology/quality-of-long-term-international-migration-estimates-from-2001-to-2011---full-report.pdf](http://www.ons.gov.uk/ons/guide-method/method-quality/specific/population-and-migration/international-migration-methodology/quality-of-long-term-international-migration-estimates-from-2001-to-2011---full-report.pdf)> accessed 12th February 2015.

⁴² Howarth, and Andreouli (n 5) 1.

⁴³ *ibid* 2.

minorities (and the majority) in their 2013 paper.⁴⁴ Their conclusions are based on data from 28,000 randomly selected households and 4,000 households selected to provide an 'ethnic minority boost sample'. They conclude that across all groups the most common acculturation outcome is integration with British identity being stronger in cases where there are second generation immigrants. (Marginalisation is strongest among the Caribbean group, who feel most isolated from the dominant society and, as time has passed since their migration, make less investment in creating alternative identities). It is interesting to note a link between actual acculturation outcomes (as measured by Nandi and Platt) and the desired outcomes (now integration) of multicultural policy.

In 2000 and 2010 the Multicultural Policy Index maintained by Kymlicka and Banting at Queen's University Canada, with the aim of monitoring the evolution of multicultural policies in 21 western democracies by measuring the presence or absence of multicultural policies in those countries, categorised the United Kingdom's multiculturalism as 'moderate' with a score of 5.5 (it had been 2.5 in 1980) pointing out that multiculturalism is typically recognized as a demographic fact but policy discourse relies more on the terms cohesion and integration than

⁴⁴ Berry's acculturation framework is discussed in detail in section 2.4 and broadly identifies four possible acculturation outcomes.

The UK Household Longitudinal Study (UKHLS) is a major research study designed to provide new evidence about people in the UK, focusing on their lives, experiences, behaviours and beliefs and how people in the same household relate to each other. The Study was commissioned by the Economic and Social Research Council and is led by the Institute for Social and Economic Research (ISER). The National Centre for Social Research conducts the fieldwork for the survey. The study started in 2009 and follows 100,000 individuals in 40,000 households each year.

Alita Nandi and Lucinda Platt, 'Britishness and Identity Assimilation Among the UKs Minority and Majority Ethnic Groups' (2013) Working Paper Series no 2013-08

<<https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2014-01.pdf>>

accessed 1st October 2018.

on multiculturalism.⁴⁵ The index has taken measurements in 1980, 2000 and 2010 and their 'Index for Immigrant Minorities' is intended to track the extent of this multicultural shift over the past three decades, by examining the adoption of eight multicultural policies.⁴⁶ There is no definition of a 'multicultural policy' and so the measurement is controversial and, by the author's admission 'perhaps arbitrary at the edges'.⁴⁷ Rattansi is critical of Kymlicka and Banting's work on the basis that their list of policies is contentious and that the list gives only a brief indication of the responses of nation states to ethnic minorities.⁴⁸ It is indeed a crude measurement but it is useful in giving some indication of just how multicultural our society is.

In 2004 Joppke identified a seismic shift from a language of multiculturalism to one of civic integration.⁴⁹ David Cameron identified the failure of state multiculturalism in a speech at a security conference in Munich on 5th February 2011 criticising 'state multiculturalism' as encouraging some to live separate lives and linking it to radicalisation and the causes of terrorism.⁵⁰ He called for a

⁴⁵ The MPI is a '...scholarly research project that monitors the evolution of multicultural policies in 21 Western democracies... the project provides an index at three points in time, 1980, 2000 and 2010 for three types of minorities.

<www.queens.ca/mcp>
accessed 1st October 2018.

⁴⁶ *ibid.* These are:

- constitutional, legislative or parliamentary affirmation of multiculturalism;
- the adoption of multiculturalism in school curriculum;
- the inclusion of ethnic representation/sensitivity in the mandate of public media or media licensing;
- exemptions from dress-codes, Sunday-closing legislation etc;
- allowing dual citizenship;
- the funding of ethnic group organizations to support cultural activities;
- the funding of bilingual education or mother-tongue instruction;
- affirmative action for disadvantaged immigrant groups.

⁴⁷ Will Kymlicka and Keith Banting, 'Is there Really A Retreat From Multiculturalism Policies? New Evidence From the MCP Index' (2013) 11 (5) *Comparative European Politics* 577.

⁴⁸ Rattansi (n 4) 17.

⁴⁹ Christian Joppke, 'The Retreat of Multiculturalism in the Liberal State: Theory and Policy' (2004) 55 (2) *British Journal of Sociology* 237.

⁵⁰ BBC News, 'State Multiculturalism has Failed, Says David Cameron' (5th February 2011) <<http://www.bbc.co.uk/news/uk-politics-12371994>> accessed 10th October 2018.

stronger national identity, a 'shared national identity', stating '...we need a lot less of the passive tolerance of recent years and much more active liberalism'.⁵¹ He warned Muslim groups that if they failed to endorse women's rights or to promote integration they would lose their funding.

Certainly it cannot be argued that multiculturalism as social reality does not exist. But the reality is it that it is more than ever tied up in the public mind with radicalisation and terrorism within Muslim populations and the popular media in particular depicts it as a threatening reality. 'Multiculturalism has of late generated alarmist critiques in connection with its perceived support for a new tribalism and an associated threat to equality and democracy or at least to national and social cohesion'⁵² There is a sense of moral panic, Muslims being the 'suspect community' of our times and what Modood has identified as Islamaphobia.⁵³ In the past, when faced with such anxieties, Western states have often adopted exclusionary and/or assimilationist policies towards immigrants. States denied entry or naturalization to those immigrants who were perceived as unable or unwilling to assimilate, and anyone seeking citizenship was expected and sometimes even required to renounce or hide their earlier ethnic identities. Yet since the 1960s, a different approach has emerged in some Western countries, in which assimilation is renounced as a goal, and integration is seen as compatible with maintaining and publicly expressing an ethnic identity. People

⁵¹ Content of speech available at: Cabinet Office, Prime Minister's Office, 10 Downing Street, 'PM's Speech at Munich Security Conference' (5 February 2011) <<https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference>> accessed 10th October 2018.

⁵² Vaughan Black, 'Cultural Thin Skulls' (2010) 60 UNBLJ 186, 190.

⁵³ Tariq Modood, 'Islamaphobia: A Form of Cultural Racism' (2018) Submission to All Party Parliamentary Group on British Muslims in response to call for evidence on working definition of Islamaphobia <http://www.academia.edu/36775691/Islamaphobia_A_Form_of_Cultural_Racism> accessed 1st October 2018.

can participate in society through membership in immigrant ethnic communities, which are seen as legitimate social and political actors that are worthy of support and consultation. As Fischl and Johnson point out, being Muslim was not an issue until after 9/11. There were no questions on religion on the census form until 2001. The Muslim Council of Britain was not formed until 1997. But by the summer of 2005 task force groups had been created with the aim of looking at the place of Muslims in society and in the same breath at what could be done to combat violent extremism.⁵⁴ 'CONTEST', the government's anti-terrorism strategy was the result.

If the social reality of multiculturalism can lead to the perceived victimisation of certain groups then the white working class can sometimes be perceived as victims of our multicultural society. Putnam's theory of social capital, '...the connections among individuals- social networks and the norms of reciprocity and trustworthiness that arise from them' involves bonding (cohesion amongst defined communities) and bridging (overlapping networks between different communities bringing together people who are unlike). It recognizes that bonding capital can have a dark side as it excludes 'others' but the concept of 'shared values' becomes important in context of bridging capital, which suffers where there is too much cultural difference, with ethnic diversity contributing to a decline in trust.⁵⁵

⁵⁴ For example The Working Group on Tackling Extremism and Radicalisation. Home Office, 'Counter-terrorism strategy (CONTEST)' (26 Mar 2013) <<https://www.gov.uk/government/collections/contest>> accessed 16th March 2018.

⁵⁵ Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York, Simon and Schuster 2000).

Cavanagh claims that Robert Putnam had considerable influence over the policy makers in Communities and Local Government from 2007 onwards and as a result social cohesion and integration became confused.

Jill Rutter, 'Back to Basics: Towards A Successful and Cost-Effective Integration Policy' (Institute for Public Policy Research, Mar 2013)

Rattansi says Putnam's theory has severe conceptual, methodological and empirical limitations and that the transfer of his thesis to the United Kingdom is especially problematic because Putnam ignores 'cultural capital' which allows upper classes to build exclusive networks and advantages.⁵⁶ Putnam's emphasis is on the quantity not quality of relationships. He takes a broad historical sweep ignoring locales. He also ignores important social changes, for example he assesses political participation through formal political organisations rather than through alternative politics. Peter Hall looks at a different picture in Britain.⁵⁷ He finds little intergenerational difference in rates of participation and hence little evidence of a decline in social capital. Hall's analysis reveals a large gap in trust between middle and working classes in Britain whereas Putnam's work is based on an overall decline in civic trust. He has little to say about large differences in civic trust exhibited by privileged and marginalized groups. In December 2009 John Denham MP berated the middle classes for not understanding the impact of immigration on poorer workers. The middle class could benefit from 'cultural enrichment' but the working class experience pressure on jobs and housing. In 2004 Goodhart took Denham's recognition of the resentment of the white working class further and drew the conclusion that immigration and growing diversity were undermining the kind of common culture, trust and solidarity that had earlier allowed a culture of sharing to develop, his basic assumption being that citizens are likely to be supportive of welfare benefits only to those who seem similar to themselves in values and lifestyle.⁵⁸ The more different the culture of their

<https://www.ippr.org/files/images/media/files/publication/2013/03/back-to-basics-integration_Mar2013_10525.pdf?noredirect=1> accessed 1st October 2018, 38.

⁵⁶ Rattansi (n 4) 100.

⁵⁷ Peter A Hall, 'Social Capital in Britain' (1999) 28 *British Journal of Political Science* 417.

⁵⁸ David Goodhart, 'Too Diverse?' (2004) 95 (30) *Prospect Magazine* 7.

neighbours and the less the sense of shared history, struggles and a collective contribution to the welfare state, the less strong the feelings of empathy, sympathy and solidarity that the white indigenous population feel. A 2006 study of London's changing East End highlights this.⁵⁹ It paints a picture of acute hostility where the white working class population is seething with anger at the new culture and practice of entitlement according to need rather than contribution to local and national wealth. But the study has been criticized for a lack of contextual information, for homogenizing the white working class (which consisted of Irish, Polish, Greek, etc.) and treating the poorest as synonymous with the whole. Minorities are unified in other misleading ways- the local dynamics cannot be encapsulated in an account that simply pits whites against Bangladeshis. Multiculturalism is the social reality of the United Kingdom in the twenty first century. However, the social reality of multiculturalism is uneasy. Successive governments have failed to put in place strong policy guidance reacting instead to perceptions of threats. Ashcroft and Benn say that the current approach to multiculturalism is one of 'rebalancing'.⁶⁰

Certainly in terms of the criminal law generally and the culture-responsibility relationship in particular this re-balancing is a welcome development. Throughout this exploration of multiculturalism as social reality we can see a number of themes. They can be broken down into eight themes and listed as follows:

- Multicultural policy is, and has historically been, elusive and there is a lack of consistency and of clarity in both purpose and terminology and in particular a lack of engagement with the criminal law.

⁵⁹ Gavron G Dench and K Young, *The New East End: Kinship. Race and Conflict* (Profile Books 2006).

⁶⁰ Richard Ashcroft and Mark Bevir 'Multiculturalism in Contemporary Britain; Policy, Law and Theory' *Critical Review of International, Social and Political Philosophy* 2018 21 (1) 1-21.

- There is and has been an emphasis on immigration control rather than post immigration settlement. The British Nationality Act 1948 missed the opportunity to consider the rights and responsibilities of immigrants and this omission has been successively followed throughout the history of immigration policy.
- Favell states that the historic approach to multiculturalism in the United Kingdom has been one of race relations through social cohesion.⁶¹
- Where it is possible to find policy on post immigrant/migration settlement this has largely been directed at regulating 'undesirable practices' following immigration.
- Throughout history beginning with responses to Jewish Immigrants in the 1800's it is possible to identify the emergence of 'suspect communities' made up of certain groups of immigrants. Legal responses to such groups may have the potential to result in unjust laws.
- There is an emphasis in policy (and in academic literature) on rights rather than responsibility. This absence of reference to responsibility includes of course criminal responsibility and therefore it is not surprising that if criminal responsibility generally is not in the multicultural discourse then the culture-responsibility relationship must too be forgotten or excluded.
- The matter of post immigration settlement is largely delegated to local communities with central government distancing itself from involvement.
- Policy and academic literature focus on the immigrant and immigrant communities. This does not encompass the whole picture of our contemporary multicultural society consisting now of migrants and refugees too. As Ashcroft states multiculturalism in the United Kingdom '...seems primarily to be viewed in terms of the non-white immigration sparked by decolonization.'⁶²

Bearing these overarching themes in mind it is easy to see how the culture-responsibility relationship has indeed been overlooked in multicultural policy. Ashcroft recognizes that '...a recurring feature of the different debates over multiculturalism is...a challenge by a minority to implicit or explicit norms or practices of a majority.'⁶³ The culture-responsibility relationship encapsulates such challenges which arise from minority claims that the neutrality of the state is illusory, something that we are familiar with through perceptions of the endemic

⁶¹ A Favell, 'Multicultural Race Relations in Britain: Problems of Interpretation and Explanation' in Christian Joppke, *Challenge to the Nation State: Immigration in Western Europe and the United States* (Oxford Scholarship Online 2003).

<<http://www.oxfordscholarship.com/view/10.1093/0198292295.001.0001/acprof-9780198292296-chapter-10>> accessed 1st October 2018.

⁶² Richard T Ashcroft and Mark Bevir, 'Multiculturalism in Contemporary Britain: Policy, Law and Theory' (2017) 21 (1) *Critical Review of International Social and Political Philosophy* 1, 14.

⁶³ *ibid* 3.

cultural bias in the criminal justice system explored in section 2.4. Ashcroft recognizes too that the ‘...domestic legal issues raised by multiculturalism in the UK are legion and there is really no aspect of domestic law that has been untouched’ but we are yet to see evidence of the criminal law responding to such issues, at least in the realm of responsibility.⁶⁴

⁶⁴ *ibid* 8.

4.3 Multiculturalism as Policy

The focus of this section is a review and analysis of historic and contemporary multicultural policy in the United Kingdom. The historical approach is required because demographic multiculturalism within the unique socio-political context of the United Kingdom has been identified in the introduction to this thesis as one of the two parameters within which the culture-responsibility relationship should be analysed and situated. It is therefore necessary to examine the evolution of the contemporary multicultural population and the historical policy response to that evolution to enable us to understand why we are where we are today and to distinguish this jurisdiction from others where there has perhaps been a different trajectory in the formation of the multicultural makeup. Contemporary multicultural policy needs to be examined because the aim of the thesis is to undertake a socio-legal and interdisciplinary analysis of the culture-responsibility relationship and an understanding of relevant policy will provide the social and political context underlying the way forward for this relationship in the criminal law of England and Wales. Again, Cotterrell is helpful here in arguing the case for a socio-legal approach that makes ‘...the study of law a great conversation that draws on the whole range of types of knowledge necessary to make that conversation an informed one’.⁶⁵

The assertion in the introduction to this thesis that the United Kingdom has not adopted a ‘policy of multiculturalism’ is perhaps a misleading and oversimplified statement that needs re-examining. It implies that ‘a policy of multiculturalism’ is a one dimensional and straightforward thing, a question of agreement at the

⁶⁵ *ibid* 5.

highest level that we embrace and commit to what is, *de facto*, a 'multicultural' world. It further implies that the United Kingdom government and its predecessors have failed to give any consideration to the issues raised by multiculturalism. Although this thesis is critical of successive governments and other agencies (particularly those within the criminal justice system) for their failure to engage in a meaningful way with, as appropriate, multiculturalism or culture and in turn with the culture-responsibility relationship, the latter a problem that has arisen from the demographic condition of multiculturalism, it is not fair to suggest that there have been no attempts to consider certain aspects of multiculturalism. In fact as the section on the history of multiculturalism above shows successive United Kingdom governments have been managing population movement, and the consequent multicultural circumstances, for centuries. It is certainly possible to identify trends in multicultural policy (perhaps subtly different from the trends identified in reality in section 4.2) notably race relations, Parekh's Britishness defined as a '...plural identity that celebrates difference as a community of communities', social cohesion and more recently the affirming of shared values and integration.⁶⁶ However, as Howarth and Andreouli point out, we now need to recognize the current intensity of multiculturalism due to globalization.⁶⁷

In this light, the existing approach to dispensing with the issues that compete in the sphere where cultural diversity and the criminal law of England and Wales meet, which involves a semblance of accommodation and equality, can be seen as an inadequate response to contemporary social reality and this failure to

⁶⁶ Bhikhu Parekh, *The Future of Multi Ethnic Britain: Report of the Commission on the Future of Multi-Ethnic Britain* (London, Profile Books 2000).

These trends are summed up by Jopkke (n 60) 16.

⁶⁷ Howarth, and Andreouli (n 5).

engage on a deep level with what cultural diversity means for the future of the criminal law of England and Wales at both a theoretical and a practical level and to consider suggestions for the way forward is a missed opportunity in the quest for justice and for a law that should be evolving to be fit for purpose in a multicultural era.⁶⁸

It is necessary to define what is meant by 'policy'. This is limited to that found in the documents that have been identified and listed in Annex B to this thesis (part 1 lists relevant government documents and, part 2 EU sources and part 3 those from other relevant organisations and sources) and to that necessarily inferred from historical analysis where policy is not made explicit. In fact it is difficult to find definitive statements of multicultural policy in relation to any period and most of what we know, certainly until the 1960's, seems to come from retrospective academic analysis and commentary. A Hansard search for the terms 'multicultural' and 'multiculturalism' between 1st January 1800 and 31st October 2018 reveals 226 references with the first not appearing until 1985 and with a peak in 2007/8. Most of these references are in relation to immigration, terrorism and, latterly, Brexit.

A deductive approach is applied to the analysis of 'policy' with a view to establishing that law (and especially the concept of responsibility) and policy have largely failed to interact. It is difficult to categorise the research method chosen to analyse these policy documents. It could be argued that the analysis is nothing more than an extended Literature Review but, as explained in section 1.4 it is

⁶⁸ Discussed in detail in Chapter 3.

more 'thematic' in searching for references to engagement between law (particularly the criminal law and responsibility) and policy. The approach taken could fall within a strict definition of Content Analysis, '...a research technique for the objective, systematic and quantitative description of the manifest content of communication'.⁶⁹ Content Analysis is considered a quantitative method of social research with an emphasis on measurement and the transparency of rules used in the analysis. The key qualities of Content Analysis are being objective and systematic, the technique involved here including those characteristics. However, the method chosen does not look at manifest content, such as would be the case with the mass media texts typically analysed using this method, but with latent content as an underlying theme is sought and identified. Perhaps the approach better fits what Bryman refers to as 'qualitative content analysis'.

The method is therefore described as qualitative and it can be subject to a deductive or an inductive approach, although Finfgeld-Connett warns of a threat to validity with a deductive approach (taken here as stated above) because of the possibility of verifying the obvious and overlooking that which runs counter to the hypothesis.⁷⁰ Writers on the method envisage a sample of the relevant documents being examined but here no sample was selected because as complete a body of documents as it has been possible to find has been analysed.

⁶⁹ Bernard Berelson, *Content Analysis in Communication Research* (1952) as quoted in Alan Bryman, *Social Research Methods* (5th edn, Oxford, Oxford University Press 2016) 289.

⁷⁰ Deborah Finfgeld-Connett, 'The Use of Content Analysis to Conduct Knowledge Building and Theory Generating Qualitative Systematic Reviews' (2013) 13 (2) *Qualitative Research* 341, 345.

However, as will be seen, there is little to be found within policy documents, both historic and contemporary, to assist in answering the research question *how should the criminal law of England and Wales respond to the relationship between culture and legal responsibility?* This finding advances the hypothesis that the criminal law of England and Wales has failed to engage meaningfully with the social reality of our multicultural world and that the pathway through the competing demands of multicultural accommodation and the preservation of the existing social order under the Rule of Law is not clearly marked. The current focus of multicultural policy in the United Kingdom (immigration and the prevention of violent extremism) targets Muslim groups and seems to exclude all other *Conditions for Integration* where the purpose of integration is stated to be ‘long term action to counter extremism’.⁷¹ Yet multicultural policy should be about far more than this and it should certainly be providing guidance for those involved at all levels of the criminal justice system. Policy on immigration and terrorism is still much clearer than policy on multiculturalism and post-immigration settlement with the aim of the UK Border Agency being, inter alia, to strengthen the country’s borders.⁷²

The introduction to this chapter sets out the alternative understandings of the term ‘multiculturalism’. According to the understanding adopted here, multicultural policy may adopt a number of different responses to a multicultural population. The terms traditionally associated with multicultural policy include acculturation, assimilation, segregation (or separation), marginalisation and

⁷¹ Department for Communities and Local Government, ‘Creating the Conditions for a More Integrated Society’ (21st February 2012) <<https://www.gov.uk/government/publications/creating-the-conditions-for-a-more-integrated-society>> accessed 5th September 2018.

⁷² UK Immigration Advice & Information <www.aboutimmigration.co.uk> accessed 1st October.

integration but more recently new terms such as 'interculturalism' and 'omniculturalism' have emerged in academic and policy dialogue. Here we will look at understandings of assimilation and integration. The terms immigrant and migrant are used interchangeably because the sources drawn on reflect the focus of their times, immigration or migration, but understandings of these concepts apply equally to both immigrant and migrant. Before looking at specific policies over time we can understand the most common policy responses under the umbrella of multiculturalism.

We examined Berry's acculturation framework in Chapter 2 in establishing the relationship between culture and responsibility but focused there on acculturation as a process of acquiring a second culture, a psychological change within the individual.⁷³ Although it is hard to see acculturation as a policy response to the social reality of multiculturalism the outcomes of acculturation identified by Berry, integration, assimilation, separation and marginalisation, may be seen as policy responses. As will be seen below, assimilation (involving the loss of the minority culture and the adoption of the majority culture) was an implied multicultural policy in the United Kingdom in the twentieth century (implied because it appears that there is no evidence of it being explicitly stated). Assimilation is the desired outcome of a society where members are culturally indistinguishable. As a policy assimilation can be criticized for being based on the idea of a homogenous society prior to immigration; it also assumes the interconnectedness of different dimensions of assimilation (although the idea of 'segmented assimilation', usually

⁷³ This understanding is summarized in the following article by Berry and Sam. David L Sam and John W Berry, 'Acculturation When Individuals and Groups of Different Cultural Backgrounds Meet' (2010) 5 (4) *Perspectives on Psychological Science* 472, 472.

applied to second generation immigrants may overcome this).⁷⁴ If a strong assimilationist stance is adopted, there can be no allowance within the criminal law for the culture-legal responsibility relationship. However, we saw evidence in section 3.2, from case law in England and Wales, of leniency during sentencing on the basis that immigrants are becoming assimilated and this evidence comes from a period when policy was based on implied assimilation.⁷⁵ Some academic writers too argue for allowances to be made dependent upon the degree of assimilation that the defendant has experienced. For example, Ma advocates the right for defendants to rely on a 'cultural defence' for a limited time following immigration as individuals become used to local laws.⁷⁶ She suggests a period of five years but Van Broeck is rightly critical of this hard and fast rule that bears no relation to the actual degree of assimilation of the individual concerned and hence no fit assessment of responsibility and appears to be an arbitrary time period.⁷⁷ Before looking at multicultural policy in specific periods of history it is helpful to consider the meaning of 'integration'.

Integration

Whilst integration may be at the heart of today's multicultural policy (as discussed below), until recently there seems to be unwillingness in policy documents to define it. The Casey Review reversed this tendency with a definition in 2016 of

⁷⁴ Segmented assimilation theory is explained by Alejandro Portes and Min Zhou, 'The New Second Generation: Segmented Assimilation and Its Variants Among Post 1965 Immigrant Youth' (1993) *Annals of the American Academy of Political and Social Science* 530, 74-98.

⁷⁵ For example in the cases of *R v Bailey* [1961] 66 Cr App Rpt 828 and *R v Byfield* [1967] Crim LR 378 the courts imposed lenient sentences against men who had sexual intercourse with girls under the age of 16 on the basis that this was acceptable in their home countries and they had not yet been assimilated in the United Kingdom and were unaware of the law here.

⁷⁶ Veronica Ma, (1995) 'Culture Defence: Limited Admissibility for New immigrants' (1995) 3 *San Diego Justice Journal* 462.

⁷⁷ Jeroen Van Broeck, 'Cultural Defence and Culturally Motivated Crimes (Cultural Offences)' (2001) 9 (1) *European Journal of Crime, Criminal Law and Criminal Justice* 1, 1.

integration as ‘...the extent to which people from all backgrounds can get on with each other in enjoying and respecting the benefits the United Kingdom has to offer.’ But this, like multiculturalism, is still construed as having two distinct meanings with academics seeing it as a process that migrants are involved in following their arrival in the United Kingdom and policy makers seeing it as an end goal and Cavanagh’s definition, ‘...integration may be seen as a person or group of people possessing the opportunities and skills needed to ensure social inclusion and long term well-being. It is both a process and an outcome’, is therefore more encompassing.⁷⁸ It is seen as relating to equality and ‘...the elimination of unacceptable degrees of inequality and segregation’.⁷⁹ Of course the question for this thesis is how the criminal law will need to develop to play its part in a successful integration policy. A Migration Policy Institute paper of 2012 refers to integration as a ‘dazzling’ and ‘treacherous’ concept but it is understood as a two-way process based on mutual rights and corresponding obligations of immigrants and the host society that provides for full participation of the immigrant.⁸⁰ ‘This implies on the one hand that it is the responsibility of the host society to ensure that the formal rights of immigrants are in place in such a way that the individual has the possibility of participating in economic, social, cultural and civic life and on the other, that immigrants respect the fundamental norms and values of the host society and participate actively in the integration process, without having to relinquish their own identity’.⁸¹ For some, there are still overtones of assimilation ‘...in particular a concern that the key focus of interest

⁷⁸ Rutter and Cavanagh, ‘Towards a Successful and Cost-Effective Integration Policy’ (22nd March 2013) <www.ippr.org/publications> accessed 7th February 2015.

⁷⁹ *ibid.*

⁸⁰ Shamit Saggat and Will Somerville, ‘Building a British Model of Integration in an Era of Immigration: Policy Lessons for Government’ Migration Policy Institute, Washington (2012).

⁸¹ European Commission, Communication on Immigration, Integration and Employment, COM (2003) 336, Brussels, 3 June 2003.

is whether migrants will become culturally similar to the rest of the population and the normative judgment that they ought to do so'.⁸²

A detailed paper from IRSS Home Office *Mapping the Field* reports on a survey of British research on immigration and refugees undertaken between 1996 and 2001. The aim of the report is stated as being '...to better inform government policy development'.⁸³ A conceptual survey of the integration of immigrants and refugees found that whilst these groups were treated differently, there is no consensus on what integration means or on how it can be measured. However, it states that integration must be recognized as a two way process '...of adaption, involving change in values, norms and behaviour for both newcomers and members of existing society' because if it is merely one way then there are connotations of assimilation.⁸⁴ This seems to recognize the need for existing norms (and arguably laws?) to change too. Although the report recognizes that integration is complex and therefore cannot be studied from the perspective of a single discipline it does not list law among the 9 disciplines identified as covering integration.⁸⁵ This reinforces the view that law and hence responsibility and multiculturalism are disconnected. Again, there is a focus on rights '...above all integration in a democracy presupposes the acquisition of legal and political

⁸² Report of The Migration Observatory University of Oxford-COMPAS (Centre on Migration Policy and Society) Policy Primer on Integration Sarah Spencer March 2011 p4. The Migration Observatory produces policy primers. A new primer was due in June 2012 but this does not appear to have been published.

⁸³ Stephen Castles, Maja Korac, Ellie Vasta, Steven Vertovec, 'Integration: Mapping the Field' (December 2002)
<<http://forcedmigrationguide.pbworks.com/w/page/7447907/Integration%3A%20Mapping%20the%20Field>> accessed 1st October 2018.
From Executive Summary December 2002.

⁸⁴ *ibid* 116.

⁸⁵ The disciplines listed are economics, political science, history, sociology, anthropology, geography, urban studies, demography and psychology. *ibid* 114.

rights by the new members of society so that they can become equal partners'.⁸⁶ Interestingly there is reference to agency in the statement '...developing the human agency needed to function effectively in a new environment requires the individual and collective initiative of the newcomer' so perhaps in recognising agency we can see an oblique recognition of individual responsibility?

Taking this point on integration and responsibility further, in his model of refugee integration Kuhlman includes legal integration. Yet whilst the IRSS report lists possible 'indicators of legal integration' these are the right to reside, the right to participate in the labour market, the right to access social services and the acquisition of citizenship. Where are the reciprocal duties or responsibilities? The Report refers to Glover's 2001 work on areas of government policy intervention relevant to immigration and refugee law and states that Glover claims that there is 'legal flexibility to accommodate cultural/religious customs (including changes to the law to accommodate specific practices)'.⁸⁷ Unfortunately this is not taken further.

Gans identifies 'bumpy integration' where the migrant is integrated in one domain but not necessarily all. Other models of integration are based on identity and acknowledge change over time. For example Harrell-Bond and Voutira recognize three stages of integration for refugees, physical segregation, liminality and reincorporation.⁸⁸ What is absent from both policy documents and academic literature (apart from the work of Ma and Van Broeck referred to above) is an

⁸⁶ *ibid* 111.

⁸⁷ *ibid* 135.

⁸⁸ Barbara Harrell-Bond and Eftihia Voutira, 'Anthropology and the Study of Refugees' (1992) 8 (4) *Anthropology Today* 6.

account of what integration looks like in the context of the culture-responsibility relationship. This may be because the implementation of integration policies (or at least strategies), such as they are, fall largely on local government or on the voluntary and community sector and there can be conflict between central and local government with the strong view from local authorities that central government should not dictate policy where local differences require flexibility.⁸⁹

Interculturalism is a relatively new idea, interestingly promoted by Cattle, who in 2001 was the author of the Home Office Report on Community Cohesion.⁹⁰

Cattle introduces interculturalism as a replacement for multiculturalism. It seeks

‘...to provide a new paradigm for thinking about race and diversity. Multiculturalism may have had some success in the past but it has simply not adapted to the new age of globalisation and super diversity. Interculturalism is about changing mindsets by creating new opportunities across cultures to support intercultural activity and it’s about thinking, planning and acting interculturally. Perhaps, more importantly still, it is about envisioning the world as we want it to be, rather than determined by our separate past histories.’⁹¹

It is noteworthy that the term does not yet appear in policy dialogue, despite Cattle’s high profile (or former high profile) in the policy world. To some extent the dialogical approach of contemporary political philosophers examined in Chapter 4 of this thesis fits with Cattle’s framework of interculturalism. It is encouraging that Cattle is advocating a proactive approach, such as that taken here in searching for a just framework and interculturalism is an idea that we can

⁸⁹ Identified by The Migration Observatory Report. The Migration Observatory’ <<http://www.migrationobservatory.ox.ac.uk/briefings/migration-flows-a8-and-other-eu-migrants-and-uk>> accessed 12th February 2015, 5..

⁹⁰ A Report of the Independent Review Team Home Office Report (The Cattle Report 2001) <<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/Default.aspx?recordId=96>> accessed 1st October 2018.

⁹¹ Ted Cattle, *Interculturalism- the New Era of Cohesion and Diversity* (London, Springer 2012). 276

take forward to Chapter 5.⁹² The relevant question here of course is how do integration and the culture-responsibility relationship interact? If integration is both a process and an outcome the culture-responsibility relationship can be part of the process of integration through its place in clearly defining rights and responsibilities for migrants and part of the outcome as those with a cultural background different from that of the majority become clear about how their cases will be treated in the criminal justice system.

Multicultural Policy Pre 1960

As seen in discussing historical social reality, whilst it is possible to get a clear picture of the nature of late nineteenth and twentieth century immigration in the United Kingdom and government attempts to control the numbers of immigrants, it is much more difficult to find clear policy statements on what the response to the resultant new multicultural society should be. It is reasonable to conclude that throughout the period discussed above there was a preoccupation with immigration and a lack of application to the aftermath of immigration. Academic writers seem to identify an early assumption of *laissez faire* certainly until the 1960's but there appears to be no documentary evidence of this attitude. Kymlicka and Banting point out that '...each new wave of immigrants is often perceived as a source of anxiety and insecurity by native-born residents of the host society who worry about the extent to which immigrants are able or willing to integrate and about the social impact of religious and cultural differences'.⁹³

⁹² There is also the idea of omniculturalism, a situation that recognizes two stages, the first being where the omnicultural imperative demands that we give priority to human commonalities and the second being where group based differences are recognized. However, we are committed in the culture-responsibility relationship to the individual. Fathali M Moghaddam, 'The Omnicultural Imperative' (2012) 18 (3) Culture and Psychology 304.

⁹³ Kymlicka and Banting, The Multicultural Policy Index (10th December 2014) <<http://www.queensu.ca/mcp/>> accessed 1st September 2018.

Perhaps one of the ways successive governments have demonstrated of dealing with this fear has been to adopt (consciously or otherwise) an assimilationist policy. A 2007 Institute of Race Relations Briefing Paper states that ‘...assimilation was the expectation when ‘New Commonwealth’ immigrants came to help to rebuild the war-torn country.’⁹⁴ Again, no source is cited for this conclusion although some academics recognise that policy makers and researcher used both the terms assimilation and integration for the settlement of new commonwealth immigrants.⁹⁵ Multicultural policy becomes a little more easy to find from 1960 onwards and we can see the development of this firstly from 1960-1997 and then during the Labour governments from 1997-2010, the Coalition government for 2010-2015 and the current Conservative government.

Multicultural Policy 1960-1997

Perhaps the first clear policy statement comes following the racial tension of the 1960’s. A policy of integration can be identified, defined by the then Home Secretary Roy Jenkins in a 1967 speech as ‘...cultural diversity, coupled to equal opportunities, in an atmosphere of mutual tolerance’ and ‘...not a flattening process of uniformity’.⁹⁶ This is generally considered to be an affirmation of integration, identifiable in four main strategies (and seen by many as still being at the heart of integration policy today)

- Protection against discrimination and violence- this relies on a heavy race relations agenda with Race Relations Acts being passed in 1965, 1968 and 1972. The emphasis was on ‘good race relations’, peaceful coexistence through toleration, diversity and pluralism.⁹⁷

⁹⁴ Jenny Bourne, ‘In Defence of Multiculturalism’ (2007) Institute of Race Relations Briefing Paper No. 2.

⁹⁵ For example, Patrick Weil and John Crowley, ‘Integration in Theory and Practice: A comparison of France and Britain’ (1999) *Migration and Social Cohesion* 100, 108.

⁹⁶ R Jenkins, *Essays and Speeches* (London, Collins 1970) 27.

⁹⁷ Stephen Castles, Maja Korac, Ellie Vasta, Steven Vertovec, ‘Integration: Mapping the Field’ (December 2002)

<http://forcedmigrationguide.pbworks.com/w/page/7447907/Integration%3A%20Mapping%20th>
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- The collection of data.
- Controls on immigration.
- Legal duties to promote good community relations.

Multiculturalism was not really part of the political dialogue and policy, such as it was, relied heavily on a race relations agenda. Tiryakian identifies a 'paradigmatic shift' in how modern states approached multicultural policy in the years from the mid 1960's as they dealt with demographic change and considered what that meant.⁹⁸ This shift was towards 'acknowledging, accepting, welcoming and accommodating the presence of others'. So how have successive governments responded in the way of multicultural policies since the end of the 1960's?

It has been difficult to find evidence of multicultural policy emanating from successive governments from 1970 to 1997.⁹⁹ Tiryakian says that from the 1970's multiculturalism was '...a way of reconciling a certain pragmatism about living together- in practice rather than theory- with a striking traditional belief in the role of community, neighbourhood initiatives, cooperatives.'¹⁰⁰ This was never enshrined in doctrine, policy or national ideology but it moved the United Kingdom towards a vision of society 'based on group identity and defined on ethnic/racial lines'. Such policy as there was tended to be localized and evident within major cities as funding was made available for various BAME groups.¹⁰¹

[e%20Field>](#) accessed 1st October 2018, 116.

⁹⁸ Edward A Tiryakian, 'Assessing Multiculturalism Theoretically: *E Pluribus Unum, Sic et Non*' International Journal of Multicultural Societies 5 (1) 20-39 26.

⁹⁹ These are

- 1970- 1974-Conservative Government, said to have had an uneasy relationship with multiculturalism.
- 1974- 1979-Labour Government
- 1979- 1997-Conservative Government

¹⁰⁰ Tiryakian (n 98) 26.

¹⁰¹ British and Minority Ethnic.

Multicultural Policy 1997-2010

It was during this era of Labour governments that interest in multicultural policy seemed to be at its peak. The Parekh Report, commissioned in 1998 was published in 2000.¹⁰² This is a forward looking and aspirational document rather than a backward looking one that summarises former policy. There is a section that deals with criminal justice but the focus is on racism and diversity.¹⁰³ Although there is no attempt within the report to engage with legal principles and theory the report points to evidence of the fact that ‘...there is a perception in Asian, black and Irish communities that the criminal justice system is not just’.¹⁰⁴ This is based on data that shows ‘that black and Irish people are differentially treated at all stages of the criminal justice system’.¹⁰⁵ The Report does not give further detail of why this might be so and neither does it suggest any follow up recommendations.

This was an era during which the European Union began to have influence on domestic multicultural policy and although, in the light of Brexit, it is not important to explore this in any depth, the strong EU led commitment to integration needs to be recognized for relevance to the direction that multicultural policy in the

¹⁰² Parekh, *The Future of Multi Ethnic Britain* (n 65). The Runnymede Trust is an independent think-tank that aims to promote racial justice in Britain. The Commission was asked to:

- Analyse the present state of Britain as a multi-ethnic country
- Suggest ways in which racial discrimination and disadvantage can be countered
- Suggest how Britain can become 'a confident and vibrant multicultural society at ease with its rich diversity'

Runnymede Publications <<http://www.runnymedetrust.org/publications/29/32.html>> accessed 1st October 2018.

¹⁰³ The checklist of recommendation for the way forward for the criminal justice system focuses on eradicating racism (for example it calls for research into the characteristics of persons convicted or cautioned for racially aggravated offences under the Crime and Disorder Act 1998) and on recognizing diversity (for example it calls for a judicial appointments commission to oversee appointments to ensure that the judiciary is more diverse).

¹⁰⁴ Paragraph 10.3 of Parekh, *The Future of Multi Ethnic Britain* (n 65) 126.

¹⁰⁵ *ibid.*

United Kingdom has taken. Through the Treaty of Amsterdam, the European Union had, and currently still has, an ever increasing power on national immigration policies (although the Treaty of Lisbon makes it clear that integration is subject to the subsidiarity principle). It is claimed that this is a policy of legal rights based on a non-discriminatory paradigm.¹⁰⁶ Since the Treaty of Amsterdam the European union has been seeking a coordinated policy on integration. The Migratory Policy Group has produced a series of Handbooks on Integration on behalf of the European Union.¹⁰⁷ The Justice and Home Affairs Council have produced a list of 11 Common Basic Principles for Integration.¹⁰⁸ However, as with domestic policy there is a general absence of interaction with law and the list of policy variables for shaping a societal model (in the search for more adequate models of multiculturalism) does not include a legal dimension.¹⁰⁹

Broadly, Labour governments from 1997-2010 show three distinct phases and attitudes towards multiculturalism. The first is a celebratory attitude towards Britain's ethnic diversity;¹¹⁰ the second, a move towards community cohesion (which shifted the focus from group identity to promoting interaction between groups) following disturbances in northern towns and the Cattle Report which

¹⁰⁶ Microcon- 6th Framework Programme of the European Union (May 2011) 15.

¹⁰⁷ The latest one was published in 2010. Jan Niessen and T Huddleston, Handbook on Integration for Policy Makers and Practitioners' (2010) European Commission Directorate General of Justice Freedom and Security Brussels.

¹⁰⁸ JHA Council 2618th Council Meeting Press Release 14615/04 Brussels 19th November 2009 Agreement on Common Basic Principles of Integration 2004

¹⁰⁹ The list is taken from the above document and reads as follows

- Citizenship and political participation
- Education
- Housing
- Healthcare
- Employment
- Policing
- Allowance of Islamic Practices and Symbols Taken From above document

¹¹⁰ Evidenced for example in the celebration of 'Cool Britannia', a period of pride in the unique culture of Britain.

identified a society of polarization and fractured lives but still advocated the idea of community cohesion and the need for secure borders following 9/11; and the third a reaction to the 7/7 bombings in 2005 and the government announcing a major review of multiculturalism with an emphasis on counter terrorism and the PVE (Prevention of Violent Extremism) Initiatives.¹¹¹ There are claims that the Labour administration from 1997-2010 undertook a clear response to the doctrine of multiculturalism in the form of ‘...state support and funding for minority groups to preserve their culture...’¹¹² However, the Migratory Policy Institute states that this was a misunderstanding as ‘there never was a clear doctrine or programming on multiculturalism in the United Kingdom’.¹¹³ A Downing Street speech by Tony Blair in December 2006 is interpreted as being against the ideology of multiculturalism and in part led to media talk of a ‘backlash’ against multiculturalism. Whilst Blair referred in that speech to the need for ‘allegiance to the Rule of Law’ he also stated ‘If you come here lawfully we welcome you. If you are permitted to stay here permanently you become an equal member of our community and become one of us. The right to be different. The duty to integrate. That is what being British means’.¹¹⁴

¹¹¹ The Cattle Report Community Cohesion: A Report of the Independent Review Team Home Office (The Cattle Report 2001) <<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/Default.aspx?recordId=96>> accessed 1st October 2018.

<<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/DownloadDocumentsFile.aspx?recordId=96&file=PDFversion>> accessed 5th February 2018.

2002 Secure Borders Safe Haven Immigration White Paper (Home Office 2002) Led to Nationality, Immigration and Asylum Act 2002.

¹¹² The Migratory Policy Institute is part of the Transatlantic Council of Migration. Shamit Saggat and Will Somerville ‘Building a British Model of Integration in an Era of Immigration: Lessons for Government’ (May 2012) <<https://www.migrationpolicy.org/pubs/UK-countrystudy.pdf>> accessed 5th February 2018, 10.

¹¹³ *ibid* 11.

¹¹⁴ Downing Street speech by Tony Blair 8th December 2006. Philip Johnston, ‘Adopt our Values or Stay Away, Says Blair’, *The Telegraph* (9th December 2006) <<http://www.telegraph.co.uk/news/uknews/1536408/Adopt-our-values-or-stay-away-says-Blair.html>> accessed 17th March 2018.

The Department for Communities and Local Government was set up in 2006 and the main focus of the Department were the Independent Commission on Integration and Cohesion, the Migration Impacts Forum and the Migration Impacts Fund¹¹⁵. The Independent Commission on Integration and Cohesion made their final report in 2007 (Our Shared Future) and made 57 recommendations that were responded to in the 2008 Government Report (The Government's Response to the Commission on Integration and Cohesion).¹¹⁶ This 2007 report was key in the development of policy because it attempted to set out a new definition of integration and community cohesion and recognized for the first time that integration was key to cohesion. It clearly set out 3 foundations

- People from different backgrounds having similar life opportunities.
- People knowing their rights and responsibilities.
- People trusting one another and trusting local institutions to act fairly.

It further identified three key ways of people living together

- A shared future vision and sense of belonging.
- A focus on what new and existing communities have in common alongside a recognition of the value of diversity.
- Strong and positive relationships between people of different backgrounds.

¹¹⁵ The Migration Impacts Forum was set up in June 2007 so that experts working in the field of migration could present ministers with evidence of the impact of migration. By 2009 the Labour government were considering bringing the forum to an end and replacing it with the Migration Advisory Committee. This latter body which is an advisory non-departmental public body sponsored by the Home Office still exists.

The Migration Impacts Fund was set up in 2009 but scrapped by the Coalition Government in 2010. It had funded local authorities to work with migrants to provide community cohesion.

¹¹⁶ Our Shared Future: Final Report of Commission on Integration and Cohesion (June 2007) <<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/Default.aspx?recordId=18>> accessed 1st October 2018.

Department for Communities and Local Government 2008, 'DCLG annual report 2008 (15 May 2008)

<<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/DownloadDocumentsFile.aspx?recordId=17&file=PDFversion>> accessed 1st October 2018.

The 2008 report responded by making several recommendations.¹¹⁷ Relevant here are (2) that central government should set out a clear policy on integration and cohesion, (17) that there should be a new body to manage the integration of new migrants independent of government but sponsored by DCLG (38) DCLG should clearly set out what their strategy is in funding intercultural dialogue.¹¹⁸ However, subsequent reports are critical of the Labour government for consistently failing to take measures to implement the recommendations made. If integration was considered to mean people knowing their rights and responsibilities, what was done to bring this worthy objective into practice?

The Goldsmith Review followed this.¹¹⁹ This is arguably the most significant government report in terms of the culture-responsibility relationship (and the criminal law more generally) as it does at least introduce the notion of legal responsibility. In the Executive Summary which looks at the 'Legal Rights and Responsibilities of Citizens' it is pointed out that there is a right of protection coupled with a duty of allegiance. This duty of allegiance includes 'the duty to obey the law when in the United Kingdom and liability for certain offences in the United Kingdom even if committed abroad'. But it is acknowledged that the previous report (the 2008 Department for Community and Local Government Report) '...observes that the history of legislation on citizenship and nationality has led to a complex scheme lacking in overall coherence or any clear and self-contained statement of the rights and responsibilities of citizens'.¹²⁰ At point 27

¹¹⁷ One Recommendation was the production of 'Welcome Packs' for new arrivals!

¹¹⁸ In December 2007 there was a Consultation on Interfaith Strategy and it was decided that the final strategy would include a Framework for Interfaith Dialogue and Social Action- basis for considering how to fund interfaith and intercultural dialogue.

¹¹⁹ The Prime Minister asked Lord Goldsmith to carry out a review of British Citizenship in particular to clarify the legal rights and responsibilities associated with British Citizenship

¹²⁰ As Goldsmith points out there are 6 different categories of British citizen which does not make for clarity of rights and responsibilities

the Goldsmith Report states that there has never been any attempt to make a statement on the rights and responsibilities of citizens. However, Goldsmith says that this would be overly legalistic and the only suggestion is for a narrative statement that would not be justiciable. Clearly, citizens are expected to obey the law and although there is no overarching statutory duty in English law to obey the law, all who receive its protection are under a duty to do so and upon prosecution will attract punishment if they do not. And protection is stated to amount to defences and mitigation (point 46). The implied duty to obey the law is not drawn tightly by reference to citizenship and this is extended to those acquiring citizenship under the British Nationality Act 1981.¹²¹ However, a blurring of citizenship is noted (point 14) and this arises in terms of loyalty as the courts have suggested that non-citizens too may be subject to the duty of allegiance. In *R v Tchorzewski* Lord Campbell said ‘...those who find asylum here must ever bear in mind that while they have the protection of the law of England they are bound to obey that law’.¹²² With the social reality of multiculturalism as it is today we need to look beyond notions of citizens to those of immigrants, migrants and refugees. Some international instruments also say that certain classes of migrant must obey the law for example, the Convention Relating to the Status of Refugees 1951 Article 2.

¹²¹ Oath of allegiance from British nationality Act 1981

I, (X) swear by Almighty God that on becoming a British citizen I will be faithful and bear allegiance to Her Majesty Queen Elizabeth, her heirs and successors according to law... I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfill my duties and obligations as a British citizen’

Section 42 Schedule 5 Paragraph 1 British Nationality Act 1981

Since 1st January 2004 this has been amended to read

I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen.

¹²² *R v Tchorzewski* [1858] 8 St Tr NS 1091 referred to in the Goldsmith Report.

The Goldsmith Report was followed by *The Governance of Britain*, a Green Paper whose aims were to forge a new relationship between government and the citizen and to begin the journey towards a new constitutional settlement, with an emphasis on enhancing the rights and responsibilities of citizens.¹²³ It was ‘...the first step in a national conversation’.¹²⁴ This paper was different from other government initiatives because it was the first to emphasize the need for widespread consultation. It was not on multiculturalism specifically but introduced the possibility of a ‘British Statement of Values’ and a ‘British Bill of Rights’ and followed on from Gordon Brown’s speech at the Labour Party Conference in the Autumn of 2006:

‘We the British people must be far more explicit about the common ground on which we stand, the shared values which bring us together, the habits of citizenship around which we can and must unite. Expect all who are in our country to play by our rules’.

The focus on ‘Britishness’ is ascribed to a number of factors including the threat of home grown terrorism and the impact of multiculturalism on society. It is arguable that the Green Paper did not really engage with the social reality of multiculturalism with its emphasis on citizenship at a time when net migration to the United Kingdom was at its peak but it did lead ultimately to the Constitutional Reform and Governance Act 2010.

Interestingly migrants rather than citizens were the focus of the next government papers. The 2008 *Managing the Impacts of Migration; A Cross Government Report* was updated in June 2009 with *Managing the Impacts of Migration:*

¹²³ Research Paper 07/72 26th October 2007 HC Library.

¹²⁴ Ministry of Justice, *The Governance of Britain* (Cm 7170, July 2007) 5.

Improvements and Innovations.¹²⁵ In the foreword to the latter document it states '...equally where migrants choose not to play by the rules we will work with the police to come down hard on those who commit crimes and remove those who cause most harm in our communities...making newcomers earn their citizenship...by obeying the law.'¹²⁶ There is a separate section on crime and policing which refers to Immigration Crime Partnerships across England and Wales (between UKBA and ACPO) and to the establishment of Immigration Crime Teams.

In the 2008 paper *Face to Face* a framework is suggested for the way in which the government will support stronger dialogue between people of different faiths. This followed on from a multifaith event held at Parliament on 3rd January 2000, 'a shared act of reflection and commitment', hosted by the government and assisted by the Inter-faith Network for the UK and was based on a three month public consultation with 185 responses. One question in this consultation asked 'Tell us about issues which limit the ability to bridge and link'. The response was gender issues and conventions about men and women in public which of course ties in with feminist concerns around the recognition of culture.

Multicultural Policy 2010-2015

¹²⁵ Department for Communities and Local Government, 'Managing the Impact of Migration: Innovations and Improvements' (London, March 2009) <<http://webarchive.nationalarchives.gov.uk/20120919213058/http://www.communities.gov.uk/documents/communities/pdf/1179350.pdf>> accessed 5th September 2018.

¹²⁶ *ibid* 5.

In 2010 the Coalition government began with a focus on integration. In a revised PREVENT strategy (Home Office 2011) it was stated that ‘...we will do more than any government before us to promote integration’.¹²⁷ Against this rhetoric there was dialogue, particularly in the media, about a ‘retreat’ from multiculturalism, although Phillips identifies this retreat as beginning from 1990’s onwards as ‘...multiculturalism became the scapegoat for an extraordinary array of political and social evils’.¹²⁸ But, although Phillips argues that we have a ‘robust’ multiculturalism arrived at through ‘multicultural drift’ rather than a conscious philosophy or indeed policy (a viewpoint that supports the theme running throughout this chapter that multicultural policy is elusive) it is a retreat from multiculturalism that forms the political context for her book *Multiculturalism Without Culture*. Song argues that there is only a backlash in relation to immigrant multiculturalism, a political backlash based on fear of the ‘other’ but as that is the widely held perception of the nature of our multiculturalism she would in effect seem to recognize the backlash.¹²⁹ With this in mind the government (through the Department for Communities and Local Government) published a report in February 2012 *Creating the Conditions for Integration* stating that ‘...it is only common sense to support integration’¹³⁰ Yet, there is still difficulty about what ‘integration’ means within the document and there are some interesting anomalies in the Report. Confusingly, there is reference to abandoning

¹²⁷ PREVENT 6

<https://www.gov.uk/government/publications/prevent-strategy-2011>

accessed 18th October 2018.

¹²⁸ Anne Phillips, *Multiculturalism Without Culture* (Princeton, Princeton University Press 2007) 3.

¹²⁹ S Song, ‘Multiculturalism’, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition) Edward N. Zalta (ed)

<<http://plato.stanford.edu/archives/spr2014/entries/multiculturalism/>> accessed 1st October 2018.

¹³⁰ Department for Communities and Local Government, *Creating the Conditions For a More Integrated Society* (21 February 2012) <https://www.gov.uk/government/publications/creating-the-conditions-for-a-more-integrated-society>> accessed 23rd February 2018, 6.

multiculturalism and adopting 'a more assimilationist approach', which in turn does seem to suggest a retreat from state multiculturalism and invites the question 'what did the Coalition government's version of integration actually look like'? Despite the separate PREVENT strategy, the 2012 report states that integration is 'central to long term action to counter extremism', emphasizing again the focus on security. The Report recognizes that integration challenges have traditionally been met through legal rights and obligations around equality, discrimination and hate crime but it calls for 'changes in society', not just law and states that this is a not a job for government but for collective action. The Report envisages that collective action will come about if the government '...create(s) the conditions for civic leadership on integration' because integration comes from every day activities and the government should only intervene 'exceptionally' but the government agreed to take some steps including

- The Big Lunch
- Superact and Making Music Event – a national community music making day held on 9th September 2012 (and repeated 10th-12th July 2015 funded by DCLG)
- Reform to Immigration and Settlement Rules.

The conclusion to the report was that the government's role in achieving an integrated society should be strongly shaped by localism and the 'Big Society'.¹³¹

The 2016 Casey Review sums this up dismissively as the era of 'saris, samosas and steel-drums' and not surprisingly Cavanagh identifies that '...currently the

¹³¹ The focus of the Big Society is to create the conditions for integration and the concept of the Big Society comes from political ideology of the early twenty first century drawing on ideas of conservative communitarianism and liberal paternalism. See A Walker and S Corbett, 'The Big Society: Neo -Liberalism and the Rediscovery of the Social in Britain' (Sheffield Political Economy Research Institute 2013).

government is struggling with a dilemma - universal values or distinctive values'¹³²

By the end of their term of office the Coalition government was struggling within an atmosphere of negativity surrounding the term 'multiculturalism' (as used in the first interpretation in the introduction to this chapter) yet an acknowledgment that a culturally diverse population is an essential feature of contemporary society. As Cantle states '...multicultural policies are toxic but multicultural societies are the future'.¹³³ There was a general sense that the policy and practice of integration was lacking direction. This was evidenced in a number of independent reports. The Migration Policy Institute stated that '...few countries make systematic efforts to integrate immigrants and refugees into their social and political fabric and fewer still can claim success...' and a Migration Observatory Policy Primer observes '...a lack of consensus on the objectives of policy intervention and some suspicion of government intentions has meant that the term integration is contested and not used consistently at national or local level... This has been a contributory factor in a lack of coherence on policy, including a lack of clarity on the demarcation between policy relating to migrants and to British born ethnic minorities.' The Migration Observatory summarises integration as a minimalist strategy where '...the various strands of immigrant integration indicate a policy shift away from multiculturalism but not a regression to the acculturation and assimilationist frameworks publicly adopted by some European

¹³² Jill Rutter, 'Back to Basics: Towards A Successful and Cost-Effective Integration Policy' (Institute for Public Policy Research, Mar 2013) <https://www.ippr.org/files/images/media/files/publication/2013/03/back-to-basics-integration_Mar2013_10525.pdf?noredirect=1> accessed 1st October 2018, 38.

¹³³ Cantle (n 90).

countries in recent years'.¹³⁴ Although the report states that we have a tradition of migration and a tradition of tolerance, this view does not seem to accord with the statement within the document itself that integration is being seen as 'central to long term action to counter extremism'.¹³⁵ The paper also states that '...we will robustly challenge behaviours and views which run counter to our shared values such as democracy, Rule of Law, equality of opportunity and treatment...'¹³⁶

The strategy is minimalist because in the past integration challenges have been met with legal rights and obligations around equality, discrimination and hate crime but now, claims the report, we need changes in society, not just law and this is a not a job for government but for collective action. It claims that the Government intends to 'create the conditions for civic leadership on integration' and sets out how this is to be achieved.¹³⁷ The emphasis lies on the premise that integration comes from every day activities, so that the government needs to intervene only 'exceptionally'. The report has its critics. Despite the robust government emphasis on integration as a policy for the way forward the Migratory Policy Institute still claims, in its executive summary that '... the United Kingdom has not developed a formal integration programme' and identifies an 'uncertain way forward' in terms of multicultural policies.¹³⁸ Cavanagh criticizes the 2012

¹³⁴ The Migration Observatory, University of Oxford
<http://www.migrationobservatory.ox.ac.uk/briefings/migration-flows-a8-and-other-eu-migrants-and-uk> (accessed 12th February 2018) 18.

¹³⁵ *ibid* introduction.

¹³⁶ *ibid* 5.

¹³⁷ It states that

- we should speak honestly about the issues and create space for response
- give people power, knowledge and control which enables them to come together locally as an integrated community.

¹³⁸ Based at University of Sussex and part of the Transatlantic Council of Migration. Shami Sagar and Will Somerville, 'Building a British Model of Integration in an Era of Immigration: Policy Lessons for Government' Migration Policy Institute, Washington (2012) 1. The Migration Observatory' <<http://www.migrationobservatory.ox.ac.uk/briefings/migration-flows-a8-and-other-eu-migrants-and-uk>> accessed 12th February 2015.

report for its many omissions.¹³⁹ She agrees that integration can happen in practice without government intervention but claims that there is a role for policy. The state has clear obligations towards migrants and migrants in turn have responsibilities towards society but they state ‘...these responsibilities are clear in current policy: learn the language and obey the law’. Learning the language may be clear, but where is ‘obey the law stated’? Under the Coalition government there was also an organisational issue within government as responsibility for migrants was shared among various departments.¹⁴⁰ However, there was some specific reference to the law in a limited context such as the Ministerial Group on Gypsies and Traveller’s Progress report April 2012 which outlined 26 commitments across government including ‘improving access to the criminal justice system’ through the National Offender Management, the Shpresa Programme which reported on impact of migration and on working with Albanian nationals to help them understand their rights and responsibilities in the United Kingdom and the IRSS report ‘Mapping the Field’ reports on research done by Stevens on law and policy towards Roma in the UK.¹⁴¹ In that latter report under the heading ‘Justice and the Legal System’ it states ‘...the justice and legal system appears to be under-represented in legal research.’¹⁴²

¹³⁹ Rutter and Cavanagh, ‘Towards a Successful and Cost-Effective Integration Policy’ (22nd March 2013) <www.ippr.org/publications> accessed 7th February 2015.

¹⁴⁰ For example, the UK Border Agency, the Department for Local Government and Communities and the Equality Office.

¹⁴¹ Dallal Stevens 2001 ‘The Migration of Romanian Roma to the UK: A Contextual Study’ European Journal of Migration and Law 2003 5(4) 439-461.

¹⁴² Stephen Castles, Maja Korac, Ellie Vasta, Steven Vertovec, ‘Integration: Mapping the Field’ (December 2002) <<http://forcedmigrationguide.pbworks.com/w/page/7447907/Integration%3A%20Mapping%20the%20Field>> accessed 1st October 2018.

Cantle is very critical of successive governments for the failure to coordinate integration programmes, for the emphasis on a system based on group rights and social initiatives and for policy confused with anti-terrorism measures. By 2012 he was calling for a review of multiculturalism. 'There is a timely and obvious need to develop a progressive rethinking on multiculturalism. For many reasons, not all of which are fair, the multicultural brand has become toxic and enjoys little by way of popular nor political support.' However it is not just about rebranding. Multicultural policies were developed in the 1960's and while arguably appropriate for that time have failed to adapt to the current period of globalization and superdiversity.

Integration, under the Coalition government was still difficult, with a sense that there was a lack of conceptual clarity about integration and a common understanding about the role of government in promoting it and clearly there was no interaction between integration and law. The Casey Review, discussed below, states that the Coalition government had promised a stronger integration strategy but PREVENT was too controversial to deliver and '...attempts to promote integration had not fulfilled their stated aim.'¹⁴³

Multicultural Policy 2015-Present Day

The present Conservative government therefore inherited something of a minefield on multicultural policy. On 8th May 2015, a day after the General Election, a Policy Paper was issued stating '...we want to achieve more

¹⁴³ Dame Louise Casey, 'The Casey Review, A review into Opportunity and Integration' (December 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575973/The_Casey_Review_Report.pdf> accessed 1st October 2018, para 2.2.

integrated communities.’ In reality this was just a list of projects funded between funded projects 2010 to 2015 under the Coalition government and the statement that integration is a local issue and requires a local response because local communities should identify the issues that affect their areas and shape their own responses.¹⁴⁴ Whilst Cameron, as leader of the Coalition, had renounced state multiculturalism in 2011 the current Conservative government has not clearly set out its policy on multiculturalism. Policy is now under the umbrella of the Ministry for Housing, Communities and Local Government whose focus seems to be housing. However, a Hansard search shows 34 references to multiculturalism in Parliamentary debate between 1st July 2015 and 31st October 2018. Whilst, once again, the content of such debates is linked mainly to terrorism, immigration and Brexit, there have been debates on ‘Public Life: Values’ and ‘National Life: Shared Values and Public Policy Priority’.¹⁴⁵ In the latter Lord Blencathra states that ‘...we must not in the name of discredited multiculturalism sacrifice our western liberal democracy’ and Lord Bilimoria states that ‘...in encouraging multiculturalism we did not encourage integration enough.’

Policy in the early years of the Conservative government seems to echo that of the Coalition with a search on the Department for Communities and Local Government website on 15th January 2016 showing up to date news as ‘Your Guide to Planning a Street Party’.¹⁴⁶ However, due to concerns about terrorism, immigration and the economy, in July 2015 the new government commissioned

¹⁴⁴ This reflected the policy of ‘localism’ under the Localism Act 2011.

¹⁴⁵ < <https://hansard.parliament.uk/Lords/2015-07-16/debates/15071640000146/PublicLifeValues?highlight=multiculturalism#contribution-15071641000001>> accessed 5th February 2018.

¹⁴⁶ Department for Communities and Local Government, ‘Organise a Street Party’ < <https://www.gov.uk/government/get-involved/take-part/organise-a-street-party>> accessed 6th July 2018.

Dame Louise Casey to undertake a review of integration and opportunity in the countries most isolated and deprived areas and the Casey Review was published on 5th December 2016.¹⁴⁷ The terms of the Review were to consider how well we all get on and how well we do compared to one another. The review team met with 800 people and considered written submissions from another 200 and ‘...none said that there was not a problem.’ Paragraph 1.8 of the Review states that ‘...creating a just fair society where everyone can get on is a cornerstone of Britain’s values.’ The Review is a mine of information and gives a strong sense of guidance for the way forward. In it we see encouraging evidence of engagement with law although the terms ‘culture’ and ‘multiculturalism’ seem to have all but disappeared from its language.

Whilst the Review envisages an ongoing national conversation about the steps that everyone can take to increase integration and opportunity it also makes some initial recommendations. These are set out in paragraph 1.75 and include the need ‘...to improve the integration of communities in Britain and establish a set of values around which people from all different backgrounds can unite. This is envisaged through (and numbers 4, 5, 6 and 12 from a list of 12 are quoted here)

- (4) attaching more weight to British values laws and history in our schools.
- (5) considering what additional support or advice should be provided to immigrants to help them get off to the best start in understanding their rights and obligations and our expectations for integration
- (6) ...consider the introduction of an integration oath
- (12)...consider an oath for holders of public office enshrining respect for the Rule of Law and equality.

¹⁴⁷ Dame Louise Casey, ‘The Casey Review, A Review into Opportunity and Integration’ (December 2016)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575973/The_Casey_Review_Report.pdf> accessed 1st October 2018.

The Review states that ‘...numerous reports of community cohesion and integration had been produced in the preceding 15 years but the recommendations they had made were difficult to see in action.’¹⁴⁸ Part of that is because ‘integration’ is ‘...a nebulous concept which resists a single definition or description.’¹⁴⁹

‘British Values’ have been an important theme under Labour, Coalition and current Conservative governments. The current government, in its Counter Extremism strategy, recognizes the combination of the following as integral to a successful and cohesive nation- democracy, the Rule of Law, individual liberty, equality, freedom of speech and mutual respect, tolerance and understanding of different faiths and beliefs. Integration too, requires these common values’...but these need to strike the right balance between the benefits of diversity and those of unity or cohesion.’¹⁵⁰ We can see in the culture-responsibility relationship the need to strike this very same balance. The Review recognizes that ‘...respect for the law has featured as a popular attribute in a variety of surveys on values and Britishness, including a 2015 ComRes Poll in which it was ranked second ‘most important’ British value.’¹⁵¹ However, there is no further discussion of what this means or of how respect for the law should be enshrined in wider multicultural policy. The Review goes on to look in detail at religion, education and inequality but there is no mention of ‘respect for the law’ other than in relation to ‘Religious Codes’ which looks at arbitration by non-state agencies and the call for

¹⁴⁸ *ibid* para 2.2.

¹⁴⁹ *ibid* para 2.5.

¹⁵⁰ *ibid* para 5.8.

¹⁵¹ *ibid* para 5.10.

government and law enforcement agencies to take action against practices incompatible with 'UK' law in this dimension.¹⁵²

Following on from the initial recommendations of the Review outlined above, there are 12 broad recommendations for moving forward. These include a call on central government for a programme to improve community cohesion with local authorities to pick up on a breakdown of integration at the earliest stage and as we saw in paragraph 1.75(4) the promotion of 'British' laws, history and values within the core curriculum in all schools to '...build integration, tolerance, citizenship and resilience in our schools.'¹⁵³

In the Review, Casey is critical of past failures '...to implement practical actions with sufficient consistency, persistence of force to keep pace with the rate of change in communities.'¹⁵⁴ This echoes the findings of an All Party Parliamentary Group Report following an enquiry into the integration of immigrants and published in August 2016 which commented on the 'hitherto remarkably non-interventionist' role of government and called for a pro-active and comprehensive government strategy.¹⁵⁵ Casey does not blame any particular administration but identifies a failure of will to take practical action and the approach to cohesion over time as 'wrong' with '...a long standing failure to manage the settlement of migrants a particular concern' although she does note that cohesion policy has been squeezed out since 2010 '...with the [Coalition] government only willing to act exceptionally over the issue falling well below its stated ambition of 'to do

¹⁵² Paragraph 8.49 calls for more to be done to ensure that religious tribunals operating in the United Kingdom do so within our standards of equality and our legislation.

¹⁵³ These are Recommendations 1,2, and 4.

¹⁵⁴ *ibid* Ch10, para 10.1.

¹⁵⁵ APPG Report recommendations.

more than any government before to promote integration.”¹⁵⁶ The previous reports (many of which we have reviewed here), she says make ‘sorry reading’ because ‘...the vast majority-if not all- of the findings, recommendations and concerns could be or are echoed in this Report.’¹⁵⁷ A year after publication of the Review there was no evidence of the current government having acted upon the implementation of Casey’s recommendations with Casey herself criticizing the government for its failure to act and citing a preoccupation with Brexit as the reason.¹⁵⁸

However in March 2018 the government published its Green Paper ‘Building Stronger More Integrated Communities’ inviting views on its vision for ‘...building stronger integrated communities where people-whatever their background- live, work, learn and socialize together based on shared rights, responsibilities and opportunities.’ The consultation was open from 14th March to 5th June and the outcome is currently awaited. The key government proposals include the consideration ‘...of providing information to prospective migrants before they arrive in the United Kingdom to give them a clear expectation about our life in modern Britain including our laws, norms and standards.’¹⁵⁹ And perhaps finally we find something that refers, obliquely at least to the culture-responsibility

¹⁵⁶ Dame Louise Casey, ‘The Casey Review, A review into Opportunity and Integration’ (December 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575973/The_Casey_Review_Report.pdf> accessed 1st October 2018, para 10.3.

¹⁵⁷ *ibid.*

¹⁵⁸ Matthew Weaver, ‘Louise Casey: Ministers have Done Absolutely Nothing about Cohesion’ *The Guardian* (5th December 2017)

<<https://www.theguardian.com/society/2017/dec/05/louise-casey-ministers-have-done-absolutely-nothing-about-cohesion>> accessed 1st October 2018.

¹⁵⁹ 2018 Integrated Communities Strategy

Ministry of Housing Communities and Local Government

Green Paper Building Stronger More United Communities (2018)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696993/Integrated_Communities_Strategy.pdf> accessed 1st October 2018, 14.

relationship in the statement on page 56 that ‘...the links many immigrant communities have to their countries of origin can present challenges to integration where social or cultural norms overseas alter from British values and influence the way that people behave here...we need to better understand these international influences and their impact on integration.’

We can therefore conclude that integration is still the dominant way of thinking about multicultural policy and perhaps we have the clearest government statement on multicultural policy for a long time. A review of multiculturalism as philosophy may help us to understand how the culture-responsibility relationship and the policy of integration can interact.

4.4 Multicultural Philosophy

Raz says that multiculturalism is a relatively new word, and that the Oxford English Dictionary traces it to the 1950's and 1960's.¹⁶⁰ If Song is correct in her assertion that multiculturalism as philosophy is 'a body of thought in political philosophy about the proper way to respond to cultural and religious diversity' there is a huge amount of thought on what that response should look like.¹⁶¹ Multicultural philosophy seeks to offer a way through the imbalances in society that arise from 'difference' and, like state multiculturalism, promotes the recognition of difference through the 'politics of difference'. Bhandar asserts that multiculturalism derives from Hegel's political philosophy of recognition.¹⁶² This in turn draws on the work of Fichte.¹⁶³ According to Hegel, the relationship between the self and others is the fundamental defining characteristic of human awareness and activity. Multiculturalism is therefore associated with 'identity politics', the 'politics of difference' or 'the politics of recognition', seeing oneself through the perspective of others. The term the 'politics of recognition' was introduced by Taylor in 1992 who argues that recognition constitutes a vital human need and that misrecognition is a violation.¹⁶⁴ Citizens are therefore engaged in a 'struggle for recognition' and adequate recognition can only be achieved within '...an institutionalised order of rights.'¹⁶⁵ These early ideas on

¹⁶⁰ Joseph Raz, 'Multiculturalism' (1998) 11 (3) *Ratio Juris* 193, 193.

¹⁶¹ S Song, 'Multiculturalism', *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition) Edward N. Zalta (ed) <<http://plato.stanford.edu/archives/spr2014/entries/multiculturalism/>> accessed 1st October 2018.

¹⁶² Brenna Bhandar, 'The Ties that Bind: Multiculturalism and Secularism Reconsidered' (2009) 36 (3) *Journal of Law and Society* 301.

¹⁶³ J G Fichte, *Foundations of Natural Right* (Cambridge, Cambridge University Press 2000) <<http://assets.cambridge.org/9780521573016/sample/9780521573016ws.pdf>> accessed 5th February 2018.

¹⁶⁴ Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton, Princeton University Press 1992) 1.

¹⁶⁵ Bernard Williams, *Ethics and the Limits of Philosophy* (London, Routledge 2011) 59-68.

recognition have been refined and Benhabib says that to be a 'self' is to insert oneself into 'webs of interlocution' because '...our agency consists in our capacity to weave out of those narratives our individual life stories which make sense for us as unique selves.'¹⁶⁶ The intersubjective constitution of the self therefore comes from dialogic moral practices but she distinguishes identity politics (with its belief that we can and should do justice to certain claims by allowing the group to define the content as well as the boundaries of its own identity) from the politics of recognition which can '...initiate critical dialogue and reflection in public life about the nature of the collectivity itself.'¹⁶⁷ The challenge in the context of culture and legal responsibility is to work out how the culture-responsibility relationship can fit into the established order, how best that relationship can do justice to recognition and how it can avoid misrecognition. The aim of this section is to situate the culture-responsibility relationship in the discourse on multicultural justice.

If the emphasis in policy has been on rights (and not responsibility) then traditionally the emphasis in philosophy has been on groups (and not individuals). The question for this thesis is how multicultural philosophy can help us understand what is at stake in the wider realm as we seek to find an answer to the research question. Interaction between multicultural philosophy and the culture-responsibility relationship is neatly summed up by Levine who states that '...in a culturally diverse society, there is an inherent conflict between the unity required to govern, the need to honour diverse traditions and practices of cultural

¹⁶⁶ Seyla Benhabib, *The Claims of Culture* (Princeton, Princeton University Press 2002) 15.

¹⁶⁷ *ibid* 70.

groups, and the recognition accorded to autonomous individual actors'.¹⁶⁸ In section 2.4 we identified a number of recurring themes within this attempt to balance governance, culture and individuals but we have been consistent in making the importance of the group subsidiary in the context of the culture-responsibility relationship.¹⁶⁹ We have acknowledged the historical interpretation and adaptation of influential factors by a group in creating a 'culture' that is in turn adopted and adapted by the individual but the culture-responsibility relationship pertains solely to the individual. However, we can see that multicultural philosophy as well as multicultural policy has traditionally centered around the group. If we go back to the understandings of multicultural policy set out in section 4.1 we recall 'state' multiculturalism' as a situation where the cultural minorities are, or are thought of, as distinct communities and where multiculturalism encourages this distinctiveness. Within this therefore there is the recognition of the 'group' and the ensuing fear of cultural relativism as one group is placed higher in the group hierarchy than another. There is the fear of pluralism. There is the fear too of essentializing, as individuals are overlooked as autonomous agents and ascribed the perceived characteristics of the group. These are issues that we reviewed in the context of the culture-responsibility relationship in section 2.4 where such fears, broadly labelled as threats to equality, were assuaged.

Dworkin says that every plausible political theory has the same ultimate value, equality. So the debate is not about accepting equality but about how to interpret it and multiculturalism raises several issues for equality. Taylor wrote in 1992 of

¹⁶⁸ Kay L Levine, 'Negotiating the Boundaries of Crime and Culture: A Socio-Legal Perspective on Cultural Defense Strategies' (2003) 28 (1) *Law & Social Inquiry* 39, 68.

¹⁶⁹ These are equality on the one hand and broadly, on the other hand, issues that could be seen as a threat to equality including individualised justice with its implications for pluralism and relativism and essentialising with implications for agency.

the switch from the equality of sameness to the equality of difference. Liberal egalitarian multiculturalism is based on the liberal values of autonomy and equality and recognizes that culture is valuable to people because it enables individual autonomy and self-respect and, because members of minority groups are disadvantaged in terms of access to their own cultures, they are entitled to special protections. The opposition to this idea is that religious and cultural minorities should bear responsibility for their own beliefs and practices because religion and culture may shape one's willingness to seize an opportunity but they do not affect whether one has such an opportunity. Barry argues that justice should be concerned with ensuring a reasonable range of equal opportunities for the individual. Raz places limits on toleration towards groups so that cultural communities should not be allowed the right to repress their own members, the option to leave one's group must be viable and publicly recognized and all groups must allow their members '...access to adequate opportunities for self-expression and participation in the life of the country in the widest sense.'¹⁷⁰

Modood, however, emphasises the importance of the group and advocates 'strategic essentialism'. This means accepting empirically that groups do exist and that group identity should be normatively accepted if it is important to the bearers and therefore groups should be politically accommodated. Multicultural strategy, says Modood, should include a new 'we' because anti-essentialism alone is not enough to undermine or negate a policy of (state) multiculturalism.¹⁷¹ Kymlicka's work on multiculturalism comes from the premise that all minority groups suffer disadvantage. This is especially true of national and ethnic

¹⁷⁰ Raz (n 159) 199.

¹⁷¹ Tariq Modood, HASS Research Lecture at University of Exeter 14th September 2014 on theme 'Identities and Beliefs: Societal and Lifestyle Shifts.' (2014).

indigenous groups.¹⁷² There should therefore be state intervention to sustain minority cultures and advance the rights of the group in the form of 'group differentiated rights' but '...liberals can only endorse minority rights in so far as they are consistent with respect for the freedom and autonomy of individuals.'¹⁷³ In this preservation of autonomy Kymlicka is true to liberal values and it allows him to claim that '...in all liberal democracies, one of the major mechanisms for accommodating cultural difference is the protection of the civil and political rights of individuals.'¹⁷⁴ However, there is an argument that the group has no moral existence of its own and so group rights are in fact individual rights. Shachar (2001) refers to *nomoi* communities who are not sufficiently protected by the individual rights offered by liberal democracies and so special group rights are needed because '...once we acknowledge the constitutive relationships that exist between state institutions and majority cultural norms, we must prioritise substantive justice among the various cultural groups in order to achieve some balance of equilibrium; procedural justice merely reinforces pre-existing imbalances and dominant cultural norms.'¹⁷⁵ We argued in section 2.4 against Renteln's call for the 'cultural defence' to be a mechanism for redressing such state/individual imbalance and here there are also individual/*nomoi* conflicts where individual justice for, for example, women, may be compromised at the expense of group rights. This is, says Sachar, '...the paradox of multicultural vulnerability' whereby it is not possible to simultaneously protect the rights of the group against the state without harming the rights of individuals against the

¹⁷² Will Kymlicka, *Liberalism, Community and Culture* (Oxford, Oxford University Press 1989). Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon 1995).

¹⁷³ Kymlicka, *Multicultural Citizenship* (n 171) 75.

¹⁷⁴ *ibid* 26.

¹⁷⁵ Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, Cambridge University Press 2001) 3.

group.¹⁷⁶ The multiculturalist approach, however, is pluralism and based on the rights of group against state and not individual against state.

There have been arguments that link the social reality of multiculturalism with the political philosophy of communitarianism, in turn the philosophy behind the policy of community cohesion. We have considered communitarianism in the context of Cotterrell's work and its closeness to culture but it is a much more politicised concept than culture, not least because of the theoretical ability of the community to create its own laws because '...laws roots are in a social group conceived as a united entity whose values, beliefs, common interests, allegiances or tradition provide its foundation.'¹⁷⁷ Communitarianism emerged in the 1990's as a 'third way' perspective between the politics of the left and the right but is criticized as the concept of 'community' is nebulous and Rattansi asks 'when does a social group constitute a community?'¹⁷⁸ Communitarianism can also be linked with the problem of essentialism in the way that culture can as it is easy to make the assumption that communities are homogenous and strongly bonded. However, in communitarianism a greater degree of agency is implicit, a sense of a more meaningful choice for the individual about whether to belong to a certain community or not.

But we know from the understanding of culture arrived at in section 2.2 that we can no longer consider groups as bounded and static. The politics of recognition

¹⁷⁶ *Ibid.*

¹⁷⁷ Roger Cotterrell, 'The Struggle for Law: Some Dilemmas of Cultural Legality' (2009) 40 (4) *Journal of Law and Society* 373.

This is based on Dworkin's ideas of *communitas*, a theory of the political community as the author of its own laws.

¹⁷⁸ Rattansi (n 4) 97.

is also criticized because the theory does not distinguish between legitimate and illegitimate struggles for recognition, it only recognizes single sites of oppression and it does not look at struggles within the group. We know too that the culture-responsibility relationship is concerned with the individual and the quest for true blameworthiness and therefore we have to look to philosophy that moves away from the idea of the group. In essence, we cannot deny the existence of the group, both as a reality, although its boundaries are uncertain, and as a theoretical concept in the allocation of rights in a multicultural world. It is important too for its interaction with the individual. Kukathas argues that there are no group rights, only individual rights. In granting group rights the state is overstepping the mark so states should not pursue 'cultural integration' or 'cultural engineering' but a 'politics of indifference.'¹⁷⁹ The disadvantage of this is that groups who do not value toleration and freedom of association (including the right to exit a group) will practice internal discrimination. The 'benign neglect' approach permits abuse of vulnerable members within the group. This of course is the fear that lies behind the multiculturalism/feminism paradigm discussed in section 2.4. Barry is concerned with '...views that support the politicization of group identities, where the basis is of the common identity is claimed to be cultural.'¹⁸⁰ He is against both multiculturalism and communitarianism because they '...reward the groups that can most effectively mobilise to make demands on the polity.'¹⁸¹ Benhabib argues that in response to the 'strange multiplicity of our times' we have rushed into the premature normativisation of group identity which has resulted in hasty policy

¹⁷⁹ Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford, Oxford University Press 2003) 15.

¹⁸⁰ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Polity Press 2001) 5.

¹⁸¹ *ibid* 21.

recommendations.¹⁸² We have already considered Benhabib's criticism of the reification of the group which she argues is based on a faulty epistemology and she defends social constructivism as a comprehensive explanation of social difference but insists that all analyses of culture must begin by distinguishing the standpoint of the social observer from that of the social agent.¹⁸³ She rightly asks the question '...why should the individual's search for an authentic selfhood be subordinated to the struggles of collectives unless we have some ontological or hierarchical ordering of the groups to which the individual belongs, so that one group, more than other groups, can be said to portray a more authentic expression of one's individuality?'¹⁸⁴ She therefore recommends a '...deliberate democratic model that permits maximum cultural contestation within the public sphere, in and through the institutions and associations of civil society.'¹⁸⁵

Looking beyond the politics of recognition Modood and Uberoi recognise that there is an '...intuition that different types of cultural minorities deserve better treatment than they actually get.'¹⁸⁶ In some senses the culture-responsibility relationship does not belong in this discourse of supremacy battles between state, group and individual but in the wider discourse on rights, responsibilities and justice. Parekh's *Rethinking Multiculturalism* is seen as a philosophical justification for intercultural dialogue, a new direction in addressing injustice. Parekh rejects monism, which sees cultures as '...a national organic...unchanging integrated wholes', an understanding that coincides with

¹⁸² Benhabib (n 165) viii.

¹⁸³ *ibid* 5.

¹⁸⁴ *ibid* 53.

The idea of 'webs of interlocution' comes from Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, MA, Harvard University Press 1989) 36.

¹⁸⁵ Benhabib (n 165) viii.

¹⁸⁶ Varun Uberoi and Tariq Modood, *Multiculturalism Rethought: Interpretations, Dilemmas and New Directions* (Edinburgh, Edinburgh University Press 2015).

the understanding of culture we reached in section 2.2¹⁸⁷ He accepts the liberal view of cultures as linked to individual autonomy but recognizes that individuals need something to exercise that autonomy with and that is the beliefs and norms of their cultures. This resonates with Ortner's scheme, analysed in section 2.4, for assessing the effect of culture on behaviour. However, Parekh points out that cultures have no coordinating authority, are complex and unsystemised, are internally varied and '...speak in several voices.'¹⁸⁸ They have 'no essence'¹⁸⁹ and are '...never settled, static and free of ambiguity.'¹⁹⁰ So whilst each culture is a world of ideas it is not closed to other worlds and cultures can learn from one another and cultural diversity should not be viewed as a problem but as a pre-requisite for the intercultural learning that leads to '...a richer view of reality.'¹⁹¹ Parekh therefore advocates intercultural dialogue for four reasons, personal, communal, societal and universal. The culture-responsibility relationship should be situated at the societal level where 'operative public values', usually the values of the majority, can reflect too the values of the minority.

Parekh is not alone in calling for dialogue in the search for justice. Hidden within the multicultural philosophy of a number of writers there are calls for dialogue. Chui asks us to 'include people with different backgrounds in the reformulation of legal rules.'¹⁹² Barry advocates '...a principled dialogue on the interrelated problems of equality and culture'.¹⁹³ And Cotterrell asks '...what are the demands

¹⁸⁷ *ibid* 5.

¹⁸⁸ Parekh, *Rethinking Multiculturalism* (n 7) 144.

¹⁸⁹ *ibid* 175.

¹⁹⁰ *ibid* 148.

¹⁹¹ Bhikhu Parekh, *Ghandi's Political Philosophy: A Critical Examination* (London, Springer, 1989) 27.

¹⁹² Daina Chui, 'The Cultural Defence: Beyond Exclusion, Assimilation and Guilty Liberalism' (1994) 82 (4) *Cal L Rev* 1053, 1097.

¹⁹³ Barry (n 179) 19.

of the immigrant population on our law?’¹⁹⁴ The culture-responsibility relationship may not be a demand as such but it seems not only logical but just too to ask the ‘immigrant population’ *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* Habermas says that, in order to achieve context sensitive laws, we need to fully include the affected groups in the process of decision making.¹⁹⁵ Young takes this a stage further by suggesting that (formerly) oppressed groups should have a veto over questions that particularly affect them.¹⁹⁶ In dialogue we need to be wary of ‘cultural bias’ or what Mikhail calls, in his review of Cotterrell, a ‘failure to confront the enduring reality of cultural hegemony’ saying that Cotterrell’s aspiration of dialogue is unrealistic.¹⁹⁷ But we have to try. Von Jhering sees law as a kind of impartial mediator between the competing interests in society so that law’s real requirement is to ‘...relate the legal process to the developing needs of existing society.’¹⁹⁸ The use of the word ‘developing’ is significant because it recognises the fluid nature of the law.

Returning to Parekh’s rejection of monism, there must be implicit within this an acceptance of pluralism. We have been wary of legal pluralism throughout this thesis reiterating the need to situate the culture-responsibility relationship inside and not outside the criminal law. But we have recognised value or moral pluralism as an inevitable reality of a multicultural society. This reality has led Parekh to

¹⁹⁴ Cotterrell (n 176).

¹⁹⁵ Jurgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, MIT Press 1995).

¹⁹⁶ Iris Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press 1990) 183-191.

¹⁹⁷ John Mikhail, ‘Dilemmas of Cultural Legality: A Comment on Roger Cotterrell’s the Struggle for Law and a Criticism of the House of Lords Opinions in *Begum*’ (2009) Georgetown University Law Center, Research Paper No.1506242, 385.

¹⁹⁸ Von Jhering, ‘The Struggle for Law’ as discussed in Michael Freeman in *Lloyd’s Introduction to Jurisprudence* (9th edn, London, Sweet and Maxwell 2014) 208.

seek a way through the conflict between ‘...locally valid norms pitched against other locally valid norms’ and a return to ‘...ethical norms which are true and therefore universal’ and he confronts this with ‘social and ethical pluralism’.¹⁹⁹ This involves the establishment of operative public values (OPVs) arrived at through dialogue. The ‘...OPVs of a society are the public moral and political rules that bind a particular group of people into a common society. Without such OPVs the different and often conflicting components of a society could not exist as a cohesive body... OPVs constitute and embody a shared form of public life.’²⁰⁰ These OPVs are the way to negotiate multicultural inclusion because the dialogue that creates them must take place across liberal and non-liberal cultures.

At the moment the culture-responsibility relationship is not an OPV but the framing of it arrived at in section 5.3 is a reflection the perception reached in the course of this thesis of how far the foundations of the law can be manipulated at this particular time. It is therefore a social and ethical reflection of the reality of the theory and practice of our criminal law. However, dialogue around the renewed understanding of the culture-responsibility relationship and its suggested ambit can lead to it being regarded as an OPV as well as a law.

Shabani *et al* call for dialogue in the specific realm of the law, as a means of beginning to balance the competing claims of solidarity and accommodation. Even in a post recognition era there can be struggles over recognition, something Tully identifies as ‘...struggles over the intersubjective norms under which the

¹⁹⁹ P Kelly “Situating Parekh’s Multiculturalism’ Chapter 1 in Uberoi and Modood (n 186) 44.

²⁰⁰ *ibid* 48.

members of any system of government recognise each other as members and coordinate their actions.²⁰¹ These are 'norms of mutual recognition' and there may be times when individuals or groups might experience a prevailing norm as unbearable.²⁰² This is because the norms are handed down by law makers and seen as definitive and final and Tully argues that dialogue '...among those in the field who are subject to the contested norm of mutual recognition' is the way forward in what has been called the 'dialogical turn'.²⁰³ Norms of mutual recognition might be seen as being akin to Parekh's OPVs but there is an initial implication that not all are invited to participate in Tully's dialogue and in establishing the norms. Tully later corrects this by warning against the elevation of dialogue as a solution to all recognition problems and acknowledging the importance of the presence of theorists, courts and policy makers within the dialogue as a non-sovereign counterbalance.²⁰⁴ The dialogical turn is said to satisfy the claims of justice in calling into question a top-down monological approach to law making and embracing instead an interactive approach. Habermas says that '...only those norms can claim to be valid that meet or could meet with the approval of all affected in their capacity as participants in a practical discourse.'²⁰⁵ This resonates with the Rule of Law and the need for laws to have the moral authority of the population to which they apply. This might work with legislation but it does call into question the action that judges should take on a day to day basis if we accept that the declaratory theory of the law (discussed in section 3.2) is not always adhered to in practice. To address this we need to

²⁰¹ *ibid* 22.

²⁰² J Tully in Omid A Payrow Shabani (ed), *Multiculturalism and Law: A Critical Debate* (Cardiff, University of Wales Press 2007) 24.

²⁰³ *ibid* 27.

²⁰⁴ *ibid* 38.

²⁰⁵ Habermas (n 194) 66.

return to Shabani's 'normative model of integrative adjudication' which recognises that values are not always fully agreed.²⁰⁶ However, dialogue could establish general norms of recognition that, once established, judges could call upon. In any event Tully recognises that norms of mutual recognition are not definitive and absolute and that there is space within them for contestation or 'reasonable disagreement'.

McCarthy agrees broadly with Tully but extends the dialogical turn to matters beyond recognition and to a 'multilogue' which is perhaps a better description of the envisaged process. He wisely cautions that there is an empirical question over whether democratic dialogue will be successful. This is a useful practical point because although we place emphasis in Chapter 5 on the power of dialogue to validate the culture-responsibility relationship in the first instance and to further its development in the second the logistics of 'how' need to be resolved. He warns too that dialogue can be elitist.

If the post-multicultural critique is concerned with the essentialist way in which cultures are understood then one of the strengths of multicultural philosophy is the engagement of its proponents in the public sphere so that the link between theory and practice is established. Uberoi and Modood say that multiculturalism has become a debate about the public sphere and define the public sphere as '... a political space distinct from both state and economy which emerged as an aspect of the development of the modern state and specifically of the liberal state.'²⁰⁷ Section 5.4 brings together unresolved questions that have arisen

²⁰⁶ See section 3.2 for a full discussion of this.

²⁰⁷ Uberoi and Modood (n 186) 275.

throughout this thesis that could benefit from space in the public sphere. The framework for the culture-responsibility relationship is just a starting point raising in some ways more questions than it answers and Parekh's 'intercultural dialogue' can begin to formulate answers to those questions because '...there is a market place of ideas in which the good ones are expected to drive out the bad ones.'²⁰⁸

We referred in section 1.2 to a Critical Legal Studies interpretation of the *ad hoc* approach of the criminal courts to questions of culture and responsibility. We can return to this theory in the context of multicultural justice. The Critical Legal Studies movement emerged in American law schools in the 1970's from the premise that liberal thought is underwritten by a number of contradictions, most notably the difference between rules and standards and the conflict between intentionalism and determinism. The law's power to make social change is hampered by its commitment to such liberal values especially universalism. These ideas lead to unjust social hierarchies such as the domination of men over women, rich over poor and white over non-white. Law appears neutral but it masks existing patterns of power and control. We have seen throughout this thesis a shift over time in some of the claims underpinning the Critical Legal Studies movement, particularly those around identity politics where an awareness of the structural injustice beneath the surface of the law in a number of dimensions can be recognised and addressed through multicultural justice in general and the culture-responsibility relationship in particular. Both Mookherjee's border tracing and Parekh's intercultural dialogue can be helpful in

²⁰⁸ *ibid.*

their recognition of sights of oppression and the oppression of majoritarian laws and so are useful devices in warding off claims of injustice. One claim of the Critical Legal Studies movement is that legal culture can be mystifying to those standing outside it. In section 2.4 we recognised the perception of cultural bias in the courtroom and suggested that the culture-responsibility relationship, in genuinely constructed and individual cases, might be helpful in overcoming such perceptions. We have been consistent in promoting the importance of the culture-responsibility relationship in the search for individual justice and we can pre-empt the critical Critical Legal Studies interpretation of liberalism's autonomous individual, '...the liberal and romantic idea of each individual being the author of his life and responsibility for what he makes of it', because we have taken account of Parekh's remark that social contract tradition is based on '...the half-truth of the atomistic or individualistic ontological reduction of the concrete human being.'²⁰⁹ We have reconstructed our individual to be a concrete being whose well being is of the highest value.²¹⁰

Morrison says that philosophy seeks to '...maintain the delicate balance between humanity and the cosmos.'²¹¹ This must be especially true of multicultural philosophy. Raz says that multiculturalism is a new way of seeing an old truth and warns against '...the dangers of each one of us understanding the universal in terms of him or herself, a danger which is particularly great when the other is an alien in our country, when we are at home and he is not.'²¹² Multiculturalism therefore aims to give us a 'heightened awareness' and the culture-responsibility

²⁰⁹ *ibid* 57.

²¹⁰ *ibid* 92.

²¹¹ Wayne Morrison, *Jurisprudence from the Greeks to Post Modernity* (Oxford, Cavendish Publishing 1995) Chapter 2.

²¹² Raz (n 159) 197.

relationship can be seen as an example of that heightened awareness, a mechanism by which the standpoint of others in our country can be recognized and comprehended.²¹³ Jahanbegloo says that we need mediation of our moral and human duties but that our focus needs to be '...not so much on the intentions or motives and inner lives of individuals as on the structures of social relations.'²¹⁴ Perhaps this can be seen as being in conflict with our insistence on the primacy of the individual for the purposes of the culture-responsibility relationship but it resonates with Norrie's moral contextualism in the attribution of legal responsibility. It does not seem possible at the moment to push the limits of the suggested framework in section 5.3 as far as to consider the structures of social relations but this meeting of legal and multicultural philosophy adds weight to the call for ideology around the construction of the individual to be carried forward to the realm of dialogue as discussed in section 5.4.

4.5 Conclusion

²¹³ Ramin Jahanbegloo, *Talking Politics: Bhikhu Parekh in Conversation with Ramin Jahanbegloo*. (Oxford, Oxford University Press 2011).

²¹⁴ *ibid* 207.

The broad aim of this Chapter was to generate a deeper understanding of the term 'multiculturalism' within the specific socio-political context of the United Kingdom in the twenty first century. This aim was achieved in two ways, firstly by researching the history of migration in relation to the United Kingdom, particularly population movements since 1900, to arrive at a clear understanding of the social reality of multiculturalism today and secondly by carrying out an analysis of both historical and contemporary multicultural policy. We now have a clear picture of multiculturalism as social reality and multiculturalism as policy. We see a diverse population brought together through centuries of migration, particularly immigration between 1950 and 2000 and fluid migration from 2000 onwards. We see an elusive and weak policy, not of state multiculturalism, but of integration. This is characterised by the distance of central government, race relations, immigration control and latterly anti-terrorism measures and the implications of Brexit. Policy, such as it is, displays a lack of concern with post immigration settlement, and references to rights, responsibilities, British values and the Rule of Law are not followed up with explorations of meaning or meaningful attempts at developing policy in these areas further.

In the course of pursuing that first aim we also set out to explore and establish the idea that as a society we have not fully considered the implications of multiculturalism for law and justice and that the perception of law and multiculturalism as bounded fields is not unfounded. In particular we have found that the culture-responsibility relationship and multicultural policy have not interacted. This lack of engagement between these spheres furthers the hypothesis that the culture-responsibility relationship remains an unexplored

concern, not just in the criminal law and criminal justice system but in the wider realm of multiculturalism.

Throughout this Chapter we have been questioning how recourse to multicultural policy can help in answering the research question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* The wide world of policy can seem far removed from the seemingly small world of the culture-responsibility relationship and yet they are intrinsically linked in a number of ways. In section 2.4 we asserted that the culture-responsibility relationship has a socio-legal justification beyond that of the pursuit of individual justice and the recognition of the culture-responsibility relationship can be justified too in terms of its ability to provide a tangible legal response to and realization of multicultural policy whilst multicultural policy can in turn provide elucidation for the essence and ongoing development of the culture-responsibility relationship. We have seen calls in multicultural policy for allegiance to the Rule of Law, we have seen calls for citizens and immigrants to know their 'rights and responsibilities' and to obey the law. But what has been done to move these calls into the practical realm? The culture-responsibility relationship can, in a narrow way, answer those calls. It can be both the basis of a right and a responsibility. Looking back to section 2.4 and the nuanced understanding of the relationship we arrived at there we can see that it affirms the responsibility of the individual to obey the law and it creates the legal right of the individual to have cultural evidence taken into account in court in limited and defined tightly circumstances. If we take integration as the basis of current multicultural policy and pick up on the recent reference in multicultural policy to British values including respect for the law, then the culture-

responsibility relationship can be seen as reinforcing that respect whilst at the same time encompassing the tolerance that our society is renowned for.

We have questioned too how recourse to multicultural philosophy can help in answering the research question. The politics of recognition give the culture-responsibility relationship a political purpose and give clarity to the conflict between individual and group. Whilst we have been clear throughout this thesis that justice in itself is an adequate justification for the existence of the culture-responsibility relationship, seeing it as a means by which 'the other' can be recognised adds weight to its importance.

At the end of Chapter 3 we saw the reluctance, perhaps even the fear, of the criminal law and criminal justice system to engage with culture. Moving this to the next level we can see from the analyses in this Chapter the reluctance of multicultural policy to engage with law, particularly the criminal law. It is no wonder then that the culture-responsibility relationship is under-explored in multicultural policy and yet in Chapter 2 we established its importance for contemporary justice in a multicultural society. If multiculturalism (as policy) evades law and law in turn evades culture, yet culture is the basis of multiculturalism (as social reality) then the circle does not quite meet up and there is a sense that justice cannot be achieved. In section 4.4 we turned to multicultural philosophy in the hope of finding the answer to a just way forward for the culture-responsibility relationship. Some of the issues have been explored in earlier parts of the thesis, particularly in section 2.4 where the problems inherent in the culture-responsibility relationship were also seen as a socio-legal justification of its importance. But where uncertainty creeps in the best answer

comes from dialogical theory and we can identify and take forward to Chapter 5 suggestions for further dialogue.

Whilst the broad aim of the Chapter has been achieved some tangible progress has been made towards answering the question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* The current government rhetoric does seem more committed to engagement between law and multicultural policy and we need to harness this interest and take forward to the framework in Chapter 5 thought about how legal responsibilities generally and the culture-responsibility relationship in particular can be incorporated into the wider multicultural picture as well as into the practice of our criminal law. Whilst there seems to be agreement that ‘state multiculturalism’ has failed, multiculturalism in terms of a demographic description is still very much a social reality and the development of multicultural policy, pending the response to the Green Paper consultation, is looking encouraging. Baroness Mobarik recently said in the House of Lords ‘...for a long time, diversity or multiculturalism were celebrated and encouraged on this island... it is deeply disappointing to think that multiculturalism was simply a failed experiment... it was not multiculturalism *per se* which was at fault but the way that we went about promoting it...just because we got multiculturalism wrong, we must not be reactive, go to the other extreme and impose assimilation.’²¹⁵ The culture-responsibility relationship can sit well within a framework of integration and its recognition can be seen as a positive step toward a coherent multicultural policy that engages with law and justice and

²¹⁵ Baroness Mobarik in House of Lords Debate on Public Life Values 16th July 2015. ²¹⁵ <<https://hansard.parliament.uk/Lords/2015-07-16/debates/15071640000146/PublicLifeValues?highlight=multiculturalism#contribution-15071641000001>> accessed 5th February 2018.

that balances respect for the Rule of Law with the recognition of individual difference. Chui recognized this almost twenty five years ago when she saw three possible responses to the 'cultural defence', affirmation (which corresponds most closely with exclusion), opposition (which corresponds most closely with coercive assimilation) or an intermediate position in which cultural evidence is used to show the defendant's state of mind.²¹⁶ We need to take forward to Chapter 5 the argument that the culture-responsibility relationship is integral to the criminal law in a multicultural era and that it needs to be considered in the context of multicultural policy because currently the criminal law is not doing'...all that it can to help us live with our differences.'²¹⁷

²¹⁶ Chui (n 200) 1101.

²¹⁷ Elizabeth Butler-Sloss (n1)

CHAPTER 5

The Way Forward and Conclusions

*'The challenge then is to take minds and hearts formed over the long millenia of living in local troops and equip them with ideas and institutions that will allow us to live together as the global tribe that we have become.'*¹

5.1 Summary of Arguments

In this thesis we have undertaken a socio-legal and interdisciplinary analysis of the relationship between culture and legal responsibility focusing on the individual (not the group) and responsibility (not rights) within the parameters of (i) the foundations, practice and policy of the criminal law and criminal justice system of England and Wales; and (ii) understandings of multiculturalism within the socio-political system of the United Kingdom in the twenty first century. Throughout that analysis we have been mindful of justice as we have searched for an answer to the question *how should the criminal law of England and Wales respond to the culture-responsibility relationship?* The result of the analysis is a renewed and specifically nuanced understanding of the culture-responsibility relationship whose importance for contemporary justice has been established. In general, we have advanced the hypothesis that the criminal law and criminal justice system of England and Wales manifest the absence of a consistent and coherent engagement with both culture and the culture-responsibility relationship and we have tentatively offered some thoughts on that lack of engagement. We have also identified a lack of engagement between the criminal law and multicultural policy.

¹ Kwame Anthony Appiah *Cosmopolitanism: Ethics in a World of Strangers* (London, Penguin 2015) 8.

We have suggested that if multicultural policy evades law and law in turn evades culture (even though culture is the basis for multiculturalism) then the circle is not complete.

The broad aims of the thesis have thus been achieved and the purpose of this Chapter is firstly to take the knowledge gained forward and into the practical realm through the construction of a framework that suggests a way for the criminal law and criminal justice system of England and Wales to engage meaningfully with the culture-responsibility relationship (section 5.3) and secondly to identify those matters that are important for justice in a contemporary multicultural society and that need further consideration at a theoretical, practical or policy level under the two broad headings of criminal law and multicultural policy (section 5.4).

One of the most important things to come from the thesis is the distinction between the culture-responsibility relationship and the 'cultural defence'. This is much more than a matter of semantics. However, the body of literature that has built up over the last 25-30 years surrounding the 'cultural defence' has been invaluable in allowing us to construct the understanding of the culture-responsibility relationship which we have reached here and is a wealthy source for its ongoing development. The word 'defence' is used too loosely in discourse and does not bear the scrutiny of legal analysis as its meaning is situated on a spectrum from acquittal to mitigation in sentencing without any *relationship* between culture and responsibility necessarily being established. The culture-responsibility relationship is a much stronger legal concept and something that is workable in the practical realm. It harnesses strength not just from its dislocation

from the idea of a 'defence' but through its thoroughly considered interpretations of both 'culture' and 'responsibility'. We have given both culture and responsibility fluid understandings with culture conceptualised as a fuzzy complex whole derived from the historical interpretation and adaptation by a group of a number of possible influential factors that an individual may adopt. Responsibility is attributed to liberalism's autonomous individual whose capacity (as choice and fair opportunity) must be considered but whose character, at least at the stage of establishing guilt or innocence, must not be seen as either innately good or bad because in a multicultural context this runs the risk of essentialising. In considering responsibility we are aware of interests, ideas and influences outside of the individual that may have a bearing on his responsibility. These broadly 'relational accounts' of responsibility are particularly important in the context of culture but perhaps currently less workable in the practical realm. Our understanding of responsibility also broadens its meaning to be relevant to both decisions of guilt or innocence and to the degree of responsibility attributed at the sentencing stage. The culture-responsibility thus gains a sense of purpose from finding a place within the criminal justice system.

A second overriding matter of importance to be established by this thesis is the clear need for the culture-responsibility relationship to be included in the criminal law and criminal justice system of England and Wales. The general symbiosis between law and culture identified in section 2.4 fortifies this argument along with the findings reported in Chapter 3. The aim of that Chapter was to gather evidence to support the hypothesis that the culture-responsibility relationship has not been duly considered in theory, practice and policy and to reflect on the lack of engagement between the criminal law and culture more generally. Several

patterns were identified and detail is given in section 3.5. These include, most notably,

- a greater engagement between criminal law and culture in the realm of the 'cultural offence' than that of the culture-responsibility relationship.
- a greater engagement between criminal law and culture at the sentencing stage than at the guilt stage.
- a lack of clarity about the treatment of 'cultural evidence' in court.
- an inconsistency in decisions on both guilt and sentencing.
- a general uncertainty about and reluctance to engage openly with culture.
- gendered implications in the treatment of culture in the courtroom.
- statistics on conviction rates and appeal rates in cases involving culture that are at odds with the statistics in cases that do not involve culture.

We examined the foundations of the criminal law to consider whether there is any immanent structural or theoretical barrier to the accommodation of the culture-responsibility relationship and found that, with political will, there is space within the existing system. We have found multicultural policy to be elusive and have noted the failure of successive governments to follow through on seemingly empty policy statements. Whilst we can now identify integration as a policy aim, the focus of the current government is on immigration rather than post immigration settlement and on regulating undesirable practices. Central government has abdicated responsibility for multicultural policy, relying on local communities to provide integration strategies. Multicultural Policy emphasises the immigrant rather than the migrant and is embedded in race relations. Most of all the focus is on the prevention of terrorism. The emphasis is on rights rather than responsibilities and groups rather than individuals. There is no engagement between multicultural policy and the criminal law in general and therefore it is no surprise to find that the culture-responsibility relationship has not been considered at a policy level. There is evidence in the rhetoric of commitment to British values, the Rule of Law and the need for all to obey the law but this is,

once again, not followed through and there is no active exploration at policy level about what these things actually mean. We concluded in section 4.5 that the culture-responsibility relationship is capable of uniting policy and practice as it can sit within a integration framework as both the basis of a right and a responsibility, answering the call for a two way process in which immigrants are 'socially included' and enjoy equal treatment. A surprising finding is the bridge that multicultural philosophy can provide between the practice of the criminal law (in the form of the culture-responsibility relationship) and multicultural policy because in section 4.4 we gain understanding into the complex relationship between individual group and state and whilst we are concerned with the individual we can see how his autonomy, his sense of self, is informed by those outside of himself. The next section includes further thoughts on culture, multiculturalism and justice.

5.2 Reflections on Culture, Multiculturalism and Justice

The thesis did not set out to adopt a postmodern approach to either culture or the culture-responsibility relationship but the understanding of culture that we arrived at in Chapter 2 has a distinctly postmodern aura. Postmodern jurisprudence is attacked for its interpretivist approach to concepts perhaps previously considered definitive and objectively understood. We have seen in our own analysis of both culture and responsibility a reluctance to be prescriptive and to favour instead a fluid interpretation of these concepts. Another concept that can be subjected to the postmodern critique is that of justice. Feldman argues that we understand justice as both a value and ‘an inexhaustible drive’, the former informed by philosophical hermeneutics and the latter by deconstruction.² Throughout this search for an answer to the question, *how should the criminal law of England and Wales respond to the relationship between culture and legal responsibility?*, justice has been ephemerally present and even though we have not attempted define it, we know innately that it is a value to which we must aspire. Like culture, justice is socially understood and yet we do not seek to undermine its value because it is not in some ways tangible. Feldman argues that ‘...we are open to the meaning of justice, not because our souls transcend culture but rather because we participate in our communal traditions and culture.’³ Justice is therefore understood from within our own cultural standpoint. Perhaps that is why Rawls’s *Theory of Justice* has been so enduring, because he asks us to find a just place for ourselves from behind the veil of ignorance where we are supposedly, among other things, a-cultural. We need the culture-responsibility

² S Feldman S, ‘The Politics of Post Modern Jurisprudence’ (1996) 95 (1) Michigan Law Review 166, 197.

³ *ibid.*

relationship to feel 'just' and have seen throughout this thesis the complex challenges in balancing competing interests in the search for justice. We said at the outset that we wanted to avoid what Norrie refers to as an anti-nomial approach. The multiple binaries that we have confronted (male/female, insider/outsider, white/non-white, individual/group, rights/responsibilities, agency/determinism, guilt/sentencing, equality/inequality) have made this a challenge but have not undermined the search for a just answer to the question at the heart of the thesis as the culture-responsibility relationship has been considered in the widest possible sense throughout and the suggested framework for a way forward is grounded in theory, practice and policy.

In the realm of justice multiculturalism is challenged by the intersection of culture and equality. Phillips writes, in *Multiculturalism without Culture*, of a normative commitment to equality but also of support for multiculturalism and women's rights, achieved through dispensing with an essentialist understanding of culture so that individuals from minority groups are left with agency.⁴ And at times we see the absence of culture in multiculturalism because culture is somehow inherently problematic. Perhaps that is why, in Chapter 3, we became aware of a fear of culture within the courtroom, or at least of an uncertainty or reluctance about how to engage with it. Culture, it seems, is only allowed into the practice of the criminal law through the 'back door'. This might be because it is perceived as belonging to the other and something that others belong to. These thoughts raise questions about the plausibility of culture as a concept in the realm of justice. But culture is intrinsically present in law as we saw in the three disparate cases

⁴ Anne Phillips, *Multiculturalism Without Culture* (Princeton, Princeton University Press 2007).
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outlined in section 1.1. It is as stated in section 2.2, what makes us uniquely human and as Matravers points out, humans ‘...reflect on their culture, criticize and revise it, add to it elements derived from others, even replace it with another, but they cannot transcend or operate outside the realm of culture altogether.’⁵ And therefore the law, to be truly just, needs to embrace it.

Fuller states that law is ‘...the enterprise of subjecting human conduct to the governance of rules’ but questions who is making these rules because for the rules to stick there must be ‘an internal morality of the law.’⁶ Fuller recognises in this ‘hundreds of thousands’ of systems of law as clubs and associations the world over make their rules which bind their members. But the ‘internal morality’ of state law is necessary too, with morality being given the meaning of ‘acceptability’. Magnarella says that the criminal law embodies the morality of the politically dominant but again why should this be so if we live in a multicultural world and if we recognise the need for dialogue?⁷ We need dialogue to allow us to decide upon what is ‘acceptable’. Parekh sees multiculturalism as a movement for justice rather than an uncritical celebration of all norms and the culture-responsibility relationship can play its part in that movement. Teubner says that law has lost its identity in postmodern times, that it ‘...has surrendered to new Gods: it is seen as a servant of economics, of utility, while we demand that it should be a moral phenomenon.’⁸ Multiculturalism needs to be one of those gods. Raz says that multiculturalism can be a ‘...normative precept motivated by concern

⁵ Matt Matravers ‘Responsibility Morality and Culture’ in Will Kymlicka, Claes Lernestedt and Matt Matravers (eds) *Criminal Law and Cultural Diversity* (Oxford, Oxford University Press 2014) 109.

⁶ Lon Fuller, *The Morality of Law* (New Haven, Yale University Press 1969) 106.

⁷ Paul Magnarella, ‘Justice in a Culturally Pluralistic Society: The Culture Defence on Trial’ (1991) 19 *Journal of Ethnic Studies* 65.

⁸ Gunther Teubner, *Juridification of Social Spheres* (W de Gruyter 1987).

for the dignity and well-being of all human beings' and a well-considered culture-responsibility relationship can also be viewed in this positive light.⁹

⁹ Joseph Raz 'Multiculturalism' *Ratio Juris* 1998 11(3) 193.
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5.3 A Suggested Framework for the Culture-Responsibility Relationship

Matravers states that '...the moment at which the criminal law of a liberal state is brought to bear on a person with a different cultural background from the majority-seemingly in response to actions that implicate that background-can create a certain anxiety in liberals.'¹⁰ It is hoped that the analysis in the thesis and the ensuing framework can go some way towards alleviating that anxiety. There are a number of themes that have been identified throughout this thesis that are insufficiently developed to be included in a practically based framework at this stage. These are taken forward to section 5.4 as subjects for further research and/or dialogue. The framework reflects the findings made throughout this thesis. It reflects the current limits of the law as established in this thesis and is therefore not radical but sensitive to the need to resonate with the political will and aware of alienating its ability to be reasonably considered or of inducing fear. It adheres, broadly, to the tenets of liberalism. It recognises the need for strict standards through criminal norms and the limits of the orthodox criminal law but balances these against extended perceptions of agency and moral responsibility in the wake of multiculturalism. It attempts to reflect the delicate balance between the need for equality and the need to accommodate the individual from a different cultural background. It is, in the spirit of dialogue, a starting point.

The framework is divided into (i) general recommendations; (ii) recommendations relating to practice and policy; and (iii) recommendations relating to substantive law.

¹⁰ Matt Matravers 'Responsibility Morality and Culture' in Kymlicka, Lernestedt and Matravers (n 5) 89.

General Recommendations

- The concept of the 'cultural defence' should be disregarded in discourse about the relationship between culture and legal responsibility and its place taken by the culture-responsibility relationship.

Practice and Policy

- Cultural evidence should be admitted to the courtroom. Renteln still argues that cultural evidence should be allowed in all cases as a 'procedural matter' so that the judge should always consult an expert, that is an anthropologist.¹¹ This may not be necessary but the Judiciary need to have clear guidance on when to consider culture. This could be whenever a need to establish a *relationship* between culture and legal responsibility arises. Cultural evidence should not be treated any differently from other evidence but should fall within the ambit of the Criminal Procedural Rules and experts on cultural evidence should be subject to the same standards on reliability as other experts.
- We identified significant reference to culture in policy documents relating to the Judiciary and a commitment to training the Judiciary in the awareness of cultural difference. This commitment should be acted upon so that the Judiciary is better equipped to deal with culture in both the realm of procedure and the substantive law.
- The Sentencing Council should make clear what mitigating factors can be taken into account in personal mitigation. Sentencing Guidelines should therefore be amended to include specific guidance on where culture might be relevant as a mitigating factor (and arguably as an aggravating factor).
- Sentencing Remarks should be published in all cases at Crown Court level and above involving a cultural dimension so that we can begin to understand better the interaction between law and culture in the courtroom.

Substantive Law

- There should be no further criminalisation of cultural practices. 'Cultural Offences' can challenge the limits of the criminal law and criminalisation theory and legislation aimed at preventing the harm in forced marriage and FGM has not proved effective.
- There should be no distinct stand-alone 'cultural defence'.
- The Judiciary should embrace the opportunity to consider the defence of loss of control in the context of culture. Subjective understandings of a litigant 'in the circumstances of the defendant' should be explored if the situation calls for the court to consider whether there is, in any individual case, a relationship between culture and legal responsibility.
- Capacity may be considered as bearing upon responsibility in findings of guilt or innocence. It is vital that this should only be considered where the

¹¹ Alison Dundes Renteln, *The Cultural Defense* (Oxford, Oxford University Press, 2005)

defence raise the issue of capacity as relevant to a *relationship* between culture and legal responsibility. Character should not be considered at the stage of establishing guilt or innocence.

- Ortner's 'middle position' in the cultural schema of determinism could be adopted as an initial test for establishing the culture-responsibility relationship in individual cases. The question that we cited in section 2.4 '*...did my culture, this assemblage of shared meanings and standards to which I have become enculturated determine or influence my behaviour?*' could be put forward and tested as a model direction to juries in cases where culture and responsibility meet.
- Both the capacity and the character of an individual should be relevant in personal mitigation in sentencing.

Lernestedt says that '...my guess (or at least wish) is that in time what we now label 'cultural' evidence in criminal law will be seen as a part of that coherent whole', that is the general law on personal responsibility.¹² This framework is perhaps the first step towards such a goal. It is by no means a perfect solution. In applying this framework in practice it is clear that, for now, the sentencing process will bear the burden of accommodating the culture-responsibility relationship. This recognises Fletcher's 'mercy' and whilst something about this way forward feels perhaps a little disingenuous, in the final analysis for now at least it may be that '...justice is to be done not through adherence to the Rule of Law but through the sentencer's discretion.'¹³ Waldron says that '...allowing cultural norms to change the terms of the criminal law in certain circumstances for specific defendants from specific communities, would lead to unacceptable contradictions, concerns about retroactive application, and mass confusion among the public as to what constitutes criminal behaviour.'¹⁴ But this is not what the culture-responsibility relationship sets out to do. It is not cultural norms that

¹² Claes Lernestedt 'Criminal Law and Culture' in Kymlicka, Lernestedt and Matravers (n 5) (eds) 45.

¹³ Celia Wells and Oliver Quick *Lacey, Wells and Quick: Reconstructing Criminal Law* (Fourth edn, Cambridge, Cambridge University Press 2010) 101.

¹⁴ Jeremy Waldron, 'One Law for All? The Logic of Cultural Accommodation' (2002) *Washington and Lee Law Review* 59(1).

are changing the law from the outside but consensus arrived at, in the now, through a culture-responsibility relationship grounded in the existing reality of policy and practice of the criminal law and criminal justice system and, in the future, through dialogue about the ongoing development of this framework. It is not for 'specific defendants from specific communities' but for everyone- when and where a *relationship* between culture and legal responsibility is established. It does not pose the threat of mass confusion but rather seeks to bring consistency to existing confusion. In time the culture-responsibility relationship can become normalised within the criminal law and at that point we may be able to adopt a more common sense and manifest approach but until it is established we need clear (though negotiable) guidelines.

5.4 Matters to Take Forward

The framework for the culture-responsibility relationship suggested in section 5.3 is a starting point. It includes ten ways in which the criminal law can move forward in a practical way to meet the needs of defendants from any background where culture might be thought to have an effect on responsibility. It is intended to reflect the limits of the law as they stand today. However, a number of other matters have arisen in the course of the analysis undertaken in this thesis. They are not recommended for inclusion in the framework because they do not pertain directly to the development of the culture-responsibility relationship, because they cannot be contained by it or because they involve a significant shift in thinking about the values underpinning the criminal law. They are nevertheless important for the ongoing and just development of the culture-responsibility relationship or for justice generally in a multicultural world. We do not want to forget them and this list can be seen as a working agenda of 'matters for further discussion'. Following the distinct parameters within which this research has been carried out these are divided into matters of the criminal law and matters of multicultural policy.

Criminal Law

- Norrie's argument that motive is more central to human agency than intention should be revisited. Much of Renteln's work, being non-jurisdiction specific, is also focused on motive.
- Norrie's moral contextualism should be revisited in terms firstly of defining who is responsible for acts that contravene the law and secondly in relying on retribution as the basis for punishment. As Norrie says '...there is growing uncertainty as to the correct philosophical basis for criminal law concepts and the growing challenge to orthodox subjectivism as the dominant approach to criminal responsibility.'¹⁵
- 'Cultural offences' need to be revisited. The concept of harm and the question of what or who the criminal law is protecting needs to be

¹⁵ Alan Norrie, *Punishment Responsibility and Justice; A Relational Critique* (Oxford, Oxford University Press, 2000) 1.

reconsidered in the context of a multicultural population. It seems to defeat the purpose of legislation creating the offences of forced marriage and FGM to allow culture in personal mitigation but if rehabilitation or reform is a better punishment outcome than retribution (for example, education and/or reform goals might be a more appropriate basis for punishment in these cases) then perhaps it could be used in mitigation to drive a more appropriate sentence. The low prosecution rates in cases of forced marriage and FGM needs to be addressed.

- The concept of 'honour' needs to be revisited. The inherent reluctance of the criminal law to include it in decisions both on guilt and in sentencing needs to be clarified.
- Further research into outcomes in cases in the criminal justice system involving a cultural dimension needs to be carried out. This picks up the findings of the Lammy Report and the perception of an endemic cultural bias in the legal system.

Multicultural Policy

In section 4.2 we identified a number of perceptions surrounding multicultural policy that were subsequently borne out in the analysis of multicultural policy undertaken in section 4.3. The culture-responsibility relationship can be seen as a positive mechanism for redressing, in part, some of these negative perceptions. We need to be mindful of elevating the purpose of the culture-responsibility relationship to the level of policy because we must remember that it is, in essence, simply a mechanism for establishing true blameworthiness at the individual level but in situating it within these perceptions it can be taken forward for discussion and dialogue in the wider realm. The themes are as follows:-

- A clear statement of current multicultural policy would be enormously beneficial. Generally we need much more transparency in these matters.
- Consideration should be given to what is meant by the Rights and Responsibilities of Citizens' and to phrases such as the 'need to obey the law' and 'adherence' to the Rule of Law in the context of the multicultural citizen and the culture-responsibility relationship.
- 'Multicultural policy' should focus on settlement after arrival in the United Kingdom. The ability of the culture-responsibility to assist in that settlement should be considered.
- There has been opposition to 'multiculturalist policy'. This can be because it has in general been seen to be created by policy elites rather than by popular demand. Therefore '...ordinary people have often seen such programmes as elitist impositions that have made their

lives more difficult in times that are difficult already.¹⁶ Dialogue is a way to circumvent this perception. There have been strong arguments for dialogue both from academia (Tully, for example) and policy (Cantle's intercultural dialogue and Parekh's focus on dialogue bridges the two domains.

- If the development of the law and legal theory depends on empirical socio-legal research to keep it grounded then empirical legal research and dialogue can perhaps be combined.
- A broad dialogue/research about the concept of culture in the legal domain would be hugely helpful in enhancing understanding of culture and understanding the law's reluctance to engage fully with it. This could extend to debate around the possibility of culture being a protected characteristic for the purposes of the Equality Act.

All of these matters- law, culture, multiculturalism, the culture-responsibility relationship- need to be taken forward and considered as a joined up whole, with a concrete framework such as that suggested here as a starting point from which meaningful dialogue and further research can begin. As Rosen says '...legal scholars often approach the patterns of social and cultural life either as intrinsically interesting but not directly germane to the course of actual legal decision making or in need of being distinct from law.'¹⁷ This can no longer be so because '...it is by moving back and forth across the analytic line that separates law from culture that we can perhaps best see how problems raised in each domain find their response not within their own confines alone but within the ambit of both- how the determination of facts depends upon the concepts by which mind and act are categorised in ordinary discourse or how the conceptual framework of legitimate authority is shaped by its judicial articulation.'¹⁸

¹⁶ George Crowder, *Theories of Multiculturalism: An Introduction* (Cambridge Polity 2013) 4.

¹⁷ Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press 1989) xiii.

¹⁸ *ibid* 78-79.

5.5 Conclusion

Rosen says that law must seek to '...maintain the cosmos', especially in times of contested social change.¹⁹ Norrie says that '...law should be comprehended neither in its positivity nor as a metaphysical correlate but as a social phenomenon comprehended within sociological theory.'²⁰ It is a tall order to call upon a social phenomenon to maintain the cosmos, yet we know that law has this capability because it is underwritten by the political will and bolstered by the times in which it finds itself. The criminal law now needs to respond adequately to multicultural times. If '...the stories that we tell to justify one legal state of affairs over another are just that, stories', it is hoped that culture has established its place in such story telling.²¹ It is acknowledged that judgements are made on the basis of story-telling and that the '...adjudicators judge the plausibility of a story according to certain structural relations among symbols in the story.'²² Culture is such a symbol.

In legal theory there is almost unanimous agreement that we need resonance or at least not dissonance 'between the substantive norms of criminal law and prevailing social norms.'²³ How do we establish what those prevailing social norms are in a multicultural society? We talk to people. Ultimately, as Appiah says, we need to '...live together as the global tribe that we have become' and we need to reflect seriously upon the role of the criminal law in enabling us to do so. As Latour says '...there is no doubt that the war of the worlds is taking place;

¹⁹ Lawrence Rosen *Law as Culture: An Invitation* (Princeton University Press 1979) 171.

²⁰ Alan Norrie, *Law and the Beautiful Soul* (London, Glasshouse 2005) 24.

²¹ Drucilla Cornell n1 Chapter 3.

²² Celia Wells and Oliver Quick (n 13) 23.

²³ Nicola Lacey *In Search of Criminal Responsibility: Ideas, Interest and Institutions* (Oxford, Oxford University Press 2016) 18.

unity and multiplicity cannot be achieved unless they are progressively pieced together by delicate negotiations. Nobody can constitute the unity of the world for anybody else...by generously offering to let others in, on condition they leave at the door all that is dear to them: their gods, their souls, their objects, their times and their spaces, in short their ontology.'²⁴

²⁴ Bruno Latour (2002) *War of the Worlds: What About Peace?* (Chicago, Prickly Paradigm Press 2002).

ANNEX A

Decided Cases Involving a Cultural Dimension 2000-2018

Part 1-Cases Not Appealed

**1. *R v Mohammed Rahman, R v Manmoor Rahman, R v Miyibar Rahman*
Oxford Crown Court
4th November 2005**

BACKGROUND: Arash Ghorbani Zarin (19) was killed by Mohammed Raman (19) and Manmoor Raman (16) on the orders of their father Mohammed because he had been having a relationship with their sister. The relationship brought tension to the family where there was a ‘...cultural divide between the Bangladeshi born father and the British born children’. Gross, J. Prosecuting counsel said ‘... their relationship brought shame and dishonor on the family. That drove the accused, headed by the head of the family to murder Arash to vindicate the family’s honour. It is inconceivable that a murder of this kind would be organized by his 15 and 18 year old sons on their own’

3 defendants found guilty of murder and sentenced to life imprisonment.
Mohammed to serve minimum of 20 years
Miyibar to serve minimum of 16 years
Manmoor to serve minimum of 14 years

**2. *R V Rahan Arshad*
Manchester Crown Court
13th March 2007**

BACKGROUND: Uzma Rahan and her three children were killed by Arshad Rahan in July 2006 because he was jealous about his wife’s affair.
He pleaded provocation and claimed that his wife had murdered the children.

Defendant found guilty of murder of wife and three children and sentenced to life imprisonment with recommendation he serve life.

**3. *R V Athwal and Athwal*
Central Criminal Court
26th July 2007**

BACKGROUND: Surjit Kaur Athwal was killed in India in 1998. The killing was arranged by her mother in law Bachan Kaur Athwal and husband Sukhdave Athwal.
Surjit Athwal’s brother is campaigning for the Indian authorities to find her killers in India.

Defendants found guilty of murder and sentenced to life imprisonment
Bachan Athwal (mother in law) to serve 20 years
Sukhdave Athwal (husband) to serve 27 years

**4. *R v Gurmeet Ubhi Singh*
Leicester Crown Court
February 2011**

BACKGROUND: Gurmeet Singh Ubhi murdered his daughter Amrit because he could not accept her western lifestyle. He was sentenced to life imprisonment with a recommendation that he serve 15 years.

Singh's second wife (who he had attacked with a chisel, a crime he had served a prison sentence for) said that the murder of Amrit was not about her being 'westernised' but that '...it has to do with being an old fashioned father who thought his children should do what he thought. It is not really a cultural thing'.

Defendant found guilty of murder of daughter and sentenced to life imprisonment to serve 15 years

5. *R v Ashtiaq Ashgar*
Sheffield Crown Court
December 2012

Defendant found guilty of murder of girlfriend and sentenced to life imprisonment to serve 17 ½ years.

6. *R v Ahmed*
Chester Crown Court
3rd August 2012

BACKGROUND: Shafelia Ahmed was killed by her parents Iftikhar and Fazana Ahmed in 1998 for bringing shame on the family. They were not prosecuted until 2012 when another daughter staged a robbery at the family home so that she could report the killing to the police.

'A desire that she understood the cultural heritage from which she came is perfectly understandable, but an expectation that she lived in a sealed cultural environment separate from the culture of the country in which she lived was unrealistic, destructive and cruel'. Evans J.

Defendants Iftikhar Ahmed (father) and Fazana Ahmed (mother) found guilty of murder and given a life sentence, both to serve minimum of 25 years.

7. *R v Mohammed Inayat*
Birmingham Crown Court
30th October 2013

BACKGROUND: Mohammed Inayat set fire to the family home because he did not want his daughter to fly to Dubai to marry. His wife died in the fire but his daughter did not. He was charged with the murder of his wife, the attempted murder of his daughter and with arson with intent to endanger life.

Defendant found guilty of murder of wife and guilty of arson but not guilty of attempted murder of daughter. Given a life sentence to serve minimum of 22 years.

8. *R v Ahmed al-Khahib*
Manchester Crown Court
2014

BACKGROUND: Ahmed al-Khahib murdered his wife Rania Alayed.

He claimed that the djinn (demonic spirit in Islamic folklore) had commanded him to bury his wife and a defence of diminished responsibility was rejected

Defendant found guilty of murder and given a life sentence to serve minimum of 20 years.

9. *R v Jahangir Nazir*
Manchester Crown Court
March 2014

BACKGROUND: Jahangir Nazar killed his wife Farkhanda Younis and was tried at Manchester Crown Court in March 2014. She was 'westernised' and 'promiscuous' and he was jealous and controlling.

Defence of diminished responsibility caused by severe depression. This was not accepted because of his 'mental agility' after the killing.

Defendant found guilty of murder and sentenced to life to serve a minimum of 22 years

Part 2- Cases Appealed

10. *R v Faqir Mohammed*
[2005] EWCA Crim 1 880

BACKGROUND: Mohammed killed his daughter after finding her with her boyfriend in her bedroom. He raised the defence of provocation at trial and the jury was asked to take account of his depression and his 'strongly held religious and cultural beliefs', ie that sex outside marriage is a sin, and to weigh those things against the evidence from his children that he was a violent man in deciding whether he had been provoked. Provocation was not allowed as he had lost his temper rather than lost control and he was convicted of murder on 18th February 2002 at Manchester Crown Court and given a life sentence to serve a minimum of

Trial-cultural beliefs were raised in the context of provocation.

Appeal-Defendant appealed on a point of law, that the test for provocation applied during trial (*Smith (Morgan)*) should have been that under the later decision in *Holley*. The CA found that the jury would have reached the same verdict under *Holley* and the appeal was dismissed.

11. *Rv Sze-Hau Tai*
[2006] EWHC 1724 (QB)

BACKGROUND: D killed his wife by striking her three times over head with plank. He raised the defence of provocation and asked that the provocation be considered in the light of his cultural background because an assault on a man by his wife in China was deemed to be a great insult (his wife had prodded him with a plank and thrown tea in his face). The jury rejected the defence of provocation. He was found guilty of murder and sentenced to life to serve 12 years.

He appealed under Para 3 of Schedule 22 to Criminal Justice Act 2003 for a review of the minimum term of his sentence on the basis that his defence of provocation (his wife had prodded him with a plank and thrown a cup of tea in his face) should be considered in the light of his cultural background.

Trial-cultural background was not raised in the context of provocation.

Appeal-cultural background raised in the context of provocation and QBD ruled that it 'mitigated the criminality of the conduct a little'. Held that the minimum term of 12 years remain as mitigating circumstances had been properly addressed at trial.

12. *Re Siva Kumar* (Setting of Minimum Term) [2007] EWHC 1322 (QB)

BACKGROUND: Kumar was part of a gang that took a vulnerable youth hostage to extract money from him. The gang beat him to death before stripping him and setting his body alight. Kumar was convicted of murder and sentenced to life, to serve 17 years. The trial judge identified K's cultural background as the only mitigating factor, noting that his family had come to England to escape civil war in Sri Lanka.

Proceedings in QB were to set minimum term.

Trial-cultural background identified as the only mitigating factor in sentencing

Appeal- The mitigating factors were accepted on appeal on the basis that K would find his time in custody harder to bear because of linguistic and cultural unfamiliarity with those around him.

13. *R v Yones* [2007] EWHC 1306 (QB)

BACKGROUND: Yeshu Yones was murdered by her father Abdullah Yones. He pleaded guilty and was sentenced to life imprisonment. At trial the prosecution recognized the murder as an honour killing with prosecutor Nazir Azal stating that the victim '... was murdered because she loved the wrong person, in her family's eyes. It was an 'honour killing' to protect the perceived status of the family and to mark their disapproval.' Yones was convicted of murder to serve 14 years.

Proceeding in QB were to set the minimum term.

Trial- Cultural background not discussed although 'honour killing' recognised.

Appeal-Term of 14 years set by trial judge agreed.

14. *R v Nazir* [2009] EWCA CRIM 213

BACKGROUND: Samaira Nazir was killed by her brother Azhar Nazir (who actively participated in a joint enterprise to kill her because he claimed he was protecting the honour of the family) and by her cousin Imran Mohammed. Her family did not approve of the caste of her boyfriend and she was resisting an arranged marriage. Nazir pleaded diminished responsibility but was

convicted of murder and given a life sentence to serve 20 years and Mohammed a life sentence to serve 10 years.

Trial- Culture was raised in the context of the killing.

Appeal-This was against conviction on three grounds including the judges direction on joint enterprise and the anonymity of witnesses. Appeal dismissed.

15. *R v Mahmood (Babkir)* [2009] EWCA CRIM 775

BACKGROUND: Mahmood was convicted of the murder of his daughter Banaz. He did not actually kill her but arranged her killing. He was sentenced to life, to serve 20 years. His brother Ari Mahmood Babakir Aga was convicted of murder and sentenced to life to serve 23 years. Mohammed Marid Hama was also convicted of murder and sentenced to life to serve 17 years. Mahmood appealed against conviction on the basis of fresh evidence from the victim's sister. At trial he held that he did not distinguish between his sons and daughters and that he believed in human rights and women's rights. Leave to appeal refused

Trial

Appeal

16. *R v Khatun* [2010] EWCA CRIM 138

BACKGROUND: K convicted of murder of husband and sentenced to life to serve 17 years. Her defence was that the stabbing of her husband (it was her second arranged marriage) arose from cultural tensions. Various witnesses from K's background had given evidence but the trial judge excluded expert assistance on cultural issues, particularly on why she had initially lied to the police. She appealed on 3 grounds.

Ground 3-The trial judge 'was wrong to exclude expert evidence as to K's cultural background which could explain why she had initially lied to police and failed to say that she had been physically and sexually abused by her husband

HELD: Appeal dismissed. The trial judge was entitled to find that no expert assistance was required.

REMARKS: There was no issue as to the expertise of Miss Patel, an expert in the culture from which the appellant came.

Counsel argued that expert evidence was admissible because

1. The expert could help the jury understand why K had lied (and the trial judge did acknowledge that cultural background may provide an innocent explanation for lies)
2. Evidence could explain why K gave a no comment interview when arrested a fact which led to a standard adverse inference direction
3. Evidence could explain why K made no initial reference to sexual abuse

However, the assessment of reasons for lies and omissions here did not require expert evidence

Trial- The judge did acknowledge that cultural background may provide innocent explanation for lies.

Appeal- Counsel argued that expert evidence was admissible because the expert could help the jury understand why K had lied, evidence could explain why K gave a no comment interview when arrested, a fact that led to a standard inverse inference direction and evidence could explain why she made no initial reference to sexual abuse. However the trial judge was entitled to find that no expert assistance was required as assessment for the lies and omissions did not require expert evidence. Appeal dismissed.

17. *Re Naz*

[2011] EWHC 2850 (QB)

BACKGROUND: Shazad Ali Naz was convicted (along with his mother Shakeela Naz although his younger brother Iftikhar was acquitted) of the murder of his sister Rukhsana in 1999. The family claimed that this was an 'honour killing'. At trial he pleaded provocation on the grounds that news of his sisters pregnancy caused a sudden and temporary loss of control on account of his religious beliefs. The judge asked the jury to consider whether a reasonable and sober person of her brother's age religion and sex would have acted as he did. They decide not and he was convicted of murder and sentenced to life imprisonment to serve a minimum term of 17 years. At trial Tucker J said that the case was a horrific example of outdated and misplaced family pride but there was no mention of cultural reasons in his plea in mitigation. He appealed against sentence under the Criminal Justice Act 2003.

Trial-Culture was not raised in mitigation (though religious beliefs were raised in the context of provocation).

Appeal- Culture was allowed to be taken into account on appeal '...on the grounds that while the cultural background of the defendants could not excuse a killing such as this, it mitigated the criminality of the defendants a little.' (Lord Bingham LCJ) Appeal allowed and recommended minimum period for both Shazad Naz and Shakeela Naz be reduced to 14 years.

18. *R v Khan (Adeel)*

[2015] EWCA Crim 1816

BACKGROUND: Khan (17) was convicted of the attempted murder of Ismail Khan (15). He had attacked him with a hammer because Ismail Khan was in a relationship with Khan's younger sister. The court considered this a planned revenge attack. Khan was sentenced to 15 years detention in a young offenders institution. He appealed against his sentence on the grounds that he was only 17 when he committed the offence and that although the trial judge had recited Khan's background he failed to appreciate that there were '...cultural issues in play which must have imposed subtle pressure on the appellant to do something'. The prosecution had advanced the case as a 'so-called honour killing'.

Trial-Background of defendant was taken into account but not the pressures of cultural issues.

Appeal- Although the motivation for a revenge attack of this kind by an adult could never be used in mitigation '...the position may be less clear cut with a child or young person, just as it is when sentencing judges are dealing with young or vulnerable offenders who have been put under tangible and substantial pressure into committing any crime by identified family members or older friends. Here there was no evidence of such pressure. 'A vague appeal to cultural pressure cannot assist anymore than it would, for example, were a 17 year old to beat up someone in a revenge attack for a perceived insult to his girlfriend and then said

his response was the normal way of dealing with such matters in his family or social circle.’ Appeal dismissed and sentence of 15 years to stand.

**19. *Re AG Ref (No. 66 of 2010)*
(Also known as *R v NW*)
[2011] EWCA CRIM 97**

BACKGROUND: N was convicted of marital rape in the year following marital breakdown. The trial judge indicated that N, who came from an African culture where marital rape might be condoned, had been influenced by his cultural background. Reference to The AG was allowed on the basis that the sentence was unduly lenient

Trial-Cultural background was raised in the context of sentence and the trial judge made oblique reference to the effect of assimilation.

Appeal-There was concern about the judges observations on cultural influence and the defendant’s cultural background should be irrelevant to the sentencing decision. It was not a feature that could be said to justify any reduction in the sentence particularly for a defendant who had lived in the UK for some years and knew his actions were unacceptable. Sentence increased from 7 to 11 years.

**20. *Re AG Ref (No 1 of 2011)*
(Also known as *R v A*)
[2011] EWCA CRIM**

BACKGROUND: A convicted of marital rape and sentenced to 9 years in prison. Appealed on basis that cultural background was of relevance in mitigation

Trial-

Appeal-The cultural background of an offender of Pakistani origin who had raped his wife on numerous occasions was of no relevance for the purposes of mitigation. Cultural background was not a feature that justified or could begin to be said to justify any reduction in sentence. The defendant had in any event lived in the UK for some years and therefore the issue of cultural background had no relevance. (Lord Judge LCJ) Appeal dismissed.

**21. *R v MA*
[2012] EWCA CRIM 1646**

BACKGROUND: Marital rape. A sentence of 8 years was given on the basis that the defendant was dangerous and the sentence was needed for public protection. MA appealed against sentence.

Trial-

Appeal- Counsel for the appellant submitted that the learned judge ‘could have treated [him] slightly differently from a man who had been brought up in the UK. The Court of Appeal rejected that submission out of hand. ‘no man, whatever his background, creed or colour has the right to rape his wife.’ (Paragraph 20 Official Transcript)

22. R v A

[2012] EWCA CRIM 3024

BACKGROUND: A convicted of marital rape and sentenced to 14 years to serve a minimum of 8 years on the grounds of 'dangerousness' and public protection

He appealed against sentence on the ground that the starting point for sentence was too high as he had not been brought up in the UK and his offending was based on a cultural belief that he had a right to rape his wife rather than on a disregard of UK behavioral norms. Counsel submitted that the trial judge 'could have treated [him] slightly differently from a man who had been brought up in the UK'

HELD: The finding of 'dangerousness' was met. This was a campaign of rape'. Appeal dismissed.

REMARKS: 'No man, whatever his background race or creed has the right to rape his wife'

Trial

Appeal

23. *Christian and Others v The Queen*

[2006] UKPC 47

24. *R v Jamal Muhammed Ul Nasir*

[2015]

BACKGROUND: Leave to appeal against 7 year custodial sentence

Trial-

Appeal- Was the culture of the victim relevant in sentencing?

25. *R v Sebastian Pinto and Others*

[2006] EWCA CRIM 749

BACKGROUND:

Trial-

Appeal- Applicants 2 and 3 appealed against sentence. Applicant 1 appealed against conviction. For applicants 2 and 3 their sentence was reduced.

26. *R v Goren*

[2001] EWCA CRIM 307

BACKGROUND: Mehmet Goren was convicted of wounding with intent to cause grievous bodily harm under S18 OAPA 1861. He was sentenced to 7 years in prison. His daughter was in a relationship with a Turkish political refugee and had left home to live with him and they were planning to marry, with Goren's consent, when the daughter was 16. After a meeting with others from the Turkish community Goren stabbed the man in the neck with a hatchet. The trial judge said that the attack had been premeditated and made in revenge. Goren raised the issue of self defence but this was not accepted. He appealed against sentence.

Trial-

Appeal-Provocation was raised at appeal and in mitigation severe treatment in Turkey where the appellant was tortured and imprisoned for his political beliefs. Defence counsel argued that the victim's political beliefs were a 'moral outrage' in the defendant's community. The Court of Appeal affirmed that the sole question for them was one of severity of sentence. It was held that although this was clearly a revenge attack the sentence of 7 years was too long and it was reduced to 5 years.

27. Crawford v CPS

[2008] EWHC148(admin)

Trial-

Appeal-The High Court accepted the submission that the Crown Court had been wrong to refer to the appellants culture. '...it may be a generous interpretation to take into account the appellant's 'culture' but the Crown Court did so, meaning that a person of the appellants culture would have a less ready understanding of what amounted to harassment than a white person. This was condescending, unjustified and unfair and assumed that the culture of the appellant predisposed him to act in certain ways.'

27. The Queen on the Application of Mohammed v Nursing Midwifery Council

[2009] EWHC 1057 (QBD Administrative Court)

BACKGROUND: The appellant was a midwife who had been struck off after being found guilty of money laundering even though she claimed she had no knowledge of the fraud. Her evidence to the Nursing Midwifery Council was that in the Yoruba culture a wife should obey her husband in all things. The council had stated 'Although the panel are sympathetic to cultural influences these should not override the law of the land or a professional person's code of conduct'. She appealed against the decision on the basis that although the panel had listened to and accepted the mitigation re the Yoruba culture they had not placed sufficient weight on it.

Trial-

Appeal -The Nursing Midwifery Council had placed sufficient weight on the cultural influence and personal mitigation is less relevant in this type of case than in criminal cases where the purpose of the sanction is punishment.

28. R v Zaynab Hamza, R v Sabina Ahmed

[2014] EWCA CRIM 2378

BACKGROUND: Two women claimed they were sisters and that they had resided together in order to be able to exercise a right to buy social housing. They were charged with 8 counts of fraud under S1 Fraud Act 2006, pleaded guilty and were each sentenced to 20 months in prison. They appealed against sentence on the basis that although they were not in fact sisters it was normal in their culture to refer to one another as sisters. There had been detailed consideration of mitigation at sentence but culture was not addressed although it had been raised in the pre-sentence report.

Trial-

Appeal-Appeal dismissed

**29. *R v Taylor (Paul Simon)*
[2001] EWCA CRIM 2263**

BACKGROUND: Taylor was convicted of possession of cannabis under Misuse of Drugs Act 1971. The question was whether the use of cannabis for religious purposes provided a defence.

Trial-
Appeal-

**30. *R v Andrews (Reuben Philip)*
[2004] EWCA CRIM 947**

BACKGROUND: Andrews imported cannabis which he used, as a Rastafarian, as a result of his religious beliefs and was convicted for drug trafficking under S 170 (2) Customs and Excise Management Act 1979 and sentenced to... He argued that S170(2) of the 1979 Act was incompatible with his rights under the Human Rights Act 1998 (and Article 9 ECHR)

Trial-
Appeal- Appeal dismissed. There was no incompatibility between S170 and Article 9.

**31. *R v Cooper (Justin Shane)*
[2003] EWCA 2259**

BACKGROUND: Cooper was convicted of dangerous driving following a car accident and sentenced to 9 months in prison and given a three year driving disqualification. He appealed against the custodial sentence on the grounds that he was a member of a devout religious community, the Plymouth Brethren, and that he was likely to be excluded from the community as a result of imprisonment. He claimed that the trial judge had not taken account of mitigating factors, particularly religious background so that prison would cause him 'greater upset than normal'.

Trial-
Appeal- Appeal against custodial sentence dismissed on the basis that '...many people from different backgrounds, whether they be religious, cultural or ethnic, would have particular difficulty coping with imprisonment, and the court would have considerable difficulty distinguishing between members of different groups on that basis.'
(Appeal against disqualification for 3 years allowed, and ban reduced to 2 years)

ANNEX B

Multiculturalism

Documents and Sources Reviewed for Thematic Content Analysis of Policy on Multiculturalism

(All sources accessed 1st October 2018)

Part 1 Government or Government Initiated Policy Documents

2000 The Future of Multi-Ethnic Britain

Commission on the Future of Multi-Ethnic Britain set up by Runnymede in January 1998

(The Parekh Report)

<http://www.runnymedetrust.org/publications/29/32.html>

2001 Community Pride Not Prejudice: Making Diversity Work in Bradford

The Bradford District Race Review Panel

(The Ouseley Report)

<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/DownloadDocumentsFile.aspx?recordId=98&file=PDFversion>

2001 One Oldham, One Future: Independent Panel Report

(David Ritchie)

Cohesion Institute (no longer available online)

2001 Integration: Mapping the Field

Report of a Project carried out by the University of Oxford Centre for Migration and Policy Research and Refugee Studies Centre contracted by the Home Office Immigration Research and Statistics Service (IRSS)

<http://forcedmigrationguide.pbworks.com/w/page/7447907/Integration%3A%20Mapping%20the%20Field>

2001 Community Cohesion

A Report of the Independent Review Team Home Office Report

(The Cattle Report)

<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/Default.aspx?recordId=96>

2002 Secure Borders, Safe Haven: Integration with Diversity in Modern Britain Immigration White Paper (Home Office 2002) Led to Nationality, Immigration and Asylum Act 2002

2004 The End of Parallel Lives? The Report of the Community Cohesion Panel

<http://www.tedcandle.co.uk/publications/012%20The%20end%20of%20parallel%20lives%20the%202nd%20Candle%20Report%20Home%20Off.pdf>

2005 Improving Opportunity, Strengthening Society Strategy: The Government's Strategy to Increase Race Equality and Social Cohesion

Home Office

<http://www.tedcandle.co.uk/publications/016%20Improving%20Opportunity%20Strengthening%20Society%202005.pdf>

2005 Integration Matters: A National Strategy for Refugee Integration

Home Office London

www.homeoffice.gov.uk/documents/cons-strat-refugee-201004/strat-refugee-integrate-2010042835.pdf?view=Binary

2006 The Duty to Integrate: Shared British Values

Speech by Tony Blair at 10 Downing Street 8th December 2006

<https://www.theguardian.com/uk/2006/dec/09/religion.immigrationandpublicservices>

2007-2008 Citizenship Survey

Department for Communities and Local Government. Race, Cohesion and Faith Research Unit, National Centre for Social Research. (2008). *Citizenship Survey, 2007-2008*. [data collection]. 6th Edition. UK Data Service. SN: 5739, <http://dx.doi.org/10.5255/UKDA-SN-5739-1>.

2007 Our Shared Future

Final Report of Commission on Integration and Cohesion June 2007

<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/Default.aspx?recordId=18>

2007 The Governance of Britain

Ministry of Justice Cm 7170 July 2007

Green Paper

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf

2007 The Governance of Britain

Green Paper 07/72 26th October 2007

House of Commons Library

2007 Fairness and Freedom: The Final Report of Equality Review

Trevor Phillips

http://webarchive.nationalarchives.gov.uk/20100806180051/http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/quality_review.pdf

2008 The Government's Response to the Commission on Cohesion and Integration

Department for Communities and Local Government

<http://resources.cohesioninstitute.org.uk/Publications/Documents/Document/DownloadDocumentsFile.aspx?recordId=17&file=PDFversion>

2008 Face to Face and Side by Side: A Framework for Partnership in Our Multicultural Society

Department for Communities and Local Government

<http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/publications/communities/facetofaceframework>

2008 Managing the Impacts of Migration: A Cross Government Approach

2009 Managing the Impacts of Migration: Improvements and Innovations

<http://webarchive.nationalarchives.gov.uk/20120919213058/http://www.communities.gov.uk/documents/communities/pdf/1179350.pdf>

2010 Attitudes, Values and Perceptions: Muslims and the General Population in 2007-2008

Department for Communities and Local Government

https://data.gov.uk/dataset/attitudes_values_and_perceptions-muslims_and_the_general_population

2010 How Fair is Britain?

Equality and Human Rights Commission The First Triennial Review

<https://www.equalityhumanrights.com/en/publication-download/how-fair-britain>

2011 PREVENT

<https://www.gov.uk/government/publications/prevent-strategy-2011>

2012 Building Safe Active Communities: Strong Foundations by Local People

Department for Communities and Local Government

<https://www.gov.uk/government/publications/building-safe-active-communities-strong-foundations-by-local-people--2>

2012 Creating the Conditions for Integration

Department for Communities and Local Government

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7504/2092103.pdf

2015 Living with Difference: Community Diversity and the Common Good

Baroness Elizabeth Butler-Sloss

Convened by the Woolf Institute

<https://www.woolf.cam.ac.uk/research/publications/reports/report-of-the-commission-on-religion-and-belief-in-british-public-life>

2015 Community Integration

Department for Communities and Local Government

Policy Paper 8th May 2015

<https://www.gov.uk/government/publications/2010-to-2015-government-policy-community-integration>

2015 Social Integration Commission

Kingdom United? Thirteen Steps to Tackle Social Segregation

Matthew Taylor

http://socialintegrationcommission.org.uk/images/sic_kingdomunited.pdf

2016 The Casey Review: A Review into Opportunity and Integration

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575973/The Casey Review Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575973/The_Casey_Review_Report.pdf)

2017 All Party Parliamentary Group Report into Integration

<https://socialintegrationappg.org.uk/wp-content/uploads/sites/2/2018/09/Final-Report-into-the-integration-of-migrants.pdf>

2018 Integrated Communities Strategy

Ministry of Housing Communities and Local Government

Green Paper Building Stronger More United Communities

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696993/Integrated Communities Strategy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/696993/Integrated_Communities_Strategy.pdf)

2018 National Conversation on Immigration

British Future and Hope not Hare

<http://nationalconversation.uk/immigration-and-integration-getting-it-right-locally/>

Part 2 European Union Policy Documents

Horizon 2020

Research Programme of European Union, successor to Microcon Framework Programmes

Migratory Policy Group (see Part 3 below)

Handbook on Integration for Policy Makers and Practitioners

European Commission Directorate General of Justice Freedom and Security
Brussels

<http://www.migpolgroup.com/>

Justice and Home Affairs Council

2618th Council Meeting

Press release 14615/04 Brussels 19th November 2009

European Integration Fund

http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/integration-fund/index_en.htm

European Integration Forum

<https://ec.europa.eu/migrant-integration/>

Stockholm Programme

European Union Observatory on Democracy - Robert Schuman Centre of the European Union Institute Florence (EUDO)

Launched January 2009. Keeps country profiles. Handbook for the UK 'Access to Citizenship and its impact on immigrant integration'

Part 3 Other Documents and Sources of Policy

Migration Policy Group (MPG)

Independent non profit think tank founded 1995 and based in Brussels with focus on migration, anti-discrimination and integration

Keeps Migrant Integration Policy Index (MIPEX) 148 policy indicators on migrant integration based on public laws, policy and research.

<http://www.migpolgroup.com/>

The Migration Observatory University of Oxford (MO)

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides impartial, independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory's analysis involves experts from a wide range of disciplines and departments at the University of Oxford.

<http://www.migrationobservatory.ox.ac.uk/>

Migration Watch UK (MWUK)

Independent and non-political think tank formed in 2008 and chaired by Lord Green of Deddinton.

<http://www.migrationwatchuk.org/about-us>

Migration Policy Institute (MP Institute)

Independent non partisan non profit think tank dedicated to the analysis of the movement of people world wide. Founded in 2001 and based in Washington.

<http://www.migrationpolicy.org/>

Multicultural Policy Index (MP index)

Research project monitoring the evolution of multicultural policies in 21 Western democracies. Based at Queens University Canada and run by Will Kymlicka and Keith Banting

<http://www.queensu.ca/mcp/home>

**[Sussex Centre for Migration Research](#)
[University of Sussex](#)**

[Migration Advisory Committee \(formerly the Migration Impacts Forum\)](#)

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