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The Significance of Culture and Cultural Factors in New Zealand Criminal Law: A Multicultural Approach to Criminality and Culpability

A Thesis,
submitted in fulfilment
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by

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Thesis Abstract

The inspiration for my thesis arises from a personal query as to why there is limited acknowledgement of culture and cultural factors within New Zealand's criminal law despite the reality that the criminal courts are implicitly required to acknowledge, where relevant, an individual's culture and cultural factors. It has also been my personal experience that lawyers, judges, the criminal justice system and other participants within criminal justice processes struggle to deal with issues of culture and its relevance within criminal law.

My dissertation queries whether the criminal law adequately recognises the changing constraints, imperatives and demands of a projected super-diversification of New Zealand's population. This diversification will inevitably perpetuate and exacerbate the cultural deficiencies that already exist within criminal law. The factors that demand a re-calibration of the criminal law's approach to culture are not only demographic but, I argue, go to the heart of the criminal law. I refer here to the fact that New Zealand's criminal law is primarily founded on Euro-Christian values, yet must, by necessity, promote a multicultural approach. The ideologies that are relied upon as justification for the criminalisation of culture-specific behaviour are founded on established criminal law principles, yet are applied by legislators inconsistently and ambiguously. The criminal courts have been sceptical in their acknowledgement of cultural factors that are not aligned with the values of the dominant Euro-Christian culture and because there are no clear guidelines or formal structures for the interpretation and application of culture within criminal law, the courts are left to deal with culture in an improvised manner. The consequences of an extemporised approach by the criminal courts is that cultural factors are misinterpreted, misunderstood and misapplied, leading to determinations that are inconsistent and culturally inappropriate. I argue that the ad hoc approach by the courts has accordingly provoked claims of inequality of treatment, unfairness and injustice.

Addressing the cultural deficiencies within criminal law must, I suggest, commence with a broad understanding of the relevance and significance of culture and cultural factors to the determination of issues that are fundamental to the criminal law. A clear appreciation of the relevance of culture will be enhanced substantially by the development of a comprehensive and workable definition of culture and cultural factors for application within criminal law. Achieving that objective will in turn promote the development of a framework for the introduction of evidence of culture in substantiating cultural contentions as well as guidelines for how the criminal courts ought to interpret and apply culture. The focus of my research is therefore on the formulation of a workable definition of "culture" and the associated notion of "cultural factors" as the initial step towards the development of a comprehensive legal structure for more meaningful recognition of culture in criminal law.

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"*E pala ma'a, ae le pala upu*" (Stones can be crushed but never words) – Sāmoan proverb

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Lexicon of Cultural and Legal Concepts

My dissertation refers to various legal concepts, principles and terms. I provide here a brief guide to these terms to aid comprehension of the discussion surrounding these terms.

Actus Reus

The act or conduct which is a constituent element of a crime.

Bicultural

Within New Zealand's cultural and constitutional context, biculturalism refers to the relationship between New Zealand as a State and the Indigenous Māori population (tangata whenua).

Criminalisation

To make punishable as a crime.

Criminality

The state of being criminal, a criminal act or practice.

Culpability

Guilt, blameworthiness.

Cultural Relativism

A theory which contends that all cultures are relative to the values of their originating culture. The traditional relativist view is that the recognition of and assessment of the impact of individual cultural factors must be tested against the values and norms of the culture from which the cultural factors originated.

Cultural factors and influences

I refer to "cultural factors" as the traditional cultural practices, values, and protocols that flow from a culture and represent or characterise aspects of a culture. Cultural factors are the features which individualise, personalise and symbolise a person's culture.

Cultural evidence (evidence of culture)

Any evidence of a cultural nature.

Cultural experts

Any person the court deems to be an expert on culture.

Cultural defence

The early discourse on the effect of recognising culture within criminal proceedings label this theory as a culture defence. I do not favour references to a cultural defence as it is misleading and does not fairly reflect the significance of culture within criminal proceedings. Not all evidence of culture will support a defence. Cultural evidence may equally operate to aggravate or mitigate offending.

Eurocentric

Is a reference to a cultural factor that is centred on any of the European cultures. It also refers to a perspective that focuses on the culture, history, economics and law in Europe and its effects on a European worldview.

European-Christian

This is a reference to the ethic and cultural grouping that comprises people who claim affiliation with one of the European States and also has connections with one of the Christian religions.

Mens Rea

The mental element which is a constituent of a crime.

Monocultural

Pertaining to one culture.

Multicultural

Pertaining to or representing several cultures or cultural elements.

Objective test of proper behaviour

An assessment of the behaviour of a defendant based on what a reasonable or ordinary person would do in similar circumstances.

Procedural criminal law

Procedural law deals with the practical steps and processes set by statute and developed by the courts. Procedural law define and support the methods by which the requirements of the substantive criminal law are administered throughout the entire criminal justice process.

Rule of Law

The principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced. It is also regarded as the principle of government by and under the law.

Subjective test of proper behaviour

An assessment of the behaviour of a defendant based on his or her perception of the subject-matter, situation or circumstances.

Substantive aspects of the criminal law

The substantive aspects of the criminal law specifically refer to the elements of offences, applicable defences and consequences of offending (sentencing) as specified by statute, and developed by the common law. It also includes a reference to the principles of the criminal law.

Substantive law

Substantive law is a general reference to statute law which describes the duties and rights that a person has and explains the legal relationship, obligations and responsibilities between individuals and the State.

Substantive criminal law

The substantive criminal law primarily comprises the statutes that define criminal offences and the elements of each offence; the various principles of the criminal law that apply generally (and those that apply to specific offences), the defences which are available to the defendant and the prescribed punishments for specific offences.

Universalism

Universalism theory holds that there is an underlying human unity which entitles all individuals, regardless of their background, to certain basic human rights.

Glossary of Words and Phrases Used

Aotearoa-New Zealand Māori [1]

Aotearoa	New Zealand
hapū	Māori kin community or grouping, sub-tribe or clan
hara	socially harmful behaviour or wrongs
iwi	Māori people, grouping or community, tribe
kanga	swearing in public
kōhuru	murder
kōhuru kōhungahunga	infanticide
makutu	curse
mana	standing, credibility, authority, control, influence
Māoritanga	common beliefs, customs and associations among tangata whenua
muru	compensation, restoration, ritualised confiscation of property, redress for wrongdoing
noa	something which is off limits
pakehā	general reference to non-Māori or a New Zealander of European decent
pāwhera	rape
reo	language, voice
tahae	theft
take	reason for taking a course of conduct, action
tangata	person
tangata whenua	"people of the land", local Māori,
tapu	sacred
te reo	the (Māori) language
te oati i roto i te iwi	swearing in public
te patu tamaiti	infanticide
tika	just, fair
tikanga	customs, traditions, the right or correct way of doing things
tikanga Māori	culture, customs, practices
tutū tara ā-whare	domestic violence
utu	compensation, balance and reciprocity
whakaino i roto i te whare	domestic violence
whanau	family, kin grouping
wharenui	main house, meeting house
whararunanga	meeting house
whenua	land

Japanese

Oya-ko shinju	parent-child suicide

South African

Tokoloshe	evil spirit

Pacific

faka'apa'apa (Tongan)	Social covenant; reciprocal obligations between males and females that dictates
faka'vale'vale (Tuvaluan)[2]	behaviour, attitudes and values between genders.
feagaiga (Sāmoan) [3]	
ifoga (Sāmoan)	Cultural apology protocols involving the parties' family and community
Pasifika (Pasefika)	A general reference to individuals or groups from Island States in the Pacific.

[1] I adopt the definitions of Aotearoa Māori words and phrases from the text by Māmari Stephens, Mary Teresa Boyce (eds.) *He Papakupu Reo Ture: A Dictionary of Māori Legal Terms* (Lexis Nexis NZ, 2013) and Pa Mikaere Ryan *The Raupō Dictionary of Modern Māori* (Raupō Publishing 2012)

[2] Refer Geoffrey Jackson *Tuvaluan Dictionary* (Suva 2001).

[3] I adopt the definitions of Sāmoan words and phrases from the text by George Pratt *A Grammar and Dictionary of the Samoan Language* (McMillan 1984).

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The Relevance and Significance of Culture in Criminal Law
Thesis Introduction

The principal aim of my thesis is to provide a secure foundation for the need to define culture for the criminal law and to contribute to the development of a workable definition of culture and cultural factors for application in criminal law. This objective is necessitated by the reality that the criminal law's approach to culture and the recognition of cultural factors requires recalibration within a modern world where the criminal courts are being pressed, within the context of a range of cultural deficiencies that exist within criminal law to, more regularly, consider the impacts of culture in the determination of the elements of offences and defences.

A recalibration of the criminal law's approach to culture and cultural factors within the context of criminalisation and culpability is necessitated by the demands of superdiversity and the extent to which the criminal law implicitly requires the recognition of cultural factors without providing adequate guidelines for the interpretation and application of culture. A clear delineation of "culture" and "cultural factors", I contend, will not only address the cultural deficiencies that permeate criminal law but will also promote the development by Parliament and the criminal courts of a methodology for more meaningful recognition of culture.

The underpinnings of New Zealand's criminal law are based on Euro-Christian values. Whilst these values cannot be said to be irrelevant to other cultures, express reference to the values of New Zealand's bi-cultural and multicultural society must also be recognised. Far from being a monocultural criminal justice system, New Zealand's criminal law recognises values and norms that are fundamental to a wide variety of cultures. However, New Zealand's substantive criminal law harbours numerous intrinsic characteristics that provide unique challenges for the recognition and application of culture. These challenges are intensified because of developing superdiversity and the statistical projections pointing to an unprecedented emergence of diversities of cultures in New Zealand. The predicted changes in population demographics will require a nuanced and progressive approach to the recognition of culture in the criminal law as New Zealand moves from a predominantly European-Christian foundation to one that is genuinely cosmopolitan.

Despite the significance of culture within all aspects of society, inclusive of the criminal law, I demonstrate by way of a cultural audit of New Zealand's criminal law that the application of culture within criminal law has been improvised and inconsistent, resulting in unfairness and inequality of treatment. New Zealand's primary criminal law statute, the Crimes Act 1961, makes no express reference to culture, yet the substantive criminal law abounds with implicit references to culture and requirements to consider culture. Because New Zealand's criminal law statutes provide no framework

for the interpretation and application of culture in criminal law, the criminal courts are therefore left to deal with culture in an ad hoc manner.

I argue that culture is an essential consideration within criminal law due to its significance and relevance to the determination of criminality and culpability. I acknowledge that the premise of my thesis in seeking more meaningful recognition of culture within criminal law raises significant difficulties, both pragmatic and philosophical for the criminal law. Adherence to the rule of law potentially undermines the application of a differentiated approach to individuals according to their cultural context. It is my contention that the criminal law, by necessity, must promote a multicultural approach. Because culture and cultural factors impact people in differing ways, the criminal law cannot therefore assume that all individuals will respond to specific situations in similar ways.[1]

It is my contention that cultural factors such as superstition, spirituality, religious beliefs and the defence of societal morals as well as other culturally-loaded emotions such as shame, fear and the concept of "honour" or "mana" significantly impact the motivations (or intent) for conduct or behaviour that may be regarded as a contravention of the criminal law. I demonstrate throughout my dissertation the relevance and impacts of culture to the determination of the subjective and objective requirements of offences (mens rea) and the impacts of cultural factors to the assessment of a defendant's intents and motivations.[2] Although the traditional view of the criminal law is that motives of a defendant are irrelevant to assessments of criminal liability, I argue that, where the situation or circumstances demand, the culturally-derived motives of a defendant can operate to either exculpate, mitigate or aggravate offending. In ensuing discussion I examine the significance and relevance of culturally-influenced motivations to assessments of culpability in the context of defences such as reasonableness, consent, colour of right, self-defence, mental impairment and provocation.

Culture is a term which is widely used as a reference to a myriad of cultural understandings and concepts, but not all such understandings of culture are relevant within criminal law. I address the cultural deficiencies within New Zealand's criminal law by formulating a definition of culture and cultural factors that can be applied within the criminal law as a prelude to the development of a methodology for assessing the relevance and significance of cultural factors in determining criminality and culpability.

I suggest that "***a shared system of clearly defined customs, ideas, values and norms of a viable cultural, ethnic, or national group which are transmitted across a society and passed on inter-generationally***" will provide the necessary parameters for application of the term "culture" within

[1] I enlarge upon this contention in Chapter Seven, Part 7.2.
[2] I enlarge upon this contention in Chapter Seven, Part 7.3.

criminal law. In conjunction with my definition of culture, I suggest that "***those clearly defined cultural elements, characteristics and attributes which flow from and represent a specific culture that have induced the defendant to behave (act) in a particular way***" can be applied within the criminal law to delineate what can be referred to as "cultural factors".

In formulating these definitions, a methodology for the development of processes whereby relevant cultural evidence can be introduced in support of cultural contentions can then be developed. I suggest that cultural evidence must enquire into the affiliations a defendant has with a claimed culture, the viability of the claimed culture, the relevance of the claimed cultural factors to the elements of the offence or defence and whether the defendant has been induced into acting in a particular way by the claimed cultural factor.

Chapter One:

Thesis Questions, Scope of Thesis, Literature Review, Methodology and Structure

I commence the discussions in this chapter by clarifying the queries that guide my research and refine the scope of my thesis. I then analyse relevant research and scholarly commentary to illuminate how earlier research has influenced the approach I adopt in developing my research and, further, in justification of the contentions to flow from my hypothesis. I then clarify the methodology that is to be adopted in developing my thesis and outline the structure of my dissertation.

1.1 Thesis Questions

The criminal courts, in a modern superdiverse world, are frequently asked to consider the relevance and import of culture in the determination of issues pertaining to the criminality of alleged offending or in assessing the elements of a criminal law defence.[1] As will be demonstrated in discussion to follow, the criminal courts have struggled to deal with how culture is introduced, interpreted and applied because, as a concept, culture is multi-faceted, dynamic and complex. There is no clear delineation of how "culture" is to be understood in the context of the criminal law and because there are no clear guidelines for dealing with culture, the criminal courts are left to deal with culture in an improvised and ad hoc manner. Within the context of this background, my thesis raises two fundamental queries. First, why is it necessary for New Zealand's substantive criminal law to define culture and develop a framework for more meaningful recognition of culture and cultural factors? Second, how, and in what context, can the criminal law provide more significant recognition of an individual's specific culture and cultural factors?

The inspiration for the first of my thesis queries arises from a personal uncertainty as to why there is limited acknowledgement of culture and cultural factors within New Zealand's criminal law, despite the reality that the criminal courts are implicitly required to acknowledge, where relevant, an individual's culture and cultural factors. It has been my personal experience that lawyers, judges, the criminal justice system and other participants within criminal justice processes struggle to deal with issues of culture and its relevance within criminal law. Further, New Zealand's primary criminal law statute, the Crimes Act 1961, does not expressly refer to "culture" and no definition or framework is provided by the substantive criminal laws to facilitate consistency in the interpretation and application of culture in criminal law.

The first of my thesis queries, I suggest, elicits an associated inquiry into whether the criminal law adequately recognises the changing constraints, imperatives and demands of a projected super-diversification of New Zealand's population? As will be demonstrated in Chapter Two, New Zealand's changing demographic make-up is predicted to present significant challenges within all areas of society, inclusive of the criminal law. The predicted changes in New Zealand's population demographics will therefore require a more nuanced and progressive approach to the recognition of culture in criminal law as New Zealand moves from a predominantly European-Christian foundation to one that is genuinely cosmopolitan. It must also be recognised that New Zealand's criminal law harbours numerous intrinsic characteristics that present specific challenges to the recognition of

[1] Refer my cultural audit of New Zealand's criminal law in Chapters Five and Six. Specific examples are also provided from the context of Māori as an exemplar of the challenges faced by any individual in seeking the recognition of his or her culture and cultural influences in Chapter Three, part 3.4.

culture.[2] I contend that addressing these challenges to the recognition of culture in criminal law requires a clear and consistent understanding of culture and how cultural factors impact criminal offending.

If it is accepted that the criminal courts have "struggled" to deal with culture, then it must also be asked what these cultural difficulties are so that a methodology can be developed to address such issues. In this regard, a cultural audit or review of New Zealand's criminal law ought to be undertaken to clarify and identify the cultural issues that require addressing.[3] Because Parliament and the criminal courts have not provided a clear framework or structure for how culture is introduced, interpreted and applied, numerous deficiencies in the way the courts deal with culture are apparent. A review of New Zealand's criminal law will show that the ad hoc and inconsistent approach to culture results in inequality of treatment and inconsistencies in the determination of cultural issues.

In Part One (Chapters Two and Three) and Part Three (Chapters Five and Six), I respond to the first of my thesis queries by demonstrating that there is a need to define culture and cultural factors for the purposes of the criminal law. A direct consequence of delineating culture for the purposes of the criminal law is that it will promote the development, by Parliament and the criminal courts, of guidelines (or a framework) for a consistent approach to the recognition of culture in criminal law.

The second of my thesis queries focuses on how the criminal law can provide more significant recognition to culture and the cultural factors that impact the offending of individuals. Criminal caselaw and academic commentary indicate that culture and cultural factors have a fundamental impact on the motivations of an individual in the context of criminal offending.[4] Culture, therefore, becomes a significant consideration in the determination of criminality and culpability. My argument is that it is within the context of assessments of criminality and culpability that culture ought to be a more significant consideration. My focus is therefore on developing a framework or set of guidelines whereby culture and cultural factors can be more effectively introduced, appropriately interpreted and consistently applied.

I respond to the second of my thesis queries by applying my definitions[5] of "culture" and "cultural factors" in developing a methodology for more meaningful recognition of culture in criminal law.[6] As

[2] I highlight in Chapter Three the nature and scope of the cultural challenges encountered by ethnic groupings by referencing the struggles faced by Māori in seeking acknowledgement of tikanga Māori by the courts.
[3] In Chapters Five and Six, I undertake a cultural audit of New Zealand's criminal law to illustrate the cultural deficiencies that permeate all aspects of New Zealand's criminal law.
[4] In Chapter Seven, parts 7.1 and 7.2, I expand on how culturally-derived motivations impact determinations of criminality and culpability.
[5] My definitions of "culture" and "cultural factors" are developed and delineated in Chapter Four.

argued in Chapter Seven, culturally-derived motivations can be a significant consideration in the determination of an offender's specific intent (mens rea) and can operate to aggravate criminal offending in some situations and exculpate or mitigate offending in other circumstances. It is also my contention that cultural considerations are relevant to the assessment of concepts such as reasonableness and proportionality and in the determination of elements of existing defences such as, self-defence, claim of right, provocation, insanity and compulsion.

[6] I offer a "relevance of culture framework" in part 7.1 of Chapter Seven and discuss how my framework can be applied within the context of New Zealand's criminal law.

1.2 Scope of Thesis

Culture permeates all aspects of the criminal law. Dialogue about culture often raises concerns about how culture, as a concept, challenges traditional understandings of principles that are fundamental to the development of the criminal law, such as, the rule of law, utilitarianism, paternalism, the harm principle, offence principle and social contract theory. My thesis is not about advocating a differentiated approach to culture that challenges the demands of the rule of law or addressing the conflicts between individual rights and public interest concerns. A discussion about culture in any context inevitably raises issues about the conflicts between competing human rights, cultural bias, stereotyping and discrimination. This is not a thesis about advocating the right to culture or promoting fair trial rights in the protection of minority and indigenous cultural rights. Speaking about culture often highlights the relevance and merits of cultural relativism and universalism. My thesis is not about addressing the conflicts between cultural relativism and universalism. By necessity, my thesis touches upon each of these other spheres of concern, however, these other dynamics of the criminal law are not the primary focus of my thesis.

New Zealand's criminal law is multi-faceted and harbours elements that are unique to the New Zealand legal landscape. Talking about culture in the New Zealand context often invites an incursion into the vast discourse regarding the principles of the Treaty of Waitangi, the rights and entitlements of tangata whenua, a multitude of constitutional issues and the obligations of the Crown to Māori. The impacts of biculturalism, multiculturalism and monoculturalism also present challenges for New Zealand's criminal law. While accepting that my hypothesis must recognise the factors that are intrinsic to New Zealand's legal landscape, my thesis does not seek to address Tiriti issues, indigenous rights and the obligations of the Crown to tangata whenua. Although my "relevance of culture" contentions may operate to address some of the concerns that arise from the over-representation of Māori and other minority groupings within criminal justice statistics, such concerns are beyond the scope of my thesis.

A thesis aimed at addressing issues of concern within criminal law cannot be considered within the vacuum of a separate stand-alone aspect of the criminal law. In addressing the queries pertaining to the cultural deficiencies that pervade the criminal law, I argue that the primary focus of my hypothesis must, by necessity, be narrowed to address the concern that there is no clear and uniform understanding of the relevance and significance of culture within criminal law. Despite the fact that the criminal law abounds with implicit references to culture and tacit requirements to recognise culture, there is no definition of culture for the purposes of the criminal law. Further, there is no formal guidance, structure or framework for the introduction, interpretation and application of culture in criminal law.

The sphere whereby the significance of culture can be most effectively demonstrated and addressed, I suggest, is in the context of the substantive criminal law areas of criminality and culpability. More specifically, I refer to the relevance of culture to assessments of the mens rea element of offences via more meaningful recognition of culturally-derived emotion and, further, the relevance of culture to the determination of elements (such as reasonableness and proportionality) that are fundamental to a number of existing criminal law defences (for example, self-defence, compulsion, claim of right and provocation).

I contend that a clear delineation of culture and cultural factors for application in criminal law will, as a consequence, promote the development of a framework for meaningful recognition of culture within New Zealand's criminal law. In clarifying the parameters of "culture" and "cultural factors" for application within criminal law, my hypothesis not only makes an original and profound contribution to the development of the criminal law, but more importantly, addresses the cultural deficiencies that abound within criminal law.

1.3 Literature Review

Academic and criminal law commentary, especially over the past 40 years, has highlighted the cultural deficiencies that exist within criminal law and sought to promote the development of a "cultural defence" to address the difficulties encountered by participants within criminal justice processes. This discourse has intensified within New Zealand caselaw over the last twenty years.[7] In this part I analyse relevant research and scholarly commentary to illuminate how earlier research has influenced the approach I adopt in developing my research and, further, in justification of the contentions to flow from my hypothesis. I critically evaluate the quality of existing scholarly writing in identifying the most appropriate research techniques and methodologies for achieving the purposes of my research. Because the focus of my research is New Zealand's criminal law, I examine the limited commentary raising cultural concerns within the New Zealand context before analysing the scope and extent to which a "cultural defence" is being advocated within comparable legal systems. In the final part of my literature review, I undertake a comparison of the "relevance of culture" approach adopted by my thesis in contrast with the formal cultural defence that is advocated by academic and criminal law commentators to clearly distinguish the approach taken by my thesis.

1.3.1 Talking About Culture in New Zealand's Criminal Law

My thesis primarily focuses on the relevance and significance of culture within the substantive aspects of criminality and culpability. Beyond discussion in relevant caselaw, there is limited discourse within the New Zealand context pertaining to culture as a defence or the application of culture in the determination of elements of an offence. As an analysis of the cases that deal with cultural issues will be undertaken throughout my dissertation, I focus here on a review of academic, domestic scholarly commentary and Law Commission research literature that address issues of culture in criminal law.

Although concerns have been elevated about the lack of a clear framework for the introduction of evidence of culture, the need for guidelines to aid the interpretation of cultural factors and the application of culture in the determination of substantive criminal law issues; these concerns, I argue, have not been adequately addressed by New Zealand's criminal courts and domestic scholarly commentary.[8] Academic and Law Commission research has focused on clarifying the general significance of ethnic and indigenous customs and values,[9] concerns regarding inconsistencies in the introduction of evidence of an offender's cultural background (or cultural information) for sentencing

[7] I highlight some of this discussion in caselaw in the course of my cultural audit in Chapters Five and Six and more specifically in Chapter Seven.
[8] I expand on this contention in the course of my cultural audit in Chapters Five and Six.
[9] New Zealand Law Commission *Maori Custom and Values in New Zealand Law* (2001) NZLC and New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (2006) NZLC.

purposes,[10] addressing incidences of unconscious bias (by police, prosecutors and the judiciary) within criminal justice processes,[11] and concerns regarding ethnic bias in jury selections.[12] While not directly focused on the development of an approach to the relevance of culture in the determination of elements of offences and defences, I briefly allude to literature within the New Zealand context that raises cultural concerns as such issues remain relevant to discussion in my dissertation, even if they are beyond the scope of my thesis.

In their 1990 report for the Ministry of Justice, Chetwin et al noted that the cultural reports (mandated under s 16 of the Criminal Justice Act 1985) were rarely used because there was limited awareness of s 16 (by both counsel and the judiciary) and there was no clear framework regarding the nature and scope of cultural information required by the courts to meet the requirements of s 16 in the sentencing of offenders.[13] The authors expressed concern about the inconsistencies in the acceptance of "evidence of culture" or "cultural information" and considered that, in extreme circumstances, this ad hoc approach may lead to claims of unfairness or a miscarriage of justice.[14] Chetwin et al recommended that the concerns regarding the use of cultural information in sentencing offenders could be addressed through enhancing the cultural competencies of professionals involved in the system, raising awareness of s 16, enhancing the cultural responsiveness and flexibility of court processes and improving resourcing (funding) for s 16 processes.[15] This educational and resourcing approach to addressing the concerns raised about cultural information in sentencing, I suggest, is of limited value because it fails to take into consideration the reality that culture permeates all aspects of criminal law and neglects the underlying concern that, as a concept, culture is complex, dynamic, and multi-dimensional. Further, there exists a vast array of contrasting understandings of culture as a concept, not only within the criminal courts,[16] but also amongst the numerous academic disciplines that deal with culture.[17] While the recommendations by Chetwin et al are educational in nature, there

[10] Alison Chetwin, Tony Waldegrave, Kiri Simonsen *Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985* (2000) Ministry of Justice, Wellington.
[11] See for example, Angela Moewaka Barnes, Ken Taiapa, Belinda Borell, Tim McCreanor *Māori Experience and Responses to Racism in Aotearoa New Zealand* (2013) Mai Journal, vol. 2, issue 2, 63-77. Also see Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (November 2009) Ministry of Justice, Wellington.
[12] See for example, Mark Israel *Ethnic Bias in Jury Selection in Australia and New Zealand* (1998) International Journal of the Sociology of Law, vol. 26, 35-54; Neil Cameron, Susan Potter, Warren Young *The New Zealand Jury* (1999) Law and Contemporary Problems, vol. 62, no. 2, 103-139; Thalia Anthony, Craig Longman *Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds* (2017) International Journal for Crime, Justice and Social Democracy, vol 6, no. 3, 25-46.
[13] The Criminal Justice Act 1985 was repealed in 2002. Section 16 was replaced by s 27 of the Sentencing Act 2002.
[14] Chetwin et al (n 10) at 142-149.
[15] Chetwin et al (n 10) at 143-146.
[16] Refer discussion in Part 4.1 of Chapter Four where I outline the various references to culture by the courts.
[17] Refer discussion in Part 4.2 of Chapter Four where I enlarge upon the differences in approach to culture by different academic disciplines.

is an underlying failure to recognise that there is a need for a clear understanding of the relevance and significance of culture within criminal law.

Concern has also been raised in commentary regarding the impact of systemic bias or indirect discrimination (unconscious bias) within criminal justice processes.[18] Such discussion inevitably raises the concern that biases are culturally-derived and will have a profound impact on whether participants within criminal justice processes are treated equally and with due fairness. In her analysis of international and New Zealand research into bias within criminal justice systems, Morrison highlights incidences of conscious and unconscious bias[19] (by police, prosecutors and the judiciary within criminal justice processes)[20] and suggests that the response by national and organisational policies to the concerns raised ought to also address other related concepts such as, race and ethnicity, prejudice, racism, disparity, disproportionality, discrimination, intentional racism, systemic racism, direct and indirect discrimination, and structural bias.[21] The responses to bias suggested by Morrison were wide-ranging but in the context of the criminal law, the focus of the responses were largely educational (involving cultural awareness training),[22] structural (for example, by removing race-correlated factors from sentencing or resisting the development of indigenous justice systems)[23] and institutional (requiring the development of ethnic strategies and cultural policies, improving the relationship between ethnic minorities and the criminal justice system and the recruitment/retention of ethnic minority staff).[24] While the Morrison report has reviewed the vast literature pointing to the impacts of bias, I argue that the suggested responses to the perceived cultural problems in criminal law were far too generalised and lacked concrete direct measures for resolving the issues raised. While culture was acknowledged as a factor that was central to the issues of "bias", the authors provided no clear understanding of how culture ought to be understood within the numerous spheres of the criminal law.

In a 1998 paper, Israel observed that the judiciary, government bodies and academic lawyers, variously heralded the jury "as the conscience of the community".[25] Israel further noted that, although juries were a significant feature of common law jurisdictions and "a symbol of the integrity and

[18] For example, Morrison (n 11).
[19] Although Morrison focuses on the term "bias", the authors acknowledge (n 11 at 21-29) that the responses of their research is directed at addressing other related concepts such as, race and ethnicity, prejudice, racism, disparity, disproportionality, discrimination, intentional racism, systematic racism, direct and indirect discrimination, and structural bias.
[20] Morrison (n 11) at 32-40 (re policing and prosecution) and 40-53 (re trial and sentencing).
[21] Morrison (n11) at 31-43.
[22] Morrison (n 11) at 80-93.
[23] Morrison (n 11) at 137-140.
[24] Morrison (n 11) at 105-107.
[25] Israel (n 12). Also refer for example, New Zealand Law Commission *Juries: Issues Paper* (1995) New Zealand Law Commission, Wellington and the New South Wales Law Commission *Criminal Procedure Report – The Jury in a Criminal Trial 7* (1986) New South Wales Law Commission, Sydney.

fairness" of criminal justice processes in these countries, doubts about the impartiality and legitimacy of juries in New Zealand and Australia were acutely impacted by ethnic bias in that indigenous people, despite their over-representation in trials as defendants, "seem to only have a minor involvement in trials as jurors, let alone as lawyers, judges or court staff".[26] Although Israel undertakes a brief review of strategies adopted in other legal jurisdictions aimed at addressing ethnic bias in jury selections, such strategies have largely been unsuccessful.[27] In 1999, Cameron et al[28] undertook research as a result of an initiative by the New Zealand judiciary to review concerns regarding "jury competence, the impact of pretrial and trial publicity, juror responses to complex, expert, or potentially prejudicial evidence, the dynamics of the decision making process and the impact of current attempts to improve juror understanding of their role and of the trial."[29] As with Israel, Cameron et al suggest that the disproportionate representation of Māori on juries ought to be addressed by administrative measures designed to ensure a higher proportion of Māori are entered on the electoral rolls (and thereby increase the availability of Māori for jury service) and reduce the possibility of Māori being challenged by the prosecution and lawyers.[30]

Academic research and criminal law commentary within the New Zealand context has touched upon cultural issues, but as illustrated above, the relevance and significance of culture and cultural factors to the determination of criminality and culpability has not been a focus of such commentary. As will be demonstrated, cultural concerns within New Zealand's criminal law are largely raised within caselaw and I allude to such commentary in ensuing discussion in support of my contentions.

1.3.2 Culture as a Defence within Comparable Legal Jurisdictions

The narrow scope of academic commentary into the relevance of culture within New Zealand's substantive criminal law, I suggest, warrants a review of discourse into the development of culture as a defence within comparable justice systems. In addressing the cultural concerns that will be the focus of my thesis, I confine the emphasis of review here to examine the academic and criminal law commentary pertaining to the development of a "cultural defence" within common law jurisdictions. I analyse here how the concept of a cultural defence is understood in other legal justice systems, the arguments in favour of the establishment of a culture defence, the development of culture as a consideration in criminal law and the numerous challenges to the adoption of a "formal cultural defence" within substantive criminal law. In seeking a cultural approach that is apposite for New

[26] Israel (n 12) at 35-37.
[27] Israel (n 12) at 45-49 and 50.
[28] Cameron et al (n 12) at 103-139.
[29] Cameron et al (n 12) at 139.
[30] Cameron et al (n 12) at 124-125. A wider analysis of challenging jurors on the basis of racial grounds is provided by Anthony, Longman (n 12) at 25-46.

Zealand's criminal law, I allude to commentary promoting the significance of culture as a defence from the United States,[31] the United Kingdom,[32] Canada,[33] Australia,[34] Germany[35] and South Africa.[36]

Considerable interest in the use of culture in criminal proceedings and the significance of a defendant's cultural background to assessments of criminality, was prompted by numerous prosecutions where culture was advanced as an excuse or to alleviate a defendant's responsibility for allegedly criminal conduct. In the United States, academic analysis of these cases highlight the difficulties encountered by the courts in dealing with the cultural contentions and the improvised manner in which the criminal courts determined the cultural issues.[37] These cultural difficulties were raised by the Harvard Law Review Association (HLRA) in 1986 in exploring the possibility of developing a formal cultural defence in substantive criminal law.[38] The HLRA referred to the use of evidence of culture that sought to mitigate or exculpate criminal offending as a "cultural defense". In briefly alluding to various arguments in favour of a cultural defence,[39] and introducing a number of potential hurdles to more meaningful recognition of culture in criminal law, the HLRA's call for a stand-alone cultural defence initiated commentary from other cultural researchers and criminal law analysts.[40] In one of the earliest in-depth examinations of the phenomena of cultural defences, Sams

[31] See for example, Alison Dundes Renteln *The Cultural Defense* (2004) Oxford University Press. Also see Cynthia Lee *Cultural Divergence: Interest Convergence Theory Meets the Cultural Defense?* (2007) Arizona Law Review, vol. 49, 911-959; James Donovan, John Stuart Garth *Delimiting the Culture Defense* (2007) Quinnipiac Law Review, vol. 26, 109-146; Kenneth Nunn *New Explorations in Culture and Crime: Definitions, Theory, Method* (2006) University of Florida Journal of Law and Public Policy, 105.

[32] See for example, Gordon Woodman *The Culture Defence in English Common Law: The Potential for Development* at 7-34 of Marie-Claire Foblets, Alison Dundes Renteln *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (2009) Hart Publishing. Also see Anthony Good *Cultural Evidence in Courts of Law* (2008) Journal of the Royal Anthropological Society, S47-S60; Anne Phillips *When Culture Means Gender: Issues of Cultural Defence in the English Courts* (2003) Modern Law Review, vol. 66, no. 4, 510-531.

[33] See for example, Maneesha Deckha *The Paradox of the Cultural Defence: Gender and Cultural Othering in Canada* at 261-286 of Marie-Claire Foblets, Alison Dundes Renteln *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (2009) Hart Publishing. Also see Charmaine M Wong *Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada* (1999) Criminal Law Quarterly, vol. 42, issue 2, 367.

[34] See for example Simon Bronitt, Kumaralingam Amirthalingam *Cultural Blindness: Criminal Law in Multicultural Australia* (1996) Alternative Law Journal, vol. 21, issue 2, 58-63.

[35] See for example Jean-Christophe Merle *Cultural Defense, Hate Crimes and Equality Before the Law* (2006) Ethic@ Florianopolis, vol. 5, no.1, 7-19.

[36] See for example, Pieter Carstens *The Cultural Defence in Criminal Law: South African Perspectives* at 175-198 of Marie-Claire Foblets, Alison Dundes Renteln *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (2009) Hart Publishing.

[37] See for example, Rashmi Goel *Can I call Kimura Crazy? Ethical Tensions in Cultural Defense* (2004) Seattle Journal for Social Justice, vol. 3, issue 1, 443-464. Also Jeroen Van Broeck *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)* (2001) European Journal of Crime, Criminal Law and Criminal Justice, vol. 9, issue 1, 1-32.

[38] Harvard Law Review Association *The Cultural Defense in the Criminal Law* (April 1986) Harvard Law Review, vol. 99, no. 6, 1293-1311.

[39] Harvard LRA (n 38) at 1296-1298.

[40] See for example Julia P Sams *The Availability of the "Cultural Defense" as an Excuse for Criminal Behaviour* (1986) 16 Georgia Journal of International and Comparative Law, vol 16, 335-354; Carolyn Choi *Application of a Cultural Defence in Criminal Proceedings* (1990) Pacific Basin Law Journal, vol. 8, issue 1,

noted "the collision of foreign cultures with the United States legal system" posed an increasingly urgent problem for the criminal courts.[41] Sams analysed several cases before the United States courts where defence counsel (severally) argued that a defendant's cultural influences could; first, provide an "excuse" for their criminal conduct or; second, that a cultural understanding of a situation could result in a mistaken belief or ignorance of the law; or third, the cultural factors have so affected the defendant that he or she has acted under a state of diminished responsibility.[42] In alluding to the various arguments advanced against the use of culture as a defence,[43] Sams concluded that "the American judicial system and the American public should not be subjected to the cultural defense".[44] Despite this early reluctance by some commentators and the criminal courts to recognise culture, numerous other commentators have continued to advocate for more significant recognition of culture in criminal law.

In analysing the cultural arguments raised in the case of *People v Moua*,[45] Pritchard and Renteln opined that it was "crucial that the legal system be authorized to evaluate arguments based on tradition" otherwise "cultural pluralism … will simply be an illusion".[46] The authors contended that the *Moua* case illustrated the need for a coherent judicial policy to address cultural conflicts because the existing approach to culture was "dangerously schizophrenic" and, further, the absence of clear guidelines or infrastructure whereby experts can introduce cultural evidence was a "recipe for disaster".[47] Although Evans-Pritchard and Renteln raised a number of concerns as to how the court in *Moua* dealt with the cultural contentions, their call for "clear guidelines" in the introduction of cultural evidence by experts was "needed to make it clear that considering traditions in court is legitimate".[48] Renteln argues that a cultural defence is necessary because "the reality is that the courts [in the United States] are disinclined to admit cultural evidence into the courtroom … even if it is theoretically possible for cultural defenses to be raised at trial, this will not occur if judges consider

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80-90; Anh T Lam *Culture as a Defence: Preventing Judicial Bias Against Asians and Pacific Islanders* (1993) UCLA Asia American and Pacific Islands Law Journal, vol. 1, 49-68.

[41] Sams (n 40) at 336.

[42] Sams (n 40) at 335-345.

[43] Sams (n 40) at 345-352. These arguments against a cultural defence have also been raised by other commentators such as Alison Dundes Renteln *The Use and Abuse of the Cultural Defense* at 61-82 of Marie-Claire Foblets, Alison Dundes Renteln *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (2009) Hart Publishing; Phillips (n 32), Wong (n 33) and Damian Sikora *Differing Cultures, Differing Culpabilities? A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing* (2001) Ohio State Law Journal, vol. 62 [1695], 1-21.

[44] Sams (n 40) at 352-353.

[45] *People v Moua*, No. 315972-0 (Cal. Sup. Ct. Feb 17, 1985). Similar arguments were raised in Nancy Wanderer, Catherine Connors *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense* (1999) Buffalo Law Review, vol. 47, 829-873.

[46] Deirdre Evans-Pritchard, Alison Dundes Renteln *The Interpretation and Distortion of Culture: A Hmong 'Marriage by Capture' case in Fresno, California* [1994] Southern California Interdisciplinary Law Journal, vol. 4, issue 1, 1-48 at 36. Also see Nancy Kim *The Cultural Defense and the Problem of Cultural Pre-emption: A framework for Analysis* (1997) New Mexico Law Review, vol. 27, 101-139

[47] Evans-Pritchard, Renteln (n 46) at 36 and 37.

[48] Evans-Pritchard, Renteln (n 46) at 36.

culture irrelevant".[49] As noted by Phillips, similar difficulties arise in English law where "a minority custom cannot be a defence to a prosecution, unless this is explicitly allowed for in legislation".[50] As will be demonstrated in my cultural audit of New Zealand's criminal law in Chapters Five and Six, this is also a hurdle to more meaningful recognition of culture within New Zealand's substantive criminal law.

The controversial case of *People v Kimura*[51] raised a range of cultural issues and generated a considerable volume of commentary about culturally motivated offending and the improvised way the courts have dealt with culture.[52] Similar concerns were again articulated in the aftermath of *People v Chen*.[53] In both *Kimura* and *Chen*, considerable evidence of culture was accepted by the respective courts in allowing the reduction of murder charges to a conviction for involuntary manslaughter (or second-degree manslaughter) and the offender sentenced to probation for five years. The rationale applied by the courts in *Kimura* and *Chen* was that the defendants were driven to respond to a deep sense of cultural shame in traditional ways. In *Kimura*, the defendant's deep sense of shame arising from her husband's infidelity had driven her to attempt suicide with her two children by walking into the Pacific Ocean. While her own death was averted through the assistance of passing people, her two children could not be saved. Mrs Kimura was then charged with the murder of her children. The court in *Kimura* accepted that Mrs Kimura's cultural imperatives to kill herself and her children had so impacted her state of mind that she was acting under a state of "temporary insanity" at the time the homicide was committed. Similar arguments were raised and accepted by the court in the *Chen* case in the circumstances of a husband who, on discovering his wife's infidelity, struck her several times with a hammer, causing her death. The motivation advanced by the defence in *Chen* was that Mr Chen's actions were culturally driven and therefore displaced the intent to murder. Both of these cases highlighted the extremes to which cultural factors can be applied in mitigating offending or providing a defence to criminal offences but failed to provide clear guidelines as to how culture and cultural factors ought to be introduced, interpreted and applied within criminal law. The ensuing commentary on these cases served to highlight the deficiencies in the way the courts dealt with culture. Because the cultural arguments raised were specific to the wording of the particular offences and the substantive defences that were available to the defendants (for example, temporary insanity) are not universally available (there is no defence of diminished responsibility or temporary insanity in New

[49] Renteln (n 31) at 200.
[50] Phillips (n 32) at 513.
[51] *People v Kimura* (1985) No. A-091133 (Los Angeles Superior Court). I examine the facts and cultural arguments made in *Kimura* in part 7.3.1 of Chapter Seven.
[52] See for example Kim (n 46) at 117-119; Sikora (n 43) at 4-5; Lam (n 40) at 58-60; Choi (n 40) at 82-83. Also see Goel (n 37).
[53] *People v Chen* (No. 87-7774) NY Superior Court, Dec 2, 1988, and March 21, 1989. I analyse the facts and cultural arguments made in this case in part 7.3.1 of Chapter Seven.

Zealand criminal law), it could be argued that the cultural arguments raised in *Kimura* and *Chen* were specific to the circumstances of those cases.

In examining the cultural arguments advanced in the case of *State v Kargar*,[54] Wanderer and Connors[55] observed that the debate into the relevance of culture in assessing criminality exemplified the clash between individual and societal rights. The significance of the *Kargar* decision was that it provided a starting point for analysing the viability of culture as a defence because, on appeal, it was held that the lower court had erroneously ruled that the defendant's cultural background was irrelevant, and the conviction should be vacated. Wanderer and Connors noted that the "defendant's culture was not invoked in that case simply to reduce his sentence or dilute mens rea … it absolved him of guilt and reversed his conviction". Ultimately, the authors reasoned that the appeal court ruling in *Kargar* was wrong in elevating the significance of culture to inappropriate levels because "unnecessarily exalting one type of minority interest over all others upsets the delicate balance" within the criminal justice system.[56] Wanderer and Connors concluded that sufficient safeguards were woven into the United States criminal justice system to address the cultural conflicts raised, therefore a "formal cultural defence is both unnecessary and potentially harmful to the very members of our immigrant communities most in need of society's protection".[57]

The theories advanced for addressing the numerous concerns regarding a cultural defence have ranged from providing a framework for the introduction of evidence of culture,[58] addressing cultural conflicts,[59] focusing on gender concerns,[60] the need for a "Cultural Ombudsman" in the courtroom,[61] and the use of culture as a defence to address issues of bias.[62] As will be demonstrated in later

[54] *State v Kargar*, 679 A.2d 81 (Me 1996). I discuss in detail the facts and cultural arguments raised in *Kargar* at part 5.3.4 of Chapter Five and part 7.5.1 of Chapter Seven.
[55] Wanderer, Connors (n 45) at 830.
[56] Wanderer, Connors (n 45) at 872.
[57] Wanderer, Connors (n 45) at 873.
[58] See for example, Van Broeck (n 37) at 23-24 where the author suggests that the enquiry should focus on the stated motives of the accused, whether members of the relevant group agree with the stated motive and whether the stated cultural motive differs from those of the dominant culture. Renteln (n 31) at 201 and Renteln (n 43) at 64, suggests a framework that enquires into whether the accused is a member of the claimed culture, whether the claimed tradition exists and whether the "litigant" was influenced by the claimed cultural tradition at the time of acting. Also see Good (n 32) at S47-S60.
[59] Renteln (n 31) at 10-22. These conflicts are exemplified by the cultural relativism versus universalism debate between Jack Donnelly *Cultural Relativism and Universal Rights* (1984) Human Rights Quarterly, vol. 6, no. 4, 400-419: Jack Donnelly *The Relative Universality of Human Rights* (2007) Human Rights Quarterly, vol. 29, no. 2, 281-306 and Michael Goodhart *Neither Relative nor Universal: Response to Donnelly* (2008) Human Rights Quarterly, vol. 30, no.1, 183-193. Tilley adopts the significance of the cultural relativism argument and argues that there is a moral obligation by the courts to consider culture in the application of the burden of proof in John Tilley *Cultural Relativism, Universalism and the Burden of Proof* (1998) Journal of International Studies, vol 27, no. 2, 275-297.
[60] See for example, Phillips (n 32); Deckha (n 33) and Wong (n 33).
[61] William Chin *Multiple Cultures, One Criminal Justice System: The Need for a "Cultural Ombudsman" in the Courtroom* (2005) Drake Law Review, vol. 53, 651-665.
[62] See for example, Lam (n 40). Also see Bronitt, Amirthalingam (n 34).

discussion, these suggestions for addressing cultural concerns in criminal law have not been carried through and the cultural concerns perpetuate within criminal justice systems.

In her seminal text *The Cultural Defense*, Renteln examines the vast volume of academic and caselaw commentary on the use of culture in criminal law with an emphasis on how the United States courts (and other "first world jurisdictions" such as the United Kingdom, France, Canada and Australia) have dealt with cultural contentions.[63] Renteln provides an informative analysis of the impacts of culture in criminal law and a constructive summation of the numerous arguments for and against culture as a factor in mitigating criminal offending or in clarifying the elements of a defence.[64]

Renteln's central argument is that culture "matters for justice" because cultural conditioning (enculturation) predisposes individuals to act, consciously or unconsciously, in particular ways that are not recognised by the substantive criminal law.[65] Renteln develops this contention by reasoning that the criminal law is biased towards the dominant culture in that criminal law principles (for example, the objective reasonable person) represents the persona of the dominant culture under which all other viewpoints are adjudged subjective (unreasonable). Renteln therefore argues that the objective reasonable person standard violates the principle of equal protection and suggests that the defence of provocation (for example), "is theoretically available to all defendants, [but] in fact cannot be used by people who come from other cultures".[66] There are aspects of Renteln's argument that coincide with my hypothesis, however, by contrast, my approach focuses on the relevance of culture to the determination of criminality and culpability. In ensuing discussion, I distinguish the approach adopted by my thesis in divergence with that advocated by Renteln and other commentators.

Despite the vast discourse in highlighting cultural concerns in criminal law and advocating the creation of a cultural defence, no comparable legal jurisdiction has adopted a stand-alone "cultural defence". My analysis of the literature indicates a glaring deficiency in that there is a reluctance by commentators to venture a definition of culture for application in criminal law. Where there is an attempt at defining culture, the definition applied is too general for application in criminal law,[67] is

[63] Renteln (n 31) at 23-184.
[64] Renteln (n 31) at 185-210. Also refer Renteln (n 43) at 61-82.
[65] Renteln (n 31) at 12-15.
[66] Renteln (n 31) at 32 and 36. See also Kumaralingam Amirthalingam *Culture, Crime, and Culpability: Perspectives on the Defence of Provocation* at 35-60 of Marie-Claire Foblets, Alison Dundes Renteln *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (2009) Hart Publishing.
[67] See for example Nunn (n 31) at x-xvii, where the author offers an anthropological definition, but this definition is too broad for application in criminal law. In Alison Dundes Renteln *The Cultural Defense: Challenging the Monocultural Paradigm* at 793-794 of Marie-Claire Foblets, Jean-Francois Gaudreault-Desbiens, Alison Dundes Renteln (eds) *Cultural Diversity and the Law: State Responses from Around the World* (2010) Establissements Emile Bruylant, the author provides a concise understanding of a "cultural defense" but provides no definition of culture for application in criminal law.

specific to a particular argument or academic discipline,[68] or deals with aspects of culture that are not relevant in criminal law.[69] I argue that if there is no clear understanding of how culture is to be recognised and applied in criminal law, then the numerous theories and strategies suggested for addressing the cultural deficiencies in criminal law cannot be carried through effectively.

While scholarly commentary and caselaw pertaining to culture as a defence in overseas jurisdictions has cast a wide net and the discourse raises a vast range of concerns in the development of a cultural defence, the New Zealand legal landscape harbours numerous intrinsic characteristics that present challenges to the recognition of culture that are unique to New Zealand's criminal law. Although some guidance and assistance can be garnered from the discussion of culture as a defence in comparable jurisdictions, a detailed analysis and audit of how culture impacts the criminal law within the New Zealand context as well as a review of how the New Zealand courts have struggled to deal with culture will aid the development of my hypothesis. In the next section I distinguish the "relevance of culture" approach that is advocated by my thesis in contrast with the commentary and scholarly analysis regarding the development of a "cultural defence" referred to above.

1.3.3 The Relevance of Culture versus a "Cultural Defence"

My ultimate argument is that an express acknowledgement of culture by the criminal law will address the numerous cultural deficiencies that permeate all aspects of criminal law. My thesis advocates the development of a framework for more meaningful recognition of culture in criminal law based on the relevance and significance of culture in affirming, mitigating or exculpating elements of offences or in establishing the elements of various existing defences. I examine here the numerous arguments advanced in favour of using culture to support a defence as well as the counter-arguments against a formal cultural defence to provide perspective for the approach taken by my thesis.

As illustrated above, numerous commentators, cultural theorists and criminal law academics, have promoted the creation of a separate formal "cultural defence" in criminal law.[70] There is no singular widely accepted understanding of what is to be regarded as a "cultural defence". Because there is no statutory recognition of a cultural defence in substantive criminal law, I allude to relevant literature where a "cultural defence" generally denotes a legal strategy that uses evidence about a defendant's

[68] For example, Nunn (n 31). Also see John Baldwin, Sandra Faulkner, Michael Hecht, Sheryl Lindsley *Redefining Culture: Perspectives Across Disciplines* (2006) Lawrence, Erlbaum Associates Publishers, Part II, 77-127.

[69] See for example, Ann Swidler *Culture in Action: Symbols and Strategies* (1986) American Sociological Review, vol. 51, 273-286 at 273. Also Lewis R Binford *Archaeological Systematics and the Study of Culture Process* (1965) American Antiquity, vol. 31, no. 2, Part 1, 203-210.

[70] In this context, I refer to the formal recognition of a cultural defence by inclusion of a separate stand-alone defence within substantive criminal laws similar to other defences such as self-defence or insanity.

cultural background to negate or mitigate criminal liability.[71] As will be demonstrated in ensuing discussion, New Zealand's criminal law provides neither guidelines nor a clear framework for how culture and cultural contentions are to be substantiated, interpreted, and applied within criminal law.[72] In Chapter Six, I argue that the approach by New Zealand's Parliament to culture and the criminalisation of culture-specific behaviour is inconsistent, ambiguous, and in various respects promotes inequality of treatment. In the absence of guidelines, the courts are accordingly obliged to interpret and apply culture in an ad hoc and inconsistent manner. Despite the considerable justifications for more meaningful recognition of culture within criminal law, there is presently no legal system that provides a "cultural defence" in the nature of other formal defences such as self-defence, consent or insanity.

In order to clearly position the approach taken by my thesis to addressing cultural deficiencies within criminal law, I utilise the arguments made by Renteln in addressing what she refers to as "the challenges to the accommodation of cultural traditions" within criminal law.[73] Renteln suggests there are five areas of concern regarding a cultural defence.[74] In responding to each of Renteln's contentions for addressing the issues with a cultural defence, I clarify my perspective on the cultural nuances that ought to be applied within the New Zealand context.

In promoting the establishment of a formal cultural defence, Renteln argues, first, that the obligation to recognise cultural factors within criminal law arises from the demands of international human rights law, and more specifically, the right to culture and fair trial rights.[75] While it is accepted that human rights considerations impose international law obligations on States to recognise culture within the criminal law, I have chartered a different path that is focused on the demands of superdiversity on New Zealand's criminal justice processes and the realities of the variability of cultural impacts and individual cultural orientations. A consequence of these factors is that making assumptions about a person's cultural influences based on standards of assessment that are aligned with the dominant social paradigm will lead to deficiencies in the way the criminal law deals with culture. As will be demonstrated in ensuing discussion, in the absence of a clear framework for dealing with culture, the criminal law has dealt with culture inconsistently, resulting in cultural misinterpretations, inequality of treatment, unfairness and a host of other cultural deficiencies. In New Zealand, the Crimes Act

[71] See for example, Kim (n 46) at 102. Also Renteln (n 67) at 793.
[72] Refer, for example, the discussion in Chapter Three, part 3.1.
[73] Renteln *The Cultural Defense* (n 31) at 211, 212-220.
[74] One of these concerns arises from Renteln *The Cultural Defense* (n 31) at 211-220. The other four cultural concerns are discussed in Renteln *Challenging the Monocultural Paradigm* (n 67) at 797-800.
[75] Refer Renteln *The Cultural Defense* (n 31) at 211-220. Also see Renteln *Challenging the Monocultural Paradigm* (n 67) at 793, 797-800 where the author argues "that the adherence of many nations to broadly accepted international human rights laws demand that some kind of cultural defense policy be adopted by states".

1961 makes no specific reference to culture despite the reality that New Zealand's criminal law is saturated with implied references to culture and implicit requirements to recognise culture. The inconsistencies in the treatment of culture within criminal law, I argue, arise not from a lack of recognition of culture but rather a deficiency in guidelines for the introduction, interpretation, and application of culture.

Renteln's second proposition focuses on addressing the deficiencies in recognition of culture by suggesting that the substantive criminal law ought to anticipate cultural exceptions (for example, the recognition of policies that allow Sikhs to wear their turbans in contravention of, say, the laws that require people to wear safety helmets when riding motorcycles) and provide exemptions for such cultural factors.[76] In the course of discussion in Chapter Seven (part 7.3.5) I note that the criminal courts in New Zealand have yet to specifically consider the situation where a breach of the criminal (or traffic) law was induced by reliance on a religious obligation. However there are various examples where the criminal courts (and administrative tribunals) have recognised the reasonableness of a defendant's religious and cultural considerations.[77]

In specifically responding to Renteln's proposition for dealing with whether adherents of the Sikh faith should comply with the requirement to wear safety helmets when riding motorcycles, the New Zealand traffic regulations (rule 7.12(8) of the Land Transport (Road User) Rules 2004)[78] allows an exemption from wearing a safety helmet when using all-terrain vehicles, motorcycles and mopeds, specifically to adherents of the Sikh faith. Although this specific exemption is recognised by the substantive law, other cultural exemptions are more likely to be recognised under the common law concept of reasonable excuse that is preserved by s 20 of the Crimes Act 1961.[79] As discussed in Chapter Five, numerous examples already exist whereby the substantive criminal law implicitly requires the recognition of culture regardless of the fact that New Zealand's substantive laws do not expressly refer to culture.

The inconsistent and ad hoc approach to culture by the criminal courts, I suggest, largely arise from the lack of a clear framework for the application of culture within criminal law rather than the creation of "exceptions" which may instead operate to compound the deficiencies in the court's approach to culture. The methodology advanced by my thesis in this regard is to focus on providing a framework and supporting guidelines for the interpretation and application of culture within criminal law. The

[76] Renteln *Challenging the Monocultural Paradigm* (n 67) at 800-802. Various other suggested cultural exceptions are provided by Renteln in her various writings (refer discussion above).
[77] See for example, *Ausage v Ausage* [1998] NZFLR 72, (1997) 17 FRNZ 13; *R v Lee* (2006) 22 CRNZ 568 (CA); *R v Rawiri and Others* [2009] HC Wellington (CRI 2007-032-5294).
[78] This provision was introduced into the Road Traffic Rules in June 2013.
[79] Refer for example the discussion in Chapter Five, part 5.3.7 regarding the carrying of a kirpan (ceremonial knife) in a public place.

most apparent deficiency in the substantive criminal law is that, despite the numerous implicit requirements to recognise culture, there is no delineation of the concept of culture. The difficulties in this regard become increasingly problematic because a wide variety of meanings are attributed to "culture", it is a deeply complex and abstract concept and other associated concepts such as ethnicity, values, morals, and traditions are equally difficult to define. As an initial step towards the formulation of a framework for dealing with culture within criminal law, I define culture and its related concepts for application within the criminal law in Chapter Four.

A third suggestion by Renteln for addressing cultural deficiencies within criminal law centres on the introduction of cultural evidence in support of cultural claims. Renteln particularly focuses on the "abilities" of cultural experts to adequately explain cultural factors and the significance of cultural data that is placed before the courts. Renteln also raises concern about the presentation of ethnographic information and the competency of the experts involved. In the course of my cultural audit (Chapters Five and Six) I highlight various deficiencies in the way defence counsel have presented cultural evidence in a number of New Zealand cases. The overwhelming problem has been that the cultural evidence necessary to establish a cultural factor was not introduced,[80] or the connections between the defendant's actions and the cultural influences have not been established.[81] While it is accepted that cultural factors are often complex and abstract in nature, the evidence produced by cultural experts in criminal trials to date have been deficient in establishing their relevance to the defendant's actions and whether the defendant had in reality been influenced to act because of the claimed cultural factors.[82] While a definition of culture will foster better understanding of culture and its relevance within criminal law, equally important is devising guidelines for the introduction and application of cultural evidence. I address these concerns by defining culture and cultural factors for the purposes of the criminal law in Chapter Four and offering a framework for assessing the relevance and significance of culture to the mens rea of offences and elements of specific defences in part 7.1 of Chapter Seven.

The fourth and fifth suggestions by Renteln for addressing the concerns regarding a cultural defence focus on the cultural competencies of legal counsel and issues that arise from the unconscious bias of members of the judiciary.[83] I respond to these concerns together for the simple reason that in addressing the first three concerns, the issues that might arise regarding counsel competencies and judicial bias may well be addressed. While I acknowledge that legal training for counsel and the judiciary may well address these concerns, it is outside the scope of my thesis to deal with these issues

[80] For example, see *Mika v R* [2013] NZCA 648 (CA); *Saxton v R* [2009] NZCA 498 (CA).
[81] For example, see *Uluakiola v R* (2006) CA1213/09, *Mesui v R* (1 December 1999) CA485/99.
[82] See, for example *Uluakiola* (CA) (n 81) and *Mesui* (n 81).
[83] Renteln (n 67) at 807–808 (re the legal profession) and 808-816 (re judges).

beyond the value that is garnered from a clear express recognition of culture by the substantive criminal law.

In distinguishing my approach to the "cultural defence" envisaged by Renteln in her extensive writings, I argue that a separate formal cultural defence is not required within the context of New Zealand's criminal law. Because New Zealand's criminal law is already profoundly based on a monocultural model but also harbours multicultural elements,[84] a foundation already exists whereby a framework for the application of culture and cultural factors within criminal law can be developed. Ultimately, it is my argument that the appropriate approach is to define culture for the purposes of the criminal law, and accompany this with a framework by which the courts are able to assess the possible relevance of culture either to the substantive offence itself (through mens rea) or through its relevance to established defences or general principles of culpability such as the reasonable person test and proportionality. Isolating issues of culture to a specific cultural defence, I argue, sidesteps the underlying problem of the criminal law's implicit ignorance of culture and the influence of culture on the conduct of all humans.

The starting point in addressing the cultural deficiencies within criminal law will be a clearer understanding of the relevance and significance of culture through the development of a suitable definition. Other aspects of a cultural defence envisaged will be the development of clearer rules regarding the use of subjective assessments of intent and motive. As will be argued in my cultural audit and more specifically in Chapter Seven, motives (whether culturally-induced or not) are already a relevant consideration within specific offences. I therefore contend that Parliament and the courts can play a significant role in clarifying the relevance and significance of motive to the assessment of criminality and culpability. As noted by Chiu, "the legislative process, with its capacity for thorough consideration and debate of policy complexities, is the proper forum to shape all doctrinal aspects of the criminal law".[85] I agree with this approach and therefore focus on recommendations that centre on a substantive law methodology to culture in addressing the highlighted cultural deficiencies in criminal law. Ultimately, my thesis advances various suggestions for the introduction, interpretation and application of culture and cultural factors within criminal law by way of the relevance of culture to the elements of offences and defences. I seek to ingrain the recognition of culture within the fabric of the criminal law rather than isolating it to a category of defence.

[84] I highlight, in Chapter Three, the monocultural, bicultural and multicultural factors that impact New Zealand's legal landscape.
[85] Elaine Chiu *The Challenge of Motive in Criminal Law* (2005) Buffalo Criminal Law Review, vol. 8, no. 2, 653-729 at 670 in quoting Martin Gardiner *The Mens Rea Enigma: Observations on the Role of Motive in Criminal Law - Past and Present* (1993) Utah Law Review 635-749.

1.4 Research Methodology

Three broad research methodologies are used in my dissertation.[86]

The first methodology is internally-focused in analysing the law as a self-contained entity. My cultural audit (Chapters Five and Six) and the substantive chapter dealing with the application of my contentions in criminal law (Chapter Seven) require the adoption of this approach. This approach focuses on the language used in statutes and case law to make sense of New Zealand's legal landscape and the way culture is introduced, interpreted and applied within the criminal courts. The objective in adopting this analytical approach is that the ad hoc approach by different judges and courts can then be demonstrated and the cultural deficiencies that permeate the criminal law can then be highlighted. By emphasising the various inconsistencies, inequalities in treatment and contrasts in the application of culture, a clear strategy can then be developed in addressing the cultural deficiencies that presently exist in criminal law.

The second approach to analysis in my dissertation is an applied and integrated methodology. This approach necessitates the adoption of insights and nuances promoted by other disciplines to investigate the legal issues that are contended by my research as requiring a re-calibration of approach by the substantive criminal law. This methodology is applied in Chapters Two, Three and Four of my dissertation where there is a need to examine the theories advanced by other academic disciplines regarding the way law is developed and applied in society. For example, the socio-legal approach looks beyond legal doctrines to understand law as a social phenomenon (or a type of social experience). By its nature, socio-legal research is inter-disciplinary, drawing on the tools and insights of disciplines (such as sociology, social policy, anthropology, archaeology) to analyse and critique law and legal practices. As my review of relevant literature has demonstrated, the concerns about the application of culture in criminal law requires a consideration of a wide range of related concepts and understandings.

As illustrated in my review of literature above, it is also necessary to apply a comparative approach by highlighting the cultural issues that arise in other legal jurisdictions. This approach is necessitated by the practicalities and prudence of anticipating possible cultural arguments and to develop an approach to culture and cultural contentions that will be most appropriate for application within the context of New Zealand's unique cultural and legal landscape.

[86] I utilise the methodologies outlined by Caroline Morris, Cian Murphy *Getting a PhD in Law* (2011) UK Hart Publishing Ltd at 28-40.

1.5 Structure of Thesis

In the course of my dissertation, there will be considerable overlapping of themes and discussion. Several common threads will be woven through the various chapters as well as a focus on the relevance of culture to specific offences and defences to clarify and substantiate the contentions of my thesis. I suggest that a clear road-map is necessary to illuminate the path to the ultimate contentions of my hypothesis and I do so by dividing my dissertation into four parts. In relation to each part, I also allude to the research strategy adopted and clarify the methodology undertaken in clarification of the arguments and contentions advanced in each section.

Part One: The Need for an Express Recognition of Culture in the Criminal Law of New Zealand

The central argument advanced in Part One of my dissertation is the need for culture to be expressly recognised in New Zealand's substantive criminal law. My argument revolves around two contentions.

First, express recognition of culture is required within the criminal law of New Zealand because of the development of a superdiverse society. Superdiversity is set to change the face of public policy in all respects and New Zealand's criminal law ought to be no exception. In ***Chapter Two***, I demonstrate how developing superdiversity in New Zealand is going to fundamentally change all aspects of the formulation and application of public policy. The criminal law, I argue, will not be immune to the impacts of an unprecedented level of cultural diversification.

Second, a clear and express reference to the importance of culture in the criminal law is needed to bring together the currently disparate elements of culture and in addressing the cultural dislocation of Māori within Aotearoa New Zealand. Although New Zealand's criminal law is predominantly influenced by Euro-Christian values, it also harbours fundamental aspects of tikanga Māori and cultural features that are engrained within many other cultures. Far from being a monocultural justice system, the actuality is that New Zealand's criminal law is profoundly multicultural in nature and scope. Despite its significance within criminal law, culture is applied inconsistently and in an extemporised way. In ***Chapter Three***, I illustrate the importance of expressly recognising culture in criminal law because the criminal law's approach to culture continues to be ad hoc, inconsistent and culturally deficient in many respects. In elucidating the primary sources of New Zealand's substantive criminal law and the cultural influences that have shaped New Zealand's legal landscape, a number of deficiencies in the way the criminal courts have dealt with the concept of culture are evident. I examine the unique challenges faced by the criminal courts in recognising the significance of culture and its relevance to criminality and culpability. In clarifying the nature and scope of these challenges,

I use the example of Māori and their struggles in seeking recognition of tikanga Māori by the criminal courts. In doing so, I highlight the challenges faced by any individual in seeking recognition of their specific cultural influences by the courts. In referring to the example of Māori, I do not enter into the discussion of Tiriti derived obligations, rights or responsibilities, either from the perspective of the Crown or tangata whenua. This is not a Tiriti thesis in which the dynamics of the Crown and Māori relationship is discussed in the context of the questions of sovereignty or governance in Aotearoa-New Zealand.

Part Two: Defining Culture for the Criminal Law

Having established that culture is relevant and significant to the criminal law I examine, in ***Chapter Four***, the basis for an express acknowledgement of culture and its application in the determination of criminality and culpability by accentuating the elements necessary to define "culture" and "cultural factors" for the purposes of the criminal law. I do so in two stages.

First, I eliminate those references to culture that, I argue, are not relevant to the determination of criminality and culpability. These include the varying conceptions of culture within different academic disciplines, the characterisations of culture that refer to everyday activity (such as social media culture, office culture, pop culture and sports culture), "tangible" aspects of culture (such as language, dance and music) and the references to culture within a medical or scientific context. Although I acknowledge that these understandings of culture may nevertheless aid in establishing the viability of a culture, they will not be relevant considerations in assessing criminality and culpability.

Second, I isolate the elements of culture that will be relevant and significant to the determination of criminality and culpability. As illustrated in earlier chapters and particularly in Chapter Seven, these are the cultural factors that have impacted the behaviour of an individual and provide the rationale or explanation for his or her actions. These cultural factors, I argue, will be fundamental to the introduction, application and interpretation of culture within the context of concepts such as reasonableness, consent, self-defence, provocation, claim of right and mental impairment.

Part Three: A Cultural Audit of New Zealand Criminal Law

The criminal law has attempted to recognise culture in culpability and criminalisation but has done this poorly, leaving no clear principles in place for the development of a consistent approach to culture in substantive criminal law. Associated with this reason is my contention that the policies and approaches by New Zealand's Parliament and successive governments to the criminalisation of culturally-loaded behaviour have been inconsistently applied and the justifications for the

criminalisation of culture-specific offending have been contradictory. Further, criminalising culture-specific behaviour, I argue, has been ineffectual in addressing the perceived cultural concerns.

In ***Chapter Five*** I undertake a cultural audit of New Zealand's criminal law to demonstrate, first, the breadth of circumstances across the criminal law in which the courts have attempted to recognise culture. Second, I illustrate that in these attempts, the courts have dealt with culture in an ad hoc and inconsistent manner resulting in unfairness and inequality of treatment. Third, I argue that the common nexus of the cases highlighted is that they all fall within the concept of honour, shame, fear, spirituality or the preservation of a specific cultural norm.

Chapter Six is an extension of my cultural audit in that I examine in detail the justifications for criminalising culturally-driven behaviour and exploring, in particular, the rationalisation for deeming unlawful, behaviour that is specific to minority populations. My aim is to highlight the discrepancies in justifications for criminalising culture-specific behaviour and emphasising the inconsistencies in policies and approaches to culture by New Zealand's Parliament.

Part Four: The Relevance of Culture to Criminality and Culpability

Although my earlier discussion has cast a wide net across New Zealand's criminal law, the focus of my thesis ultimately narrows to a consideration of the relevance and significance of culture and cultural factors in determining criminality and culpability. Having established in earlier chapters the rationale and justifications for a transformation of approach to the way the criminal law deals with culture and cultural contentions, the focus of discussion in this Part is to examine how the highlighted cultural deficiencies can be addressed within the context of the substantive criminal law concepts of criminalisation and culpability.

In this Part, I respond to the query as to why culture and cultural factors should be recognised by the criminal law. Although the cultural audit I undertake in Chapter Five highlights several examples where the courts are implicitly required to consider culture in the context of various aspects of the criminal law, I suggest that the areas in which culture has the most significant impact is in the context of criminal offences (specifically, the mens rea element of intent) and defences. In particular, I highlight in the audit that cultural factors are especially important in the context of assessing a defendant's motivations for his or her actions or course of conduct. In ***Chapter Seven*** I therefore undertake an examination of the significance and relevance of culture over four stages.

In the first stage, I contend that culture influences emotion and that criminal behaviour is ambiguously constructed around a variety of emotions that are complex in nature and scope. Culture, I argue,

provides the structure, rules, guidelines and expectations that help us understand, interpret and express various emotions. Culture therefore operates to rationalise and explain why an individual has undertaken a particular course of conduct and these factors are manifested in the emotional responses of offenders to given situations.

Second, I link culturally-derived emotion to motive in the commission of criminal acts or conduct. I argue that culturally-loaded emotions are relevant to the mens rea element of criminal offences and I use the example of concepts such as honour, shame, fear, spirituality and the preservation of cultural norms to demonstrate the significance of emotion to motive.

Third, I tackle the traditional approach in the criminal law of excluding the relevance of motive to assessments of criminal liability. I argue that culturally-derived motive is relevant to mens rea through 'intention', but not other forms of mens rea. In support of this contention, I examine specific cultural considerations that impact the culpability of defendants, particularly where the recognition of motive in conjunction with the specified intent of an offence will provide a clearer and more precise assessment of overall culpability.

Fourth, I highlight the relevance of culture to defences by emphasising the significance of culture and cultural factors to the defences of self-defence, compulsion (necessity), consent, reasonable excuse and provocation.

Part One: The Need for an Express Recognition of Culture in the Criminal Law of New Zealand

Chapter Two:
Superdiversity and Cultural Representation in New Zealand's Criminal Justice System

Whilst cultural diversity has long been a component of New Zealand society, the developing reality of superdiversity within New Zealand means that it will increasingly be difficult for legislators to ignore the influence of culture on the development of the criminal law.

New Zealand's changing demographics indicate an emerging diversity of ethnicities and cultures that is unprecedented. The reality of the changing demographic make-up of New Zealand's population is predicted to present significant changes to all areas of society including the provision of core State services. Along with challenges to education and its delivery, health and its financial servicing, and the construction of necessary infrastructure, the criminal justice system will face increasing pressure to more adequately represent the face of cultural diversity that will be a superdiverse New Zealand. I contend that the predicted changes in population demographics will require a more nuanced and progressive approach to the recognition of culture in the criminal law as New Zealand moves from a predominantly European-Christian foundation to one that is genuinely cosmopolitan.

I commence the discussion with an analysis of the rise of superdiversity. I highlight New Zealand's population demographics and the relevant statistical data and projections of population growth pointing to a superdiverse New Zealand. The objective of this analysis is to illustrate the comprehensive and all-encompassing effects that cultural diversification will have on the development of social and public policy, civic infrastructure and the delivery of social services. The evolution of the criminal law will not be immune to the impacts of superdiversity.

2.1 Ethnic Diversification and the Impacts of Superdiversity

The phenomenon of ethnic diversification and the complexities involved in dealing with migration inflows and outflows in search of economic, social and employment opportunities in other localities are age-old concerns that in recent decades have reached unparalleled significance. An increasing number of countries have experienced significant volumes of immigration and emigration indicative of global migration patterns. These intensifications in volume, diversity and overall complexity of international migration movements is, as contended by Czaika and de Haas, commonly linked to advances in transport, communication, technology and globalisation processes.[1]

The compounding effects of these migrational trends suggest that global migration patterns have become more multifaceted rather than following past migrational movements which were often concentrated in a few bilateral pathways that largely followed colonial or other historical links. Bakewell and de Haas observed that these past migrational movements could be seen, for example, in the vast majority of migrants from Francophone Africa moving to France and migrants from Anglophone Africa moving to the United Kingdom.[2] Vertovec provides the example of the vast numbers of migrants into Britain during the 1950s to the 1970s from former British colonies such as Jamaica, Trinidad, Guyana, India, Pakistan and Bangladesh.[3] These migrational trends can also be seen within the New Zealand context, where New Zealand's close colonial ties with various Pacific nations saw vast inflows of migrants from Sāmoa, Niue, The Cook Islands, Fiji and Tonga between the 1950s and 1980s.[4]

As a social scientist, Vertovec observed in the early 2000s that in many "immigrant-receiving societies" such as Britain, there was an unprecedented influx of "new, small and scattered, multiple-origin, transnationally connected, socio-economically differentiated and legally stratified immigrants".[5] Despite its geographical isolation New Zealand has not escaped these complexities. As will be illustrated in part 2.3 of this chapter, within the New Zealand context, recent census data indicate an unprecedented increase in the range and magnitude of immigrants representing a vast

[1] Mathias Czaika, Hein de Haas *The Globalization of Migration: Has the world become more migratory?* (2015) International Immigration Review, vol. 48, no. 2, 283-323 at 284. Also see Harry Blutstein *The Ascent of Globalisation* (Manchester University Press 2016); Daniel J Bourdreaux *Globalisation* (Westport 2008).
[2] Oliver Bakewell, Hein de Haas *African Migrations: Continuities, Discontinuities and Recent Transformations* at 95-118 of Leo de Haan, Ulf Engel, Patrick Chabal (eds.) *African Alternatives* (Leiden Brill 2007)
[3] Steven Vertovec *Super-diversity and its implications* (2007) Ethnic and Racial Studies, vol. 30, no. 6, 1024-1054 at 1027.
[4] Mansoor Khawaja, Bill Boddington, Robert Didham *Growing Diversity in New Zealand and its Implications for Measuring Differentials in Fertility and Mortality* (Statistics New Zealand 2000) 1-48 at 4-6.
[5] Vertovec (2007) (n 3) at 1024.

diversity of ethnicities and cultures from all parts of the world.[6] For example, while the volume of migrants from the Pacific have moderated since the 1980s,[7] there has been a marked increase in the number of immigrants from Asia and it is predicted that by 2038, the Asian population will overtake Māori to become the largest minority grouping in New Zealand.[8] I enlarge upon the impacts of these and other fluctuations in New Zealand's demographics below.

While the phenomena of cultural diversity in contemporary societies has generated debate among cultural theorists, sociologists and cultural anthropologists over many decades, the past twenty years has seen a recalibration of approach to diversity. In 1998, Zelinsky and Lee observed from a sociological perspective, that the United States was "in the midst of a profound remaking of the relationship between people and place that is both rapid and radical, a reordering of the basic perceptions and behaviours".[9] In identifying this phenomena, Zelinsky and Lee coined the term 'heterolocalism' to emphasise how members of certain newly arrived groups were able to sustain their identity as an ethnic community despite immediate or rapid spatial dispersion arising from well-known assimilation and pluralist models.[10] In identifying the heterolocal concept (where recent populations with a shared ethnic identity enter an area from distant sources then quickly adopt a dispersed pattern of residential location while maintaining cultural cohesion through a variety of means), Zelinsky and Lee sought to distinguish their model from the non-metropolitan (movements into a metropolitan area from outside a metropolis) and the transnational (inter-country migration) phenomena. Because the focus of Zelinsky and Lee's analyses was refined to examining a narrow aspect of ethnic diversification, the label they attached to their concept, I suggest, does not capture the true nature and scale of the phenomena that is the focus of my research.

Building upon the foundation set by Zelinsky and Lee's research, Khawaja et al in 2000 observed that New Zealand fitted neatly within the global phenomenon of ethnic diversification.[11] While acknowledging Zelinsky and Lee's approach to ethnic diversification, research by Khawaja et al was focused on measuring ethnicity in statistical collections with the objective of providing an explanation for how the collection of data on race, ethnic origin and ethnicity had changed over time.[12] Because their research sought to disseminate the issues of first, how an ethnic group is defined; second, how an

[6] See for example Cluny Macpherson *From Pacific Islanders to Pacific People and Beyond* at 135-156 of Paul Spoonley, Cluny Macpherson and David Pearson (eds.) *Tangata Tangata – The Changing Ethnic Contours of New Zealand* (Thomson Dunmore Press, 2004).
[7] Geoff Bascand *Demographic Projections from Statistics New Zealand: Aims Methods and Results* (30 August 2012).
[8] Bascand (n 7).
[9] Wilbur Zelinsky, Barrett Lee *Heterolocalism: An Alternative Model of the Sociospatial Behaviour of Immigrant Ethnic Communities* (1998) Population, Space and Place, vol. 4, issue 4, 281-298 at 283.
[10] I enlarge on the impacts of assimilation and acculturation in the New Zealand context in Chapter Two (2.3).
[11] Khawaja et al (n 4) at 4.
[12] Khawaja et al (n 4) at 4.

ethnic group defines itself; and third, how individuals possessing more than one ethnicity are classified and counted, Khawaja et al labelled the subject of their analysis as 'culture diversification and complexification".[13] Although the research by Khawaja et al recognised crucial elements of the ethnic diversification phenomena, it does not fully encapsulate the immense scale of the migrational trends that are now becoming apparent.

Reanalysis of this phenomena within the New Zealand context by Spoonley and Macpherson in 2008, saw another renaming of the process involving this developing manifestation within New Zealand's cultural and ethnic diversity. These authors viewed "the movement of people, goods, capital and information providing a range of connections across borders as well as a means of sustaining identity between the place of origin and destination" as "transnationalism".[14] Spoonley and Macpherson noted that this was not a phenomena which was new to New Zealand but what had changed was that transnationalism had been made easier by the convenience and cost of travel, resulting in an intensification of transnational linkages. Spoonley and Macpherson further observed that "there was a heightened interconnectivity between people and the receding economic and social significance of boundaries between nation states" and therefore their research agenda focused on what these linkages meant for the modern state. While Spoonley and Macpherson, retained the term 'transnationalism' to capture the focus of their research,[15] the "intensification of transnational linkages" appears to require the assumption of a more appropriate label to reflect the unprecedented nature and impacts of developing diversities in New Zealand.

Although the terms hyper-diversity,[16] diversification of ethnicity,[17] and deep diversity,[18] have also been applied to describe this phenomena, over the past fifteen years the developing diversity of ethnicities and cultures in New Zealand and elsewhere has been more commonly referred to by social theorists as "superdiversity", a term which was first used in 2005 and is attributed to Steven Vertovec.[19]

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[13] Khawaja et al at (n 4) at 7.
[14] Paul Spoonley, Cluny Macpherson *Transnational New Zealand – Immigrants and Cross-border Connections and Activities* in Chapter 9, 175-194 in Paul Spoonley, Cluny Macpherson, David Pearson (eds.) *Tangata Tangata – The Changing Ethnic Contours of New Zealand* (Thomson Dunmore Press 2004).
[15] Spoonley, Macpherson (n 14).
[16] Marina Doucerain, Jessica Dere, Andrew Ryder *Travels in Hyper-Diversity: Multiculturalism and the Contextual Assessment of Acculturation* (Nov 2013) International Journal of Intercultural Relations, vol. 37, issue 6, 686-699.
[17] Vertovec (2007) (n 3) at 1025.
[18] Todd Nachowitz *Towards a framework of deep diversity: Identity and Invisibility in the Indian Diaspora in New Zealand* (2015) University of Waikato, PhD Thesis.
[19] Steven Vertovec *Opinion: Super-diversity revealed* (20 September 2005) BBC News. Also see Steven Vertovec *From Multiculturalism to Super-Diversity* (2006) Centre on Migration, Policy and Society, Working Paper 25, University of Oxford at 3-12.

While some commentators (for example, Seibers)[20] have queried whether the heuristic value of the term 'superdiversity' justifies its popularity, the overwhelming response by social and cultural theorists is that the term aptly encapsulates the nature and scale of the diversity phenomena. In his more recent commentaries, Spoonley has utilised the term 'superdiversity' to refer to the large number or percentage of immigrants and people of different ethnicities in a society or area and the implications for shared civic or economic outcomes that arise from the vast array of religious and linguistic diversities these ethnicities bring into a society.[21] In the field of linguistics, commentators such as Ritchie,[22] May,[23] and Harvey,[24] have embraced the superdiversity concept to encapsulate language concerns within New Zealand's schools. In examining the impacts of superdiversity on a variety of social and civic concerns, Spoonley et al[25] and the Superdiversity Centre, have whole-heartedly adopted superdiversity as the appropriate term to describe the focus of their research.[26]

For Vertovec, superdiversity required much more than a mere acknowledgement of cultural diversity because the nature and scale of recent migration trends, more than ever before, impacted the gamut of society's social, health, political, legal, government and infrastructure.[27] Within the context of the larger European cities, Crul suggests that it was no longer appropriate to refer to the increased amalgam of diverseness and variance in ethnic populations simply as diversity.[28] Crul contends that the term superdiversity "alerts us to other axes of difference like gender, education, age, cohorts and generations."[29] Crul further observes that between and within ethnic groups there is a growing difference between generations, between men and women and between more and less educated people. This therefore calls for a shift of focus from fixed entities like 'ethnic groups' to a dynamic interplay between different characteristics of individual members of ethnic communities and the fluid

[20] See for example, Hans Siebers *Does the superdiversity label stick? Configurations of ethnic diversity in Dutch classrooms* (2018) International Sociology, vol. 33, issue 6, 674-691.
[21] See for example, Paul Spoonley, Andrew Butler *Reporting Superdiversity. The Mass Media and Immigration in New Zealand* (2009) Journal of Intercultural Studies, vol. 30, no. 4, 355-372; Paul Spoonley *Superdiversity, social cohesion, and economic benefits* (2014) IZA World of Labour, 1-10.
[22] Jenny Ritchie *Qualities for early childhood care and education in an age of increasing superdiversity and decreasing biodiversity* (2016) Contemporary Issues in Early Childhood, vol. 17, issue 1, 78-91.
[23] Stephen May *Linguistic Superdiversity as a "new" theoretical framework: Panacea or nostrum?* (3 February 2016) Presentation at MOSAIC, Birmingham University.
[24] Sharon Harvey *Language policy and planning in superdiverse times: Aotearoa/New Zealand* (27 November 2015) Launch of the Tamaki Makaurau Auckland Languages Strategy.
[25] Paul Spoonley, Robin Peace, Natalie Jackson, Trudie Cain, Angelique Praat *Examining Super-diversity on a Global Scale* (In progress) Research by Massey University and Waikato University in conjunction with the Max Planck Institute for the Study of Religious and Ethnic Diversity (Research updates available on Massey University website).
[26] Superdiversity Centre *Superdiversity Stocktake: Implications for Business, Government and New Zealand* (Superdiversity Centre for Law, Policy and Business 2015).
[27] Vertovec 2007 (n 3). Also refer Steven Vertovec *The Emergence of Super-Diversity in Britain* (University of Oxford 2006) Working Paper No. 25; Fran Meissner, Steven Vertovec *Comparing Superdiversity* (2015) Ethnic and Racial Studies, vol. 38, no. 4, 541-555. Also refer Khawaja et al (n 5).
[28] Maurice Crul *Super-diversity vs. Assimilation: How complex diversity in majority-minority cities challenge the assumptions of assimilation* (2016) Journal of Ethnic Migration Studies, vol. 42, no. 1, 54-68 at 54.
[29] Crul (n 28) at 54.

relationships between them; "in other words: a shift from an 'ethnic lens' to a multidimensional lens."[30]

In emphasising the significance of this phenomena on the development of social discourse and policy, Vertovec viewed superdiversity as an extension on an age-old concept around understanding diversity that underscored "the new conjunctions and interactions of variables that have arisen over the past decade" surpassing the ways in which public discourse, policy debates and academic literature usually understood diversity.[31] Vertovec posited that superdiversity was characterised by a complex set of variables in the migrant and post-migrant experience where it was no longer sufficient to view diversity simply in terms of 'ethnicity' or country of origin but necessitated a consideration of additional variables such as "differential immigration statuses and their concomitant entitlements and restrictions, divergent labour market experiences, discrete gender and age profiles, patterns of spatial distribution, and mixed local area responses by service providers and residents".[32]

Superdiversity therefore recognises the substantial increases in the diversity of ethnic, minority and immigrant groups in a city or country arising from shifts in global mobility which results in the multiplication and complications of variables such as different rights, the isolation of minority groupings and differing cultural experiences within, for example, the spheres of government, education, social welfare, health and business.[33] As discussed, various articulations of the superdiversity concept have been used since this term was coined. For the purposes of my research, I adopt the notion of superdiversity in line with the work of Vertovec where he refers to superdiversity as:[34]

> the movement of people from place to place on a global scale creating increasingly complex and dynamic interplays of social functions and variables brought about by the variety of possible subset traits, ethnicity, languages, religious traditions, regional and local identities, cultural values and practices.

For the purposes of my thesis, it is not necessary to isolate a specific characterisation of superdiversity, however the significance of Vertovec's conception of superdiversity for my research is that it appropriately reflects and acknowledges the complexities and undercurrents of the fluctuating factors that impact how diversity must now be viewed. Vertovec's delineation of superdiversity not only acknowledges the transnational, heterolocal and cultural diversification aspects of diversity, it also recognises that it is an evolving concept requiring analysis of a vast array of cultural elements and concepts and their impacts on established social, political, educational, health, infrastructure and

[30] Crul (n 28) at 54.
[31] Vertovec (2007) (n 3) at 1025.
[32] Vertovec (2007) (n 3).
[33] Superdiversity Centre *Stocktake* (n 26) at 53.
[34] Vertovec (2007) (n 3) at 1, 2.

other societal frameworks and institutions. As discussed earlier, the impacts of globalisation, acculturation and assimilation will accelerate the processes that bring about a superdiverse New Zealand. By virtue of their dynamic and continuously evolving characteristics, culture and cultural influences will also require regular re-calibration.

2.2 The Impacts of Superdiversity on Social Policy and the Criminal Justice System

The development of a superdiverse New Zealand pervades all spheres of life. The increasingly complex nature of superdiversity in New Zealand means that, with the proportional diminishing of its Euro-Christian majority, there is no simple corresponding single ethnicity that will rise to take the place of a commanding majority. Further, superdiversity does not merely mean an explosion in the number of separate and independent cultures alone, but in addition, an increased complexity in the development, intermingling and sharing of experiences across and between such cultures. In this respect, superdiversity represents a steep change in the development and application of social policy. From the convenience of a presumed commonality of direction, the creation of social policy must now navigate through the complexity of diversity where commonality of direction derived from a single ethnic majority is not possible. For New Zealand, addressing the impacts of superdiversity will require progress from the multicultural policies that have had as their overall goal the promotion of tolerance and respect for collective identities towards a more nuanced approach to the needs of diverse ethnic minorities.[35]

Over the following paragraphs I briefly explore the examples of education and health policy to illustrate the challenges presented by a superdiverse society before addressing the impacts of superdiversity on New Zealand's criminal justice framework.

2.2.1 Education

Superdiversity not only brings more ethnicities and nationalities into a recipient country, it also introduces new features of migration leading to a multiplication of variables that affect where, how and with whom people live. In his early publications on superdiversity, Vertovec observed that schools mirror the level and kind of complexity of orientations, cultural and linguistic heritages that constitute reality in a society.[36] Schools are becoming more ethnically diverse with increasing numbers of students from ethnic minorities or from families that have recently migrated into New Zealand. For most of these students, English will not be their first or primary language and the cultural differences they bring into the school environment raise various challenges centred on teaching and learning within a multilingual environment. Assimilation issues for students from minority ethnicities, language and linguistic policies, compulsory attendance at school and wider cultural concerns regarding religious beliefs and the teaching of religion in schools, policies around appropriate school attire, participation in school activities and gender segregation are not new

[35] Vertovec (2006) (n 19) at 3-12.
[36] Vertovec (2007) (n 3).

concerns for education. The reality of superdiversity is that these concerns are magnified and assume far greater significance within schools.

The New Zealand Ministry of Education acknowledges that diversity within schools can create positive interactions which stimulate the creativity of students, allow recent immigrants to become more proficient in the language of their adopted country and foster inclusivity and understanding of other cultures and ethnic groups.[37] However, superdiversity also presents significant challenges for education. For example, in the context of early childhood education, Chan and Ritchie contend that in New Zealand there is a "cultural distance" between a teaching workforce that primarily represents the dominant culture and the ethnically diverse they serve. Proactively fostering engagement with diverse families must therefore be considered a key professional responsibility of teachers working in diverse communities.[38] Ritchie also suggests that the matters of concern within early childhood education in New Zealand centre around the "othering" of Māori children and families by well-meaning childhood teachers. Ritchie also notes the difficulty operating 'otherwise' within a neo-liberal policy framework.[39] In the context of New Zealand's "linguistic superdiversity", May[40] and Harvey[41] highlight the difficulties for teaching where languages are so deeply intertwined and fused into each other that the level of fluidity renders it difficult to determine the boundaries that may indicate that there are different languages involved. Although English is primarily used in New Zealand schools, a conflict arises where there is also a push to use te reo Māori or other minority languages.

Following a review of the research on the implications of superdiversity globally the Superdiversity Centre recommended that the focus of education policy in New Zealand must be more appropriately centred on a review of the compulsory school system, faith in schools, export education and language policy.[42] I suggest that the impacts of superdiversity on education in New Zealand are far wider than this and will require an on-going review of the education system. Whilst these concerns within the New Zealand context mirror those raised in education research within other jurisdictions, it is possible that the impacts of superdiversity on education will be even more significant.

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[37] Education Review Office *Ethnic Diversity in New Zealand State Schools* (2018) ERO Insights, Term 1, 2018.
[38] Angel Chan, Jenny Ritchie *Pedagogies for a Superdiverse New Zealand* (June 2017) University of Auckland, Conference Paper, 69th OMEP World Assembly and International Conference, Croatia, at 289-90. Also refer Jack P Shonkoff *Building a New Biodevelopmental Framework to Guide the future of Early Childhood Policy* (2010) Child Development, vol. 81, no. 1, 357-367 at 363.
[39] Ritchie (n 22) at 78.
[40] May (n 23). Also see Sinfree Makoni, Alistair Pennycock *Disinventing Multilingualism – From monological multilingualism to multilingual franca* at 439-453 of Marilyn Martin-Jones, Adrian Blackledge, Angela Creese *The Routledge Handbook of Multilingualism* (Routledge 2012).
[41] Harvey (n 24). Also see Annelies Roskvist, Sharon Harvey, Deborah Corder, Karen Stacey *'To improve language, you have to mix': teacher's perceptions of language learning in an overseas immersion environment* (2014) The Language Learning Journal, vol. 42, no. 3, 321.
[42] Superdiversity Centre *Stocktake* (n 26) at 36, 62-64, 170-176.

In acknowledging Vertovec's conceptions of superdiversity within the field of education research, De Carvalho suggests that the complex superdiversity scenario has been conceptualised to illuminate understanding of the "interactions of variables such as religion, language, gender, age, nationality, labour market and population distribution on a larger scale" which then have fundamental implications within a variety of community environments, especially schools.[43] On discovering that in the London schools of 2016, over 300 languages were being spoken by students, all of whom had diverse backgrounds, bringing with them a wealth of experiences and their own set of religious beliefs, De Cavalho (in addressing the challenges involved with teaching science) argued that the educational curriculum must evolve to equip teachers with a meaningful understanding of how to handle discussion and taking the discourse of inclusion beyond its current formal boundaries.[44] Sage expands on the impacts of superdiversity within British schools in observing that:[45]

> The world has gone 'global', with its people economically and politically dependent on each other as never before, resulting in unprecedented movements of people across national boundaries. In Britain, this means that English is a minority language in 1,500 schools with approaching 50 of these having no indigenous children on their rolls … Such a phenomenon brings challenges but also benefits. Immigrants introduce different views, values, cultures and customs, appreciating education more than us.

Gogolin acknowledges the significance of the "diversification of diversity" variables highlighted by Vertovec and De Cavalho as highly influential on education and the role they play on how and with whom people teach and learn.[46] In researching the approaches adopted by German and Swedish school systems for dealing with diversity, Gogolin concluded that past educational activities and responses to the migration phenomena were "temporary and transient" and failed to take into account the reality that superdiversity would be "a constant characteristic of contemporary schools and must be taken up with regard to structure as well as teaching practice".[47] Another concern, highlighted by Gogolin, is that past approaches to diversity in education have focused on the conceptualisation of 'normality' in a society where pedagogical practices were "deeply rooted in traditions of binary constructions of reality". The consequences of these "binary constructions of reality" for the immigrant student, Gogolin contends, is that the binary framework provides specific measures to temporally deal with the specific features of the student and once the student has gone through these measures, the student is transformed into "normal" and is therefore "integrated".[48] Gogolin argues that superdiversity consequently contributes to and magnifies the educational disadvantage of students

[43] Roussel De Carvalho *Science initial teacher education and superdiversity: educating science teachers for multi-religious and globalised science classroom* (2016) Cultural Studies of Science Education, vol. 11, 253-272 at 253.
[44] De Cavalho (n 43) at 253.
[45] Rosemary Sage *Meeting the Needs of Students with Diverse Backgrounds* (Continuum International Publishing 2010) at 1.
[46] Ingrid Gogolin *The Challenge of Super Diversity for Education in Europe* (2011) Education Inquiry, Vol. 2, No. 2, 239-249 at 240-241.
[47] Gogolin (n 46) at 241.
[48] Gogolin (n 46) at 240.

from immigrant minorities.[49] Brown and Gibbons raise similar concerns as Gogolin in arguing that although the overt goal and veiled intent of public education in most contemporary societies is familiar and often similar, the method of academic delivery and social inculcation in public schools varies from society to society and often leaves ethnic and racial minorities marginalised, disenfranchised, and without equal access to equitable educational opportunities, therefore the emergence of superdiversity and its expanding influences will only serve to heighten these concerns.[50]

Educational researchers and commentators such as Banks,[51] Blackledge et al[52] and Blommaert and Rampton agree that the impacts of superdiversity require the development of a multi-factor paradigm to address the multi-ethnic and all-inclusive challenges for education. Banks suggests that the challenges presented for the "education paradigms" by culture and ethnicity, can be addressed through the adoption of a multicultural approach to education which requires a consideration of (what he refers to as) the "six major components of culture"; namely, the ethnic additive and self-development concepts, language, racism, genetic, competing and radical paradigms.[53] Banks further contends that addressing these factors must focus on an understanding or ability to interpret the values and behavioural styles of ethnic groups; dialects and languages within ethnic groups; the nature of non-verbal communications, cultural cognitiveness (the ability to perceive and recognise unique components of a specific ethnic group), an appreciation of the perspectives, worldviews and frames of references attached to a particular ethnic group and the ability to identify or recognise the subtle or unconscious indicators of an ethnic group.[54]

In addressing the challenges of multilingualism in education, Sage suggests that superdiversity will require the consideration of, for example, how curriculum within schools must be developed to cater for the predicted influx of children from non-European-Christian backgrounds,[55] addressing the linguistic needs of children whose "first language" is not English, catering for the traditional expectations of minority groupings in terms of dress, social protocols and participation in traditional school activities within the context of existing practices.[56] Blommaert and Rampton argue that

[49] Gogolin (n 46) at 239.
[50] Elinor L Brown, Pamela E Gibbons *Ethnicity and Race: Creating Educational Opportunities Around the Globe* (Information Age Publishing 2011) at xi.
[51] James A Banks *Cultural Diversity and Education – Foundations, Curriculum and Teaching* (Pearson Education 2006) at 105-108.
[52] Adrian Blackledge, Angela Creese, Mike Baynham, Melanie Cooke, Lisa Goodson, Zhu Hua, Bharat Malkani, Jenny Phillimore, Mike Robinson, Frances Rock, James Simpson, Caroline Tagg, Janice Thompson, Kiran Trehan, Li Wei *Language and Superdiversity: An Interdisciplinary Perspective* at 26-51, introduction to Angela Creese, Adrian Blackledge (eds.) *The Routledge Handbook of Language and Superdiversity* (Routledge 2018).
[53] Banks (n 51) at 93-108.
[54] Banks (n 51) at 80-101 and 105-108.
[55] Refer Banks (n 51).
[56] See Sage (n 45) and also Brown, Gibbons (n 50).

addressing the challenges of multilingualism in education would be far more analytically productive if there was focus on the vastly variable ways in which linguistic features with identifiable social and cultural associations get clustered together whenever people communicate.[57] In addressing the challenges arising from dealing with a multi-lingual population within schools, sociolinguistics researchers such as Blackledge et al observe that an interdisciplinary perspective was necessary to address the impacts of superdiversity because various other factors come into play including, inter alia, differential immigration statuses, gender, age, economic mobility, social class or caste, locality and sexuality.[58]

As the discussion above suggests, superdiversity demands the adoption of subtle refinements in existing teaching methodologies to meet the educational needs of a diverse student body. Therefore a multi-faceted approach is required to address the wider challenges presented by the superdiversity phenomena for education in New Zealand.

2.2.2 Health

Superdiversity will have consequences for how healthcare services are delivered to communities that are increasingly becoming ethnically and linguistically diverse in New Zealand and overseas. As is the case with the impacts of superdiversity on education, the diversity issues that arise within the health sector are not necessarily new but are magnified in terms of their scale and complexity.

Before I progress to examine the impacts of superdiversity for healthcare in New Zealand, an issue raised by the Superdiversity Institute's research, I suggest, is also of relevance to this discussion. In research by Sawrikar and Katz into addressing health concerns for Indigenous Australians, the authors drew a distinction between the health needs of new immigrants who were "culturally and linguistically diverse" (CALD) and Australia's Indigenous population. Sawrikar and Katz argued that Australia's Indigenous groups should be considered distinct "because their experiences and needs as first nation people are seen as significantly different from other groups".[59] Within the New Zealand context, similar distinctions could be drawn between Māori and CALD, however, the Superdiversity Institute contend that although Indigenous people are not usually identified as CALD, they often experience similar vulnerabilities which result in greater injury and illness at work. Therefore, the

[57] Jan Blommaert, Ben Rampton *Language and Superdiversity* (2011) Diversities, vol. 13, no. 2, 1-21 at 1. Also refer Jean Jacques Weber, Kristine Horner *Introducing Multilingualism: A Social Approach* (Routledge 2012).
[58] Refer Blackledge et al (n 52). Also see Adrian Blackledge, Angela Creese, Jaspreet Kaur Takhi *Language, Superdiversity and Education* at 59-60 of Ingrid de Sait-Georges, Jean-Jacques Webers (eds.) *Multilingualism and Multimodality: Current Challenges for Educational Studies* (Sense Publishers 2013).
[59] Pooja Sawrikar, Ilan Katz *How useful is the term 'Culturally and Linguistically Diverse' (CALD) in Australian research, practice and policy discourse?* (Presentation to 11th Australian Social Policy Conference, *An Inclusive Society? Practicalities and Possibilities* University of New South Wales, July 2009) at 1.

Superdiversity Institute acknowledge that the concerns raised for Indigenous people globally will also have relevance for New Zealand's Indigenous population.[60] The discussion to follow will not delve into the specific needs of particular minority groups but will focus on highlighting the consequences of superdiversity on New Zealand's diverse populations.

Much of the research into the impacts of superdiversity in healthcare in New Zealand reflect research undertaken overseas but also recognise the factors that are intrinsic to New Zealand. The concerns raised by commentators regarding the impacts of superdiversity in European cities, I suggest, are equally applicable within the New Zealand context and therefore warrant reference by way of background.

In their research into the impacts of superdiversity within large European cities in the area of healthcare, Phillimore et al, propose that the ethno-national focus of previous health policies should now be replaced by policies that take into account the new complexities within cities, where "a deeper and multi-faceted understanding of everyday health practices in superdiverse contexts" must support appropriate healthcare provision. Phillimore et al therefore conclude that the demands of superdiversity will:[61]

> shape future services, providing knowledge about how welfare can be reconstructed to address need associated with complex life worlds … [and] support the development of new networks and partnerships that can collaborate to meet need at the local level. The concept of welfare bricolage will offer practitioners a new mechanism to begin to understand the wide range of resources that residents harness to attempt to meet individual need.

The impacts of increasingly diverse populations in the area of healthcare can be illustrated with regard to the conflicts that arise between the imperatives of religious or traditional beliefs versus "best practice" fundamentals, the proliferation of demand for "traditional medicines" and the cultural competency of medical professionals.

Bradby et al contend that "there is undoubtedly a need for greater recognition of multi-variable migration configurations that underpins the concept of superdiversity in the encounter between the complex and mobile populations of health professionals and of health service users".[62] The conflicts between cultural and religious beliefs versus established risks of harm to a patient can be

[60] Superdiversity Institute *Health and Safety Regulators in a Superdiverse Context: Review of challenges and lessons from the United Kingdom, Canada and Australia* (December 2018) Superdiversity Institute for Law Policy and Business.
[61] Jenny Phillimore, Hannah Bradby, Michi Knecht, Beatriz Padila, Tilman Brand, Sin Ti Cheung, Simon Pemberton, Hajo Zeeb *Understanding Healthcare Practices in Superdiverse neighbourhoods and Developing the Concept of Welfare Bricolage: Protocol of a Cross-National Mixed-Methods Study* (2015) BMC International Health and Human Rights, vol. 15, no. 16, 1-8.
[62] Hannah Bradby, Gill Green, Charlie Davison, Kristine Krause *Is Superdiversity a Useful Concept in European Medical Sociology?* (20 Jan 2017) Frontiers in Sociology, at 4.

demonstrated with analysis of the case of *B v Director General of Social Welfare*,[63] where doctors who were treating a three-year-old boy for severe nose bleeds considered that a blood transfusion was the most appropriate course of treatment. The child's parents objected to this procedure due to their beliefs as adherents to the Jehovah's Witness religion. The Court of Appeal held that the parent's right to manifest their religion under s 15 of the NZBORA could not be extended to endanger the child's welfare, health or life. The position adopted by the Court of Appeal in prioritising the welfare of the child over the religious beliefs of parents has been followed by the High Court in *Auckland District Health Board v W*,[64] and *Auckland District Health Board v E*,[65] both involving parents seeking to maintain their Jehovah's Witness doctrines. A superdiverse population will increase the incidences of cultural conflicts within the health sector and also more frequently require the determination of these issues by the New Zealand courts.

Green et al suggest that the concept of superdiversity necessitates clearer pathways (navigational assistance) to healthcare for the wide range of people with different socio-cultural backgrounds in the form of knowledge, cultural completeness and orientation.[66] The concern raised in this regard is that minority groups do not access formal medical treatment as readily as the established ethnic groups in New Zealand and will at times prefer to be treated by traditional medicines or methodologies. An increasingly diverse population will also increase demand from minority populations for access to traditional medicines and care. The concerns in this regard can be seen in *Re Norma*,[67] where a 19-month-old Sāmoan girl was diagnosed as suffering from bone cancer of the right femur which would become fatal if left untreated. To prevent spread of the cancer, doctors recommended amputation of the right leg followed by chemotherapy. The parents objected to this course of treatment and removed the child from the hospital and began treatment of the child by her great-grandmother using Sāmoan traditional medical techniques. Tompkins J acknowledged that there was no reconciling of the conflicts between the New Zealand and Sāmoan cultures in these circumstances but ruled that the approach adopted must serve the best interests of the child. Because there was a direct conflict between the assertions of the great-grandmother that the child was suffering a condition relating to muscle tissues of the thigh and the diagnosis by the medical professionals that the child was suffering from a cancer of the bone, the preferred approach must be to seek confirmation of the diagnosis. The

[63] *B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA). Also see *Auckland Healthcare Services Ltd v Liu* HC Auckland M812/96, 11 July 1996.
[64] *Auckland District Health Board v W* [2012] NZHC 1563, [2014] NZFLR 381.
[65] *Auckland District Health Board v E* [2013] NZHC 2154, [2014] NZFLR 451.
[66] Gill Green, Charlie Davison, Hannah Bradby, Kristine Krause, Felipe Morente Meijas, Gabrielle Alex *Pathways to care: How Superdiversity Shapes the Need for Navigational Assistance* (2014) Sociology of Health and Fitness, Vol. 36, No. 8, 1205-1219. Also see Simon Pemberton, Jenny Phillimore, Hannah Bradby, Beatriz Padilla, Jessica Lopes, Silja Samerski, Rachel Humphries *Access to healthcare in superdiverse neighbourhoods* (2019) Health and Place, vol. 55, 128-135.
[67] *Re Norma* [1992] NZFLR 445, (1991) 8 FRNZ 498.

High Court accordingly granted guardianship of the child to the Director-General of Social Welfare to ensure that the child underwent medical investigations and further treatment if necessary.

These challenges suggest that greater complexity in the regulatory framework governing the provision of public health is likely to eventuate. For example, the vast growth of Asian migrants into New Zealand has increased the demand for the use of traditional Chinese medicine. The use of traditional Chinese medicines is not presently subject to formal regulation and the Superdiversity Institute has queried whether practitioners in traditional medicines ought to be regulated under the Health Practitioners Competence Assurance Act 2003.[68] As noted by the Superdiversity Institute, regulations involve costs and, where the traditional health practitioners are members of the minority communities, then there will also be a requirement that practitioners have or must attain good English language and communication skills.[69]

Crawley et al highlight that a direct impact of superdiversity is healthcare providers and medical professionals have also become more ethnically diverse and healthcare interactions therefore require a greater level of skill and cultural understanding.[70] The need to establish cultural competency in the medical profession was highlighted by the Superdiversity Institute's reference to the failings by medical professionals in the case of Moresby Fonoti.[71] The Coroner and the Health and Disability Commissioner found that Mr Fonoti had died after being assaulted because no one at the hospital had communicated with his wife regarding his uncharacteristic behaviour and his inability to communicate in either English or Sāmoan.[72] It was found that an earlier diagnosis of Mr Fonoti's true condition could have been made if one of the medical professionals had consulted with Mr Fonoti's wife. The New Zealand Medical Council has since issued specific guidelines for practitioners when dealing with Pāsifika (Pacific people) and Māori patients. It is envisaged that similar guidelines will be invoked for other cultural and ethnic groupings in the course of New Zealand's developing superdiversity as well as the introduction of health policies that address the health needs of minority groups, the development of culturally appropriate attitudes towards best medical practice and cultural competence in patient care and staff relations.[73]

Superdiversity accordingly raises profound challenges for healthcare provision where regard must be given to meeting the health needs of diverse populations, a balancing of the rights and entitlements to

[68] Superdiversity Centre *Stocktake* (n 26) at 182.
[69] Superdiversity Centre *Stocktake* (n 26) at 181.
[70] LaVera Crawley, Patricia Marshall, Bernard Lo, Barbara Koenig *Strategies for Culturally Effective End-of-Life Care* (2002) Annals of Internal Medicine, vol. 136, issue 9, 673-679.
[71] Superdiversity Centre *Superdiversity Stocktake* (n 26) at 181.
[72] Health and Disability Commissioner *Canterbury Health Limited* (April 1998) at 82.
[73] See Superdiversity Centre *Stocktake* (n 26) at 36.

healthcare (especially around consultation) need to be adequately appraised and the provision of effective services across the range of population variables.[74]

2.2.3 The Impacts of Superdiversity on the Criminal Law

Raising considerable challenges for health and education as examples, superdiversity will also arouse fundamental enquiries regarding criminalisation and culpability in the development of the criminal law due to the rapidly evolving diversity of ethnicities and cultures that are involved within New Zealand's criminal justice processes. The significance of superdiversity within the criminal law is that if the notion of what it means to be a "New Zealander" was ever clear, it will increasingly become amorphous and ill-defined. Instead, there will be a rapidly evolving diversity of ethnicities and cultures that are involved within New Zealand's criminal justice processes. As the statistics highlighted below demonstrate, the dynamics and demographic breakdown of persons involved within the criminal justice system is facing unprecedented changes which, I argue, warrant a review of the substantive criminal law's approach to dealing with culture.

As will be illustrated in the discussion to follow, various inconsistencies, irregularities, misunderstandings and misinterpretations regarding culture and the recognition of cultural factors have called into question the fairness of decisions and raise claims of inequality of treatment within the criminal law. Because cultural contentions will feature more regularly within criminal proceedings, the consequences of these cultural deficiencies will be amplified. New Zealand's superdiversity, I suggest, will demand an in-depth analysis of the relationship between culture and crime. Such analysis must examine the role that culture plays in the commission of a crime with the purpose of providing guidance on the relevance and significance (weight) to be attached to culture in the determination of criminality and culpability and not merely sentencing. The impacts of superdiversity on the criminal law will therefore be vast and far-reaching. To give structure to the discussion to follow I distinguish the visible consequences of superdiversity for the criminal law from the latent effects.

The visible consequences of superdiversity for the criminal law emanate from the reality that contemporary societies that are already culturally and ethnically diverse will reach unprecedented levels of heterogeneity. For the criminal law, the range of people that become involved within the criminal justice system, therefore, are not only numerically greater, they will also be more culturally and ethnically diverse. New Zealand's judiciary, who are predominantly aligned ethnically and culturally with the Euro-Christian culture, must deal with minority cultural contentions on a more

[74] Jenny Phillimore *Approaches to health provision in the age of super-diversity: accessing the NHS in Britain's most diverse city* (2011) Critical Social Policy, vol. 31, at 5-29.

frequent basis. These individuals (defendants and witnesses) will bring with them their own cultural beliefs, traditional understandings, perceptions and motivations for their actions. For the criminal law, the consequences of superdiversity will therefore be far-reaching and pervade all aspects of New Zealand's substantive criminal law and criminal justice system.

A superdiverse population will, I suggest, introduce new varieties of offending and therefore, also require the criminal courts to deal with neoteric and varied forms of cultural contentions. Some cultural practices that are traditional and condoned culturally within many parts of the world (for example female circumcision, traditional marriage practices, honour-based violence) are nevertheless criminalised in New Zealand. Increased ethnic, religious and cultural diversity will likely result in the prosecution of these practices in New Zealand. Offending of this kind will be a new and different form of criminal offending because, although these offences have been a part of New Zealand's substantive criminal law for some time, they have not previously been the subject of a prosecution. For example, female circumcision has been criminalised under ss 204A and 204B of the Crimes Act 1961 since 1995, however, despite the prevalence of this practice world-wide, no prosecution for female genital mutilation has been undertaken in New Zealand and only a small number of prosecutions have been made in other common law jurisdictions with an even smaller number resulting in a conviction.[75]

The prosecution of "new varieties" of offending will require the criminal courts to consider a vast array of cultural evidence in support of a wide range of cultural contentions and then interpret and apply such cultural assessments in the determination of criminality and culpability. The visible consequences of superdiversity for the criminal law can be illustrated by the case of *Police v Razamjoo,*[76] where the Court was required to determine the most appropriate way for two female witnesses to give their evidence during a trial while attired in their traditional burqas, Judge Moore undertook an overall evaluation of the range of rights, legitimate expectations and public interest factors impacting on whether a deviation from the court's established processes should be made. In this instance, Judge Moore ruled that the court could depart from its normal procedures and allow the witnesses to give their evidence from behind a screen.[77]

The latent effects of superdiversity for the criminal law flow directly from the visible impacts noted above. The consequences of superdiversity for the criminal law is that the uniformity and efficiency of the criminal justice system will be compromised. In addressing the impacts of a deeply diverse population, there will be an increased demand for resources to meet the requirements of users of the

[75] The first prosecution in the UK was 2018. The only prosecution in Australia to date was in 2018.
[76] *Police v Razamjoo* [2004] 8 HRNZ 604.
[77] *Razamjoo* (n 76) at 637-8.

justice system (for example, increased infrastructure demands, the need for more and varied translation services, cultural training for members of the judiciary, lawyers and court administrators), and for improved ethnic representation on both juries and the judiciary. It is not within the scope of my hypothesis that I examine each of these consequences in detail, however, I briefly allude to the need for enhanced translation assistance and improved ethnic diversity in juries and the judiciary to emphasise the consequences of superdiversity for the criminal law.

The right to an interpreter in criminal proceedings is essential to the promotion of a fair trial,[78] and is therefore preserved by the Evidence Act 2006,[79] the Criminal Procedure Act 2011[80] and the New Zealand Bill of Rights Act 1990 (NZBORA).[81] Recent decisions by the Supreme Court and Court of Appeal suggest that the provision of "communication assistance" for defendants and witnesses requires a balancing of the right to an interpreter and whether there is a genuine difficulty with the English language.[82] In *Abdula v R*, the Supreme Court ruled that the standard required of an interpreter is "high but not one of perfection" but because best practice was not applied in this case, the Court provided some guidelines on how the interpreter must undertake his or her functions when translating in court.[83] The increasing diversity of defendants and witnesses using languages other than English places stresses on the courts to provide more interpreters with greater fluency in a larger range of languages.

I suggest that the increasing diversity of ethnicities and cultures in New Zealand also demands improved ethnic representation on juries and the judiciary. The jury selection process is now fundamentally based on the provisions of the Juries Act 1981 which removed various archaic qualification criteria based on gender (males only), age (males aged twenty-one to sixty) and land ownership.[84] Section 6 of the Juries Act 1981 provides that any person who is registered as an elector in accordance with the Electoral Act 1993 is "qualified and liable" to serve as a juror. The consequence of these qualifications is that a jury must therefore be representative of "one's peers".[85] As noted by the Law Commission, a core value of the various functions of the jury is its democratic nature which "allows members of the community to participate in the criminal justice system and

[78] See for example Celia Brown-Blake *Fair Trial and the Right to Interpretation* (2006) International Journal on Minority and Group Rights, vol. 13, 391-412.
[79] Evidence Act 2006, s 80 and s 81.
[80] Criminal Procedure Act 2011, ss 122, 386.
[81] The New Zealand Bill of Rights Act 1990, s 25(e).
[82] *Abdula v R* [2011] NZSC 130 at [59], [60]. See also *Nisha v R* [2016] NZSC 114; *Deng v R* [2013] NZSC 100; *Mathews v R* [2019] NZCA 131 at [25].
[83] *Abdula* (n 82) at [60], [61].
[84] Neil Cameron, Susan Potter, Warren Young *The New Zealand Jury* (1999) Law and Contemporary Problems, vol. 62, no. 2, 103-139 at 105.
[85] See for example, *Ellis v R* [2011] NZCA 90 at [33] to [41]; *Lyttle v R* [2017] NZCA 279 at [21]; *McNaughton v R* [2012] NZCA 16 at [6].

bring their diverse range of perspectives, personal experiences and knowledge to bear in individual criminal cases."[86]

Research by Israel (using the 1996 Census results) suggest that Māori are under-represented on juries due to a larger proportion of Māori living outside of the urban areas (and therefore beyond the proximity of most courts), a lower proportion of Māori are enrolled on the electoral lists, Māori were more likely to be geographically mobile and therefore unlikely to receive the jury summonses and a higher rate of imprisonment for Māori disqualified them from jury service.[87] Data from recent Census not only confirm the trends of under-representation of Māori on juries but also reflect similar progressions for potential jury members coming from other ethnic and cultural minorities in New Zealand.[88] While an essential element of juries is that they must be a true reflection of a superdiverse New Zealand, the statistics suggest that jury membership is not representative and superdiversity amplifies these issues of under-representation of minorities. Considerable research both in New Zealand,[89] and overseas,[90] highlight another dimension to these issues in that ethnic bias[91] and educational bias[92] in jury selection has been a concern for some time and will only be magnified by the increasing ethnic diversity and widening of the pool of eligible jurors.

As with juries, judicial diversity is essential to maintaining the integrity and legitimacy of the criminal justice system. As illustrated in part 2.3 below, minority ethnicities represent a small proportion of the judiciary in New Zealand. The cultural affiliations of judges in New Zealand are predominantly European-Christian. 10.8 per cent of New Zealand judges claim Māori cultural affiliations (but each of these judges will also claim mixed European ethnicities as well),[93] 2 judges claim Sāmoan ancestry and 2 judges are of Tongan descent. The disparity in judicial appointments is more obvious when compared with Māori who represent approximately 15 per cent of New Zealand's population and Pacific Islanders make up 7 per cent of New Zealand's population. 12 per cent of New Zealand's population are Asian, yet only two judges of Asian ethnicity presently sit in the District Court and one sits in the High Court. The disparity in ethnic representation within New Zealand's judiciary is starkly apparent and will only be emphasised further by developing superdiversity.

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[86] New Zealand Law Commission *Juries in Criminal Trials: Part One* (NZLC 1998) at [7], [24].
[87] Mark Israel *Ethnic Bias in Jury Selection in Australia and New Zealand* (1998) International Journal of the Sociology of Law, vol 26, 35-54. Also see Stephen Dunstan, Judy Paulin, Kelly-Anne Atkinson *Trial by Peers? The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995).
[88] New Zealand Census 2013.
[89] For example see Israel (n 87), Dunstan et al (n 87).
[90] See for example, Kurt Saunders *Race and Representation in Jury Service Selection* (1997) Duquesne Law Review, vol. 36, 49-74; Gillian Daly, Rosemary Pattenden *Racial Bias and the English Criminal Jury Trial* (2005) The Cambridge Law Journal, 678-710; Hilley Levin, John Emerson *Is there Bias against Education in the Jury Selection Process?* (2006) Connecticut Law Review, vol. 38, no. 3, 325-351.
[91] Israel (n 87). Also see Daly, Pattenden (n 90); Saunders (n 90).
[92] Levin, Emerson (n 90).
[93] Geoff Adlam *Census Picture of Lawyer Ethnicity* (10 October 2014) New Zealand Law Society Law Talk, 19.

Superdiversity will also impact the treatment of prisoners in custody. Relevant regulations and the Prison Operation Manual recognise the right of prisoners to register and practice their faith while in custody. The Department of Corrections acknowledge the religious dietary requirements and observance of religious protocols and have, for example, confirmed that their food is now 100 per cent halal accredited.[94] Diverse populations in prison will constantly require Corrections to readjust their policies to meet the increasingly diverse needs of prisoners. With prisons and other correction facilities, language difficulties will need to be addressed so that issues of isolation do not arise because prisoners encounter communication difficulties. Language difficulties may also limit a prisoner's participation in education and rehabilitation programs, which in turn impacts a prisoner's prospects for parole and reintegration into society.

As illustrated above, the impacts of superdiversity within the criminal justice system are varied, complex and multifaceted. From the current state of cultural diversity in New Zealand, serious anomalies in the representation of particular minorities exist. The existing concerns regarding the over-representation of Māori and Pasifika and individuals from minority populations within the criminal justice system and under-representation on juries and in the judiciary will be amplified, requiring a recalibration of approach to these concerns.[95] Over-representation of Māori and Pasifika in the criminal justice system is likely multifaceted and is a particularly serious problem for the development of substantive criminal law and the broader criminal justice system. An examination of these issues and formulating a solution is beyond the scope of my thesis. However, I contend that a more nuanced and consistent approach to the recognition of culture in the substantive criminal law will likely play a role in addressing this issue, at least in part.

The impact of superdiversity on the criminal law, I suggest, is that there will be a demand for the creation of formal processes regarding the acknowledgement of culture and the application of cultural factors within the criminal law and more meaningful recognition of culture within substantive criminal law. I contend that a fundamental requirement in achieving significant recognition of culture within the criminal law must involve defining culture and cultural factors for the application of these concepts within criminal law.

[94] Elizabeth Stanley *Human Rights and Prisons: A Review to the Human Rights Commission* (July 2011) at 36.
[95] Clara Rigoni *Crime, Diversity, Culture and Cultural Defense* (Jul 2018) Oxford Research Encyclopedia of Criminology, Online Publication, 1-30.

2.3 Cultural and Ethnic Representation in New Zealand

New Zealand today is a superdiverse society that harbours many ethnic and cultural minorities.[96] New Zealand is home to 213 ethnicities and 160 languages (as at the 2013 Census) and is now categorised as one of the few culturally and linguistically 'superdiverse' countries in the world.[97] New Zealand is also the fifth most ethnically diverse country in the OECD with one of the highest immigration rates in the world and the large indigenous component of New Zealand's superdiversity makes it "culturally and linguistically" unique compared to other ethnically diverse countries.[98]

The ethnic and cultural mix of New Zealand's population is not only becoming increasingly diverse, but the proportion of ethnic minority populations are increasing in comparison with the dominant European-Christian population. Given the cultural, ethnic and gender context provided by the statistics, I suggest that the setting of boundaries for how "culture" is to be understood is fundamental to the promotion of equality of treatment, fairness and uniformity in the application of cultural factors as they increasingly impact the substantive aspects of criminal justice processes. Elias CJ refers to the trends indicated by the 2013 Census and commented that in New Zealand there are:[99]

> serious challenges … to the law's ability to protect, recognise and affirm the right to difference of the ethnic and cultural minorities.

The statistics underscored below are based on New Zealand Census taken between 1991 and 2013.[100] The figures may indicate a breakdown of more than 100 per cent as some respondents to the Census claim affiliation with more than one ethnicity.

The criminal justice statistics reveal that those who claim European ethnicity (between 1992 and 2011) consistently remained the largest group (numerically) who are charged with criminal offences but represent 48 per cent overall of those charged. Māori are over-represented in that they reflect 37 per cent of those charged but make up an estimated 15 per cent of New Zealand's population.[101] Pacific Islanders comprise about 11 per cent of those who are charged from an overall representation

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[96] Refer for example, James Belich, Lydia Wevers *Understanding New Zealand Cultural Identities* (Stout Research Centre discussion paper 2008). Also see, Ministry of Social Development *The Social Report 2016* (2016) at 175-188.

[97] Angel Chan, Jenny Ritchie *Parents, Participation, Partnership: Problematising New Zealand Early Childhood Education* (2016) Contemporary Issues in Early Childhood, vol. 17, issue 3, 289-303 at 290.

[98] Refer Superdiversity Centre *Stocktake* (n 26).

[99] Sian Elias *Equality Under the Law* (2005) Waikato Law Review, vol. 13, 1-11 at 4.

[100]I have not referenced the data from the 2018 New Zealand Census due to discrepancies and deficiencies in the information and data generated. The issues raised regarding the 2018 census are detailed by Murray Jack, Connie Graziadei *Report of the Independent Review of New Zealand's 2018 Census* (July 2019) New Zealand Government, Wellington. As at December 2020, these issues in the 2018 Census data have yet to be resolved.

[101] New Zealand Ministry of Justice Report *Trends in Conviction and Sentencing in New Zealand - 2011* (May 2012) at 5.

of about seven per cent of New Zealand's population. The involvement of "other ethnicities" within the criminal justice system fluctuates but comprise about five per cent of those charged in 2011. Although all ethnicity groupings indicated a decrease in overall offending between 2009 and 2011, Māori showed the lowest percentage decrease in overall charge-rates.

It must be acknowledged here that the Ministry of Justice report, *Trends in Conviction and Sentencing in New Zealand* referred to above utilised ethnicity data from the New Zealand Police which may be of limited use as police only noted one ethnicity per person charged and therefore ignored the fact that most (if not all offenders) would be able to claim connections with more than one ethnicity. The deficiencies in police notations of offender ethnicity was recently highlighted by a District Court judge's reference to the system's "colour-blindness" as justification for directing that the police amend an offender's ethnicity (which police noted as European due to his fair complexion) to reflect the prisoner's true "cultural identification" as Samoan, being the culture with which the prisoner had declared his closest affiliations.[102]

New Zealand's population comprises an even split between males and females. Like many other criminal jurisdictions, most offending is committed by males. In 2014, 122,800 males were arrested by New Zealand Police while 33,000 females were apprehended, giving a ratio of one female to every 3.72 males.[103] While offending by males generally covered the gamut of offences, offending by females is relatively narrow by comparison and predominantly involves fraud, substance abuse and low levels of violence.[104] An aspect of criminal offending by females which raises concern for the New Zealand Department of Correction is that Māori women are over-represented and there are a disproportionately high number of murders committed by females.[105] While research suggests that the pathways into criminality for females are different from that for males,[106] my thesis will endeavour to analyse criminalisation and culpability issues from a gender-neutral perspective.

Those who identify with at least one European ethnicity make up 74 per cent of New Zealand's population. Those who identify with Māori ethnicity make up 15 per cent of the New Zealand population, followed by those with Asian ethnicity on 12 per cent. Pacific Islanders stand at seven per cent and the grouping of Middle Eastern/Latin-American/African ethnicities making up one per cent

[102] Refer *R v Finn* 22/08/2019, Christchurch DC, per Judge Farish. Also refer Stuff News *Christchurch drug dealer undergoes cultural switch before prison sentence* 22 August 2019.
[103] New Zealand Statistics – *Annual Apprehensions for the Latest Calendar Year 2015 (ANZSOC).*
[104] Veerle Poels *Risk Assessment of Recidivism of Violent and Sexual Female Offenders* (Department of Corrections 2005).
[105] See for example, Stephanie Covington, Barbara Bloom, Barbara Owen *Women Offenders and the Gendered Effects of Public Policy* (2004) Review of Policy Research, Vol. 21, Issue 1, 31-48.
[106] Refer Covington et al (n 105). Also refer Laura Sorbello, Lynne Eccleston, Tony Ward, Robin Jones *Treatment Needs of Female Offenders: A Review* (2002) Australia Psychologist, Vol. 37, Issue 3, 198-205.

of New Zealand's population. Between 2006 and 2013, the most significant increase in ethnic grouping has been within the Asian population with a 33 percent rise. The increase in New Zealand's European population over this period has been 14 per cent and the rise in the population from Pacific countries has also been relatively moderate at 11 per cent. The lowest increase at 6 per cent is with the Māori population. Although the grouping of Middle Eastern, Latin American and African ethnicities represents about 1 per cent of New Zealand's population, that grouping has risen by 35 per cent between 2006 and 2013.

All of the statistical groupings are highly diverse, representing large assemblages of people from different countries. For example, the Ministry of Pacific Island Affairs statistics show that the Pacific community in New Zealand, numbering 265,974 are particularly diverse, representing at least 13 distinct languages and cultural groups. More than 60 per cent of people who define themselves as part of the Pacific community were born in New Zealand and live here permanently.[107] New Zealand's Pacific population is made up of 50 per cent Sāmoans, 20 per cent Cook Islanders, 18 per cent Tongans, 8 per cent Niueans and the remaining 4 per cent consist of people from Fiji, Tuvalu, Kiribati, Papua New Guinea, Vanuatu, the Solomon Islands and the states of Micronesia. Sixty-Seven per cent of New Zealand's Pacific population live in the Auckland region.

Many of the Pacific cultures preserve their cultural connections through their language, cultural practices and church communities.[108] Bathgate and Pulotu-Endemann observe that Pacific people maintain close associations with their countries of origin by way of regular contact and financial support of relatives who remain in their "home" countries.[109] Research by the Auckland City Council[110] and the Salvation Army[111] state that these cultural connections with their home countries remain a strong influence on Pacific communities in New Zealand. These cultural connections are also seen in the close-knit Asian, African and Middle Eastern communities in New Zealand where migrants from all parts of the world bring their various cultures, ethnicities and cultural influences into the increasing diversity of a multicultural New Zealand. In maintaining their cultural traditions and influences, minority communities distinguish themselves from other cultures and from the dominant Euro-Christian culture.

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[107] Ministry of Pacific Island Affairs *About Pacific Peoples in New Zealand* MPIA website (27/11/2015).
[108] Macpherson (n 6). Also, see Jocelyn Linnekin, Lin Poyer (eds.) *Cultural Identity and Ethnicity in the Pacific* (University of Hawaii Press 1990) Chapter 7, 149-174. Jocelyn Linnekin *On the Theory and Politics of Cultural Construction in the Pacific* (1992) Oceania, vol. 2, no. 4, 249-263; Robert Norton *Culture and Identity in the South Pacific: A Comparative Analysis* (1993) Man New Series, vol.28, no. 4, 741-759.
[109] Murray Bathgate, Fuimaono Karl Pulotu-Endemann *Pacific People in New Zealand*, 104-135 in Pete M Ellis, Sunny C D Collins (eds.) *Mental Health in New Zealand from a Public Health Perspective* (Ministry of Health 1997).
[110] Auckland City Council *Exploring Pacific Economies: Wealth Practices and Debt Management* (July 2015) Working Report 2015/002.
[111] Ronji Tanielu, Alan Johnson *More than Churches, Rugby and Festivals – A Report on the State of Pasifika People in New Zealand* (The Salvation Army Social Policy and Parliamentary Unit, May 2013).

The demographic projections by Statistics New Zealand suggest that over the coming decades there will be a further decrease in the proportion of Europeans. The projected growth for all other population groupings will be significant. Those identifying themselves with at least one of the Asian ethnicities is predicted to be the fastest growing and will make up 21 per cent of New Zealand's population by 2038.[112] Population projections by Bascand indicate that by 2038, 51 per cent of New Zealanders will identify themselves as Māori, Asian or Pacific Islander, although 66 per cent will still identify as European due to New Zealanders with multiple ethnicities. Chen notes that "never before has New Zealand had living here such a large number of people who were not born here".[113] Chen further comments that:[114]

> the perspectives of ethnic minorities, as well as Maori, have been largely missing from the discussion of superdiversity to date, despite being critical. Our demographic change has given us largely untapped resources of cultural intelligence and knowledge of different cultures and languages.

An illuminating indicator of New Zealand's changing cultural and ethnic landscape is provided by a reference to the statistical data on religious connections.[115] The 2013 Census records that 43 per cent of New Zealand's population claim affiliation with a Christian religion. This is a sizeable decrease from the 58.9 per cent who declared that they were Christian in 2001 and 69 per cent in 1991. The significance of this decrease in Christians in New Zealand is even more apparent when compared to the rise in the number of people who state that they have no religion. In 2013, 41.9 per cent of New Zealand's population declared that they had no religion. This represents a substantial rise in the number of "non-religious" persons from 34.65 per cent in 2006 and 29.8 per cent in the 2001 Census.

New Zealand's non-Christian population is made up of various religions, but I have limited my analysis here to the five main non-Christian religions. From 2001 to 2013, other religions have increased their membership with a 110 per cent rise in the number of Hindus, 33 per cent increase in Buddhists and 98 per cent increase in Muslims. In 2001, those who declared their association with an Islamic/Muslim religion numbered 23,631 people and by 2013 this number had almost doubled to 46,149. Between 2006 and 2013, the number of Sikhs increased by more than 100 per cent. The 2013 Census indicates that there are approximately 90,000 Hindus in New Zealand representing an increase of 25,000 since 2006. This also explains why Hindi has become the fourth most common language used in New Zealand. The 19,191 Sikhs in New Zealand in 2013 is slightly more than a 100 per cent

[112] Bascand (n 7).
[113] Refer report by Superdiversity Centre *Stocktake* (n 26). Also see New Zealand Herald *"Superdiversity has reached critical mass, its New Zealand's future" – Mai Chen* (19 October 2015).
[114] Refer Superdiversity Centre *Stocktake* (n 26) preface at XXIV-XXV. Also see Superdiversity Centre *The Diversity Matrix – Updating What Diversity means for Discrimination Laws in the 21st Century* (February 2017).
[115] Statistics New Zealand 2013 *Census QuickStats about culture and identity* (15 April 2014).

increase on those people who declared themselves to be members of the Sikh faith in 2006.[116] In 2006, 6,858 people declared an association with Judaism or the Jewish religion, however, this figure only showed a small increase of 9 members to 6,867 in 2013.When the increases in the membership of non-Christian religions are viewed in the context of the communities that are affiliated with these religions making up 5.7 per cent of New Zealand's total population, the relevance of the rise in membership of non-Christian religions is noteworthy.[117]

New Zealand's non-Christian populations are also highly diverse in terms of culture and ethnicity. For example, New Zealand's Muslim population have migrated from all parts of the world representing over 46 different countries and include 3,000 from European countries. 99.2 per cent of those who claim affiliation with the Sikh religion belong within the Asian ethnic group. Of those who claim association with Islam or the Muslim religion, 25.7 per cent were born in New Zealand, 21 per cent were born in the Pacific Islands, 26.9 per cent were born in Asia and 23.3 per cent were born in the Middle East and Africa. Of those who are affiliated with the Hindu religion, 20.8 per cent were born in New Zealand, 31.8 per cent were born in the Pacific Islands and 42.9 per cent were born in Asia. Although 71 per cent of Catholics are born in New Zealand, those Catholics who were born elsewhere have largely come from the Philippines, England and Samoa.

[116] Refer Statistics NZ (n 115).
[117] Refer Statistics NZ (n 115).

Summary

In this chapter I have illustrated that developing superdiversity has induced the imperative of an express recognition of culture in the substantive criminal law of New Zealand. As demonstrated, the dominance of New Zealand's European-Christian population is less evident as the growth of other ethnic groups are projected to overtake the European-Christian population by 2038. The reality of the changing population demographics in New Zealand points to an unprecedented level of superdiversity and the complexities in addressing the growth in New Zealand's ethnic and cultural diversity.

The challenges presented by the concept of superdiversity are largely practical, not only by virtue of the numerical considerations involved but also the stresses in dealing with the vast range of cultural issues arising. Superdiversity, I suggest, demands that the criminal law adequately equips itself with a legal framework that promotes the recognition and application of culture within criminal justice processes. The recognition of cultural factors within a superdiverse multi-ethnic society, I suggest, will require an approach to the development of substantive criminal law that promotes the acknowledgement of cultural influences relevant to any individual regardless of their cultural, ethnic or linguistic orientation. I argue that this recognition of cultural factors will require the setting of clear parameters for delineating "culture" as a concept for the purposes of the criminal law and the development of a supporting framework for the application of culture in criminal law. Before addressing the issue of defining culture for the purposes of New Zealand's criminal law, it is important to understand more fully, the extent to which culture is currently recognised and applied by the criminal courts in order to clearly establish the need for the express recognition of culture through a workable definition.

Chapter Three
The Cultural Underpinnings of New Zealand's Criminal Law

In this chapter, I assert a clear and express reference to the importance of culture in the criminal law is needed to bring together the currently disparate elements of culture in the criminal law of Aotearoa New Zealand. New Zealand's criminal law harbours fundamental intrinsic characteristics that provide unique challenges for the application of culture and the recognition of cultural factors. In this part, I provide a precis of the cultural underpinnings of New Zealand's criminal law; not only to clarify and give context to the factors that have impacted the development of New Zealand's criminal law, but also to demonstrate that New Zealand's criminal law must, by necessity, have a profoundly multicultural foundation.

While it is acknowledged that the sources and primary influences for the development of New Zealand's criminal law emanate from values and norms aligned with the dominance of the Euro-Christian culture, I contend that tikanga Māori ought to be a fundamental aspect of the cultural landscape of New Zealand's criminal law. By focussing on the societal, constitutional, legal and jurisdictional challenges faced by Māori in seeking cultural recognition within the criminal courts, the obstacles faced by other minority cultures in obtaining meaningful recognition of their culture and cultural factors will also be highlighted. The impediments faced by Māori mirror the cultural difficulties faced by other cultures. In doing so, I also illustrate why the substantive criminal law should expressly regard culture in the determination of culpability.

3.1 The Primary Influences and Sources of New Zealand's Substantive Criminal Law

An examination of the sources and primary influences for the criminalisation of behaviour in New Zealand, illustrates how an insistence by dominant cultures that there be compliance with substantive criminal law operates to subrogate the values and practices of minority cultures. Such analysis also highlights some of the theoretical and attitudinal obstacles commonly raised in opposition to more significant recognition of cultural influences within criminal law.

The primary sources of New Zealand's substantive criminal law are numerous and would, as a matter of course, require a consideration of constitutional documents (for example, the Treaty of Waitangi 1840 and the Constitution Act 1986), legislative enactments (such as the New Zealand Bill of Rights Act 1990, the Crimes Act 1961, the Senior Courts Act 2016), the impact of international human rights treaties (that require, for example, the recognition of the right to culture), the common law, and the various principles of the criminal law (such as the right to a fair trial and the rule of law). Within the milieu of my thesis, an analysis of these wider aspects of New Zealand's substantive criminal law would be too unwieldy. As the core emphasis of my thesis is the relevance and significance of culture within criminal law, the purpose of the ensuing discussion is to provide a profile of the primary influences and sources of New Zealand's substantive criminal law by way of background for the discussion to follow. Ultimately, the focus of my thesis will narrow to an analysis of the substantive criminal law concepts of criminalisation and culpability. The impacts of these other elements of the substantive criminal law cannot be discounted and will be referred to intermittently by way of support or clarification of my contentions.

Prior to the arrival of non-Māori (Pākehā) in New Zealand, the only formal structure for dealing with criminal behaviour was tikanga Māori. As will be discussed in part 3.2 below, tikanga Māori concepts and principles were used by Māori to address criminal offending (or disturbances to the social equilibrium) within the iwi or hapū context [1]. Tikanga Māori was only able to be applied in addressing offending by Māori within the context of their communities and therefore was an incompatible framework when dealing with the criminal behaviour of non-Māori. A formal criminal justice system was required to attend to the anticipated lawlessness of non-Māori settlers and to address the instabilities arising from the potential for conflict between Pākehā settlers and Māori.

[1] John Pratt *Punishment in a Perfect Society* (Victoria University Press 1992) at Chapter 2.

The first non-Māori settlers in New Zealand were sealers and whalers from European countries in the late 1700s, establishing themselves in isolated coastal communities throughout New Zealand.[2] New Zealand's early European settlers were widely dispersed and difficult to police due not only to the lack of substantive criminal law but also because there was no formal system of criminal justice. The majority of European settlers that followed in the mid to late 1800s came from the British Isles and brought with them their culture and religious affiliations which were dominated by the Christian religions of Anglicanism, Presbyterianism and Catholicism. The influx of European settlers into New Zealand necessitated the development of a criminal justice system which would regulate the behaviour of non-Māori. The creation of the first courts in December 1841,[3] and the appointment of Chief Justice Martin as the first judge in 1842 to administer and enforce law, was intended to provide scope for addressing the anticipated lawlessness by Pākehā settlers and to deal with instabilities arising from the potential for conflict between settlers and Māori. Further, the development of a militia police force from 1846,[4] until its formal establishment in 1886 as a national police force,[5] have operated to dissipate the autonomy of iwi and hapū to manage the "affairs" of Māori within their communities.

A factor which fostered distrust between Māori and the newly created criminal justice system was that the police were armed and also used as militia by the Governor to fight in the "New Zealand Wars".[6] These "wars" were a series of armed conflicts fought between 1845 to 1872 in various parts of New Zealand that escalated from Māori resistance to further land sales and a refusal by Māori to acknowledge Crown sovereignty.[7] As noted by O'Malley, the New Zealand wars shaped the nation in all kinds of ways "by setting back Māori and Pākehā relations several generations and allowing the government to begin to assert the kind of real control over the country that had eluded it since 1840."[8] Māori in the 19th century, therefore, did not harbour confidence in the Crown, police or the Supreme Court to fairly administer the criminal justice system and to govern New Zealand society. As will become apparent in later discussion, early Māori discontent regarding alienation from their traditional lands and sovereignty disputes continue to be challenged by contemporary Māori, but the disputes are now fought within specialised tribunals and courtrooms. In parts 3.3 and 3.4 below, I explore the relevance of these disputes to the contentions of my thesis.

[2] See for example, Paul Moon *A Chequered Renaissance: The Evolution of Maori Society 1984-2004* (2009) Te Kaharoa, vol. 2, 23-41; Robert Joseph *Maori Customary Laws and Institutions – Crimes Against the Person, Marriage, Interment, Theft* (August 1999) Laws and Institutions for Aotearoa/New Zealand, 1-42.
[3] Supreme Court Act 1841 (5 Victoriae 1841, No. 1).
[4] Through the passing of the Armed Constabulary Ordinance 1846.
[5] New Zealand Armed Constabulary Act 1867.
[6] Vincent O'Malley *The New Zealand Wars Ngā Pakanga O Aotearoa* (BWB ebook 2019). Also see James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Penguin, Auckland, 1986).
[7] O'Malley (n 6).
[8] Vincent O'Malley *The Great War for New Zealand: Waikato 1800-2000* (Bridget Williams Books, 2016).

The primary sources of New Zealand's early substantive criminal law emanate from values and norms fundamental to the European-Christian culture introduced as a consequence of the signing of the Treaty of Waitangi in 1840 (Treaty).[9] As noted by Rishworth, the British Colonial Office in 1839 resolved to establish British authority in New Zealand under the pretence of protecting Māori from further uncontrolled settlement and this was achieved through the signing of the Treaty.[10] Although the signing of the Treaty has been controversial and the wording of both versions of the Treaty have been subject to considerable and prolonged dispute, it is not within the scope of my thesis that I enlarge upon the nature of such disputes. The significance of the signing of the Treaty to the discussion here, however, is that it not only marked the creation of British governance (if not sovereignty) over New Zealand, but it also provided the foundation for the introduction of a constitutional structure, a common law framework and a legal justice system into Aotearoa New Zealand.

New Zealand's constitution is "unwritten" to the extent that it is not encapsulated in a single constitutional document but is to be found in numerous statutes (for example, the Bill of Rights Act 1990, the Constitution Act 1986, State Sector Act 1988, the Electoral Act 1993, the Senior Courts Act 2016 and the District Court Act 2016),[11] the Treaty of Waitangi 1840 and various constitutional instruments originating in Britain (for example, the Magna Carta 1279, The Bill of Rights 1688 and the Act of Settlement 1700 were declared part of the law of New Zealand by the Imperial Laws Application Act 1988). Because New Zealand's constitutional arrangements are multi-faceted and incorporated within a range of documents, disseminating a clear position on the recognition of diverse cultural factors within the criminal law is also complex and difficult to discern.

A fundamental aspect of the influences imposed by New Zealand's non-Māori population is their dominance of all facets of New Zealand society. By the late 1800s, New Zealand's non-Māori population had exceeded that of Māori and the Euro-Christian population assumed dominance in many aspects of New Zealand society. Such dominance was not only seen in terms of statistics and demographics but also in the control of state institutions, ownership of strategic land holdings and

[9] Khylee Quince *Maori and the Criminal Justice System in New Zealand*, chapter 12, at 333-358 of Julia Tolmie, Warren Brookbanks (eds.) *Criminal Justice in New Zealand* (Lexis Nexis NZ, 2007). Also see, Carwyn Jones *The Scope and Significance of Māori Legal History* (2009) 3 Te Pouhere Korero at 45-62 (Victoria University of Wellington Research Paper No. 20/2014); John Dawson *The Resistance of the New Zealand Legal System to Recognition of Maori Customary Law* (2008) Journal of South Pacific Law, vol. 12, issue 1, at 56-60.
[10] Paul Rishworth *Writing Things Unwritten: Common Law in New Zealand* (2016) I.CON, vol. 14, no. 1, 137-155 at 137, 142-153.
[11] See Matthew Palmer *What is New Zealand's Constitution and who interprets it? Constitutional Realism and the Importance of Public Officeholders* (2006) 17 Public Law Review, 133. Also, Daniela Muth *Basic conceptions of the legal system: a critical comparison between New Zealand and Germany* [2004] Canterbury Law Review, 6.

businesses.[12] New Zealand's early European settlers also provided the principal influences for the criminalisation of behaviour in New Zealand.

A supervening effect of New Zealand's constitutional framework is that New Zealand's substantive criminal law has its foundation in English law which promotes social norms and expectations of behaviour aligned with the culture of the dominant Pākehā settler community. The introduction of substantive criminal law into New Zealand was through the work of James Fitzjames Stephen in the 1880s. Stephen was the principal architect of the "Stephen Code" which provided the groundwork for the codification of New Zealand's criminal law.[13] The Crimes Act 1961 is a further development of the "Stephen Code" and represents the primary articulation of New Zealand's current substantive criminal law. Other statutes, such as the Summary Offences Act 1981 define the "less serious" criminal offences, and the Land Transport Act 1998 address the "traffic or road-user" offences.

It has also been widely theorised by social scientists and criminologists that the dominance of the Euro-Christian culture in New Zealand has been enhanced through the policies of successive governments to acculturate and assimilate Māori within European culture and its supporting structures and institutions.[14] The essence of these theories is that the dominant population (culture) will usually be the most influential group in government and likely to dominate the law-making and judicial institutions of that society.[15] The social, political and general policies of the dominant population will accordingly promote the values that enhance their dominant standing and therefore perpetuate their sphere of influence over minority groupings within society.[16] Pratto et al concur with this theory in asserting that the law of any society that is developed over time, reflects the cultural values and norms of the dominant population simply because the dominant population will inevitably hold the "positions of influence".[17] It may also be that legal systems principally favour those who are members

[12] Refer Jones (n 9) at 45-62. Also see Pratt (n 1).
[13] Jeremy Finn *Codification of the Criminal Law: The Australian Parliamentary Experience*, at 224-237 in B Godfrey & G Dunstall (eds.), *Crime and Empire 1840-1890 Criminal Justice in the Local and Global Context* (Willan Publishing 2005).
[14] Refer David R Thomas, Linda W Nikora *From Assimilation to Biculturalism: Changing Patterns in Maori-Pakeha Relationships* chapter 10, 231-256 in David R Thomas, A Veno *Community Psychology and Social Change: Australian and New Zealand Perspectives* (Dunmore Press 1996), Palmerston North. Also refer J M Booth, Jack Kent Hunn *Integration of Maori and Pakeha (Special Studies No. 1)* Department of Maori Affairs, Government Printing Wellington 1962). Also see Quince (n 9), Jones (n 9) and Dawson (n 9).
[15] Refer for example Nicholas Abercrombie, Stephen Hill, Bryan Turner *The Dominant Ideology Thesis* (George Allen & Unwin Publishers, 2015).
[16] See for example Robin Bergh, Jim Sidanius, Chris Sibley *Dimensions of Social Dominance: Their Personality and Socio-political Correlates within a New Zealand Probability Sample* (2015) New Zealand Journal of Psychology, vol. 44, no. 2, 25-34. Also Chris Sibley, Kate Stewart, Carla Houkamau *Ethnic Group Stereotypes in New Zealand* (2011) New Zealand Journal of Psychology, vol. 40, no. 2, 25-34.
[17] Felicia Pratto, James Sidanius, Lisa Stallworth, Bertram Malle *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes* (1994) Journal of Personality and Social Psychology, vol. 67, no. 4, 741-763.

of the dominant culture not only because the legal processes are constructed to do so but also those who administer such processes will, in most cases, be members of the dominant culture.[18]

A flow-on effect of the dominating influence of the Euro-Christian culture in New Zealand can be illustrated with, for example, the cultural affiliations of the judiciary and members of New Zealand's legislature. New Zealand Law Society reports indicate that ninety-three per cent of judges in New Zealand are of European ethnicity.[19] 10.8 per cent of New Zealand judges claim Māori cultural associations within their specific mix of ethnicity (all of whom will also be able to claim European ancestry), two judges claim Sāmoan ancestry, two judges (appointed in 2016 and 2019) are of Tongan descent and three judges can claim Asian ethnicity. After the 2014 New Zealand Parliamentary elections, 22 Members of Parliament identified as Māori, six as Pacific Island and four as Asian, out of a total of 121 members.[20] Accordingly, New Zealand's criminal law not only has a cultural foundation emanating from its dominant Euro-Christian population, but the legislators and members of the judiciary that administer the law are predominantly Euro-Christian by ethnicity and cultural affiliations. I suggest that this cultural discrepancy can result in concerns about unconscious judicial bias and the potential for a judge to impose his or her personal cultural values and norms when determining a cultural contention pertaining to an individual whose cultural values align with a minority culture.[21] Similarly, concerns may arise as to whether a multicultural approach to the development of the criminal law could be achieved in the context of a legislative body that is predominantly European in culture and ethnicity.

As observed by Bascand, although New Zealanders who claim European ethnicity continue to be the majority (numerically), the extent of such majority is diminishing.[22] Due to the diminishing Euro-Christian population and a compounding increase in New Zealand's multi-ethnic diversity and dynamic mix of cultures, Bascand predicts it will be difficult to discern a clear majority population by the year 2038.[23] The impacts of globalisation, technical advancements allowing ease of travel, improvements in communications, inter-racial relationships and the easing of barriers to migration have all resulted in the mixing of cultural and ethnic associations. New Zealand is not immune to these impacts. Similarly, while a large percentage of New Zealanders remain aligned with Christian

[18] Refer Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System- A Review of International and New Zealand Research* (New Zealand Ministry of Justice Research Paper November 2009).
[19] Refer New Zealand Law Society Report *Lawyer Ethnicity* (dated 10 October 2014).
[20] Refer Statistics New Zealand *Snapshots of New Zealand* (2017).
[21] See Jeffrey Rachlinski, Sheri Johnson, Andrew Wistrich, Chris Guttrie *Does Unconscious Racial Bias Affect Trial Judges?* (2009) Notre Dame Law Review, vol. 84, issue 3, 1195-1246. Also Chris Cunneen *Racism, Discrimination and the Over-representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues* (March 2006) Current Issues in Criminal Justice, vol. 17, no. 3, 330-346.
[22] Geoff Bascand *Demographic Projections from Statistics New Zealand: Aims, Methods and Results* (30 August 2012).
[23] Bascand (n 22).

beliefs, recent Census trends suggest that religious affiliations continue to decline with a majority of New Zealanders indicating no connections with a religion while those who claim affiliation with the Christian religions continue to decline markedly. It is also significant that recent Census trends indicate that adherents to "minority" religions in New Zealand show substantial growth in numbers, with some religions indicating rises over 100 per cent between Census, while Christian religions have shown a regular and sustained fall in numbers between Census.

Although New Zealand is culturally diverse,[24] minority groupings and Indigenous communities still prefer to maintain connections with their primary culture through the continued use of their language, cultural practices, values and norms.[25] Accordingly, the cultural factors that distinguish one culture from another will perpetuate and the consequences of New Zealand's developing superdiversity mean that the nature and scope of New Zealand's culture is therefore also continuously evolving.

While the Euro-Christian-centric dominance of New Zealand's institutions, property holdings, businesses and social structures has historically been clear, non-Euro cultures are nevertheless strongly embedded in these aspects of New Zealand society. From a presently strong base, the multiplicity of cultures in New Zealand is predicted to increase further and accordingly will undermine the historical dominance of the Euro-Christian systems and values. The conception of a New Zealand 'culture' in the future will therefore be characterised by the notion of superdiversity. From symbols of popular culture, for example the 'number eight wire' mentality of the people of the land, right through to the structure of government, systems of health, education and welfare provision and New Zealand's criminal justice system, significant challenges will arise when dealing with diversity.

In highlighting the primary sources and cultural influences for the development of the criminal law in New Zealand, I also underscore the realities that a flow-on effect of the dominance of the Euro-Christian culture in New Zealand since the mid-1800s has been the emasculation of the Māori culture and the regression into disuse of the Māori system of justice that previously addressed criminal offending within the context of the iwi or hāpu. Despite the promotion of monocultural and monolingual policies aimed at the assimilation and acculturation of minority cultures within the Euro-Christian ethos by successive New Zealand governments, it is my contention that the principles and concepts that are fundamental to tikanga Māori remain a significant aspect of New Zealand's criminal justice system and is a crucial element of the culture of New Zealand's criminal law. In Parts 3.2 and 3.3, I examine the revival in recognition of tikanga within the criminal law and the impact that tikanga principles and concepts continue to have within New Zealand's criminal justice system.

[24] Refer discussion in Chapter Two (2.1)
[25] Refer discussion in Chapter Two (2.1)

3.2 Tikanga Māori – A Viable Legal Justice System

Having provided a precis of the dominant influences and sources of New Zealand's substantive criminal law in the previous segment, I assert that, although New Zealand's legal landscape is predominantly based on Euro-Christian foundations, it also harbours cultural elements that are significant and traditional to New Zealand's Indigenous population as well as various other minority groupings. The relevance and significance of tikanga as a fundamental aspect of the culture of New Zealand's criminal law necessitates an examination of the structure, scope and purpose of tikanga for Māori. In this part, I explore the principles and concepts that are essential to tikanga Māori and examine the relevance and significance of these cultural factors within New Zealand's criminal law. In the course of this discussion it will become apparent that although the use of tikanga Māori for addressing criminal behaviour within the iwi (tribe/people) or hapū (sub-tribe or clan) context has declined in use, tikanga concepts and processes are being recognised and applied within the criminal law and therefore continue to be an essential consideration within various aspects of New Zealand's criminal justice system.

My thesis does not seek to advance an argument for the reinstatement of customary law or the creation of alternative criminal justice processes for Māori or any other cultural minority. However, I maintain that New Zealand is not a mono-cultural society and any discussion within the New Zealand context pertaining to culture and the criminalisation of culture-specific behaviour must inevitably include a consideration of tikanga Māori because of its significance within various aspects of New Zealand's culture. Such discussion will in turn provide foundation for the recognition of cultural factors that are fundamental to other cultures and ethnicities.

Prior to the arrival of Europeans, Māori had no appellation for themselves as a national group preferring instead to refer to themselves in terms that signified their alignment with an iwi or hapū (for example, Ngai Tahu, Ngati Whatua ki Tamaki, Te Ati Awa or Ngai Tuhoe). However, King notes that the term "Māori" (meaning 'ordinary people') was closely related to tangata whenua and was therefore used by European settlers to refer to "the people of the land".[26] Although a variety of meanings[27] and misunderstandings[28] attach to the term "Pākehā",[29] within the context of this

[26] Michael King *Being Pakeha* (Hodder & Stoughton, 1988) at 12. Also see Valmaine Toki *Indigenous Courts, Self-Determination and Criminal Justice* (Routledge 2018) at 33. Also refer Anne Salmond *Between Worlds: Early Exchanges between Māori and Europeans 1773-1815* (Penguin Books, Auckland 1997) at 21.
[27] See for example Michael King *Being Pakeha Now: Reflections and Recollections of a White Native* (Penguin 2004).
[28] See for example, Claire Gray, Nabila Jaber, Jim Anglem *Pakeha Identity and Whiteness: What does it mean to be white?* (2013) Sites: New Series, vol. 10, no. 2 at 82-106.

discussion, I refer generally to non-Māori as "Pākehā" in line with common usage of such term since the 1980s.[30]

For the purposes of the discussion to follow, I refer to the processes and features of the Māori system of criminal justice in general terms as "tikanga Māori", however, this in no way diminishes the reality that tikanga Māori is complex and multifaceted. A direct translation of tikanga Māori connotes the "ways of doing and thinking held by Māori to be just and correct, the Māori way".[31] Although the terms "tikanga Māori" and "Māori customary law" are therefore not entirely synonymous,[32] for the purposes of this discussion, I use these terms as a reference to the established ways in which Māori addressed criminal offending (or "a breach of the social equilibrium")[33] within the context of the iwi or hāpu. I do not suggest that tikanga Māori is a reference to "static and therefore, … past law" but adopt an approach in line with that taken by Justice Edward Durie when he drew comparisons between the common law and tikanga in commenting that the "vibrancy of the common law is not diminished by its customary origins" and Māori custom should not therefore be constrained by its "vitality and flexibility".[34] As noted by the New Zealand Law Commission in its 2001 report into Māori customs and values, there must be "a real endeavour to understand what tikanga Māori is, how it is practiced and applied, and how integral it is to the social, economic, cultural and political development of Māori."[35] I highlight here various aspects of tikanga by way of comparison with New Zealand's established criminal justice system to give context to the contentions to flow from the ensuing discussion.

It is widely accepted by jurists,[36] criminal law commentators,[37] psychologists,[38] and cultural historians,[39] that the first "criminal justice system" in New Zealand was developed and practiced for

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[29] See for example Paul Spoonley *Pakeha Identity: A Response to Maori Sovereignty* at 148 in Paul Spoonley, Cluny Macpherson, David Pearson *Tangata Tangata: the changing ethnic contours of New Zealand* (Thomson 2004). Also see Huhana Forsyth *An Identity as Pākehā* (2018) AlterNative, vol. 14, no. 1, 73-80.

[30] Paul Spoonley *Pakeha ethnicity: A response to Maori Sovereignty* at 158-160 in Paul Spoonley, David Pearson, Cluny Macpherson (Eds.) *Nga take: Ethnic relations and racism in Aotearoa/New Zealand* (Dunmore Press, 1991).

[31] New Zealand Law Commission *Maori Customs and Values in New Zealand Law* (NZLC SP9 2001) at 1-2. Also refer *Takamore v Clarke* [2011] NZCA 587 at [59].

[32] Fiona Wright *Law, Religion and Tikanga Maori* (2007) New Zealand Journal of Public and International Law, vol. 5, 261-300 at 263.

[33] Pratt (n 1) at 43-48.

[34] Edward Durie *Custom Law: Address to the New Zealand Society for Legal and Social Philosophy* (1994) 24 Victoria University of Wellington Law Review at 326.

[35] NZLC (n 31) at preface and 95.

[36] Joseph Williams *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law* (2013) Waikato Law Review, vol. 21, 1-34 at 2. Also see *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 at [14] per Ellen France J

[37] Robert Joseph *Re-Creating Legal Space for the First Law of Aotearoa-New Zealand* (2009) Waikato Law Review, vol. 1774-97 at 82-84. Also see Jacinta Ruru *Property Rights and Māori: a right to a river?* (Research presented at the New Zealand Centre of Environmental Law conference "Property rights and Sustainability: the evolution of property rights to meet ecological challenges (16-18 April 2009). Also see Jacinta Ruru *First Laws:*

many centuries by Māori, New Zealand's Indigenous population. Prior to the arrival of Europeans in New Zealand, the Māori criminal justice system operated effectively in dealing with "any disruption to the social fabric" by Māori.[40] Tikanga Māori was a "viable" criminal justice system for regulating behaviour within the iwi and hapū context because it represented a workable, adaptable and practical system for the "criminalisation" of behaviour within Māoridom (Māoritanga) and was fully utilised by Māori into the early 1900s. The exact dates for the arrival of Māori in New Zealand is subject to considerable debate,[41] but Howe suggests that there is largely agreement that Māori, who are of Polynesian origin, first established settlements in New Zealand in the 13th century.[42] Māori tikanga has therefore been practiced in Aotearoa for about 600 years.

Before the arrival of Pākehā settlers in New Zealand, Māori relied on the transference of information through oral traditions. Māori customary practices, values and norms pertaining to the regulation of appropriate behaviour were also transmitted orally. Although several authors have sought to clarify the nature and scope of processes that governed the regulation of appropriate behaviour within the context of an iwi or hapū,[43] it is accepted there were no set rules that apply to all Māori as each iwi or hapū will have differing conceptions of tikanga. Despite the variability of approaches to criminal justice between iwi, some general principles existed which defined customary practices for Māori.

Tikanga Māori is a complex system of criminal justice which has been referred to by the Law Commission as "both flexible and adaptable and engrained within a framework of values that is receptive to change but embedded within its basic beliefs".[44] This set of beliefs, Meads observes, is associated with practices and procedures to be followed in conducting the affairs of a group or an individual.[45] As a cultural historian, Jones takes the view that tikanga Māori is a system of 'conceptual regulators' that are rooted in a set of underlying values that remain constant.[46] The notion of constancy that Jones refers to suggests that the 'conceptual regulators', as they relate to Māori, continue to be a significant influence on present-day Māori, which, I suggest, does not conflict with

Tikanga Māori in/and the Law (2017) 49 Victoria University of Wellington Law Review, 211-228 at 217; Claire Charters *Maori Rights: Legal or Political?* (2015) 26 PLR 231-236.

[38] Eleanor Brittain, Keith Tuffin *Ko tēhea te ara tika? A discourse analysis of Māori experience in the criminal justice system* (2017) New Zealand Journal of Psychology, vol. 46, no. 2, 99-107 at 99. Also Ani Mikaere *The Treaty of Waitangi and Recognition of Tikanga Māori* at 330 in Michael Belgrave, Merata Kawharu, David Williams (eds.) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed., Oxford University Press, Auckland, 2005).

[39] See for example, Joseph (2009) (n 37) at 74.

[40] Pratt (n 1) at 35. Also see Williams (n 36) at 3-5.

[41] Refer for example Diane R Simmons *The Great New Zealand Myth: A study of the discovery and origin traditions of the Maori* (Reed Publishing 1976); Kerry R Howe *The Quest for Origins -Who first discovered and settled New Zealand and the Pacific Islands?* (Penguin 2008).

[42] See Kerry R Howe *Ideas of Māori Origins* Te Ara - The Encyclopaedia of New Zealand (on-line).

[43] See for example, Pratt (n 1). Also see Moon (n 2) and Joseph (n 2).

[44] NZLC (n 31) at 2-6. Also, see Quince (n 9) at 340.

[45] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised edition, Huia Publishers 2003) at 12.

[46] Refer Jones (n 9) at 45-62

the flexible nature of tikanga Māori that the Law Commission alludes to above because tikanga, as a concept, is able to accommodate the variations in protocols, values and beliefs between iwi and hapū.

Quince observed that there were discernible contrasts between the tikanga system and the common law system in that tikanga criminal justice principles were flexible and open to liberal interpretation and application according to the protocols and values of individual iwi or hapū, while the common law system was "formal, inflexible and oriented towards retributive justice".[47] An essential difference between the colonial system of criminal justice and tikanga is that the tikanga processes had limited application in that the rules and protocols may only be applied within the auspices of a particular iwi or hapū while the substantive law applies universally to all persons who commit an offence in New Zealand.

A fundamental contrast between the two systems is that under Māori customary law, there is no requirement to prove fault in order to impose liability whereas proving criminality and culpability are essential requirements of the common law system.[48] Pratt observed that, although tikanga acknowledges that certain actions are criminal in nature, the purpose of the Māori justice system was to investigate the matter with the purpose of restoring the balance that had been disturbed.[49] Individual conduct that disrupted the social balance therefore required determination of the consequences by the collective (iwi or hapū) and addressed from a societal (whanau) perspective. The tikanga rules and protocols that regulate behaviour was dealt with from the perspective of an iwi or hapū and the community response to a crime was dependent on the context of the offending and the persons involved.[50] From the perspective of the participants in the tikanga process, what has transpired is that "there has been a breach of tapu through the commission of a hara which has affected mana, and this calls for utu."[51] Pratt recognised that the traditional Māori processes for settling disputes was a formal legal system which was founded on the belief that "socially harmful behaviour (hara), whether of a civil or criminal nature in Western terms, had been caused by an imbalance to the social equilibrium."[52]

The tikanga concept of specific crime is complex and cannot be compared directly with how specific offences are defined in criminal law statutes. Although the colonial criminal justice system clearly defines offences and the elements required to be proven to establish the offence; under Māori customary law, offences are defined according to abstract concepts involving, for example, a breach

[47] Quince (n 9) at 341.
[48] Quince (n 9) at 339.
[49] Pratt (n 1) at 34, 35.
[50] NZLC (n 31) at 36-40.
[51] Quince (n 9) at 339.
[52] Pratt (n 1) at 34-38.

of the victim's "mana" or "a disruption to the social equilibrium" of the iwi or hapū. Quince observes that because an offence has been committed within a person's "sphere of mana and responsibility" then that person will be responsible for the offending.[53] The mana of the parties involved will also determine whether the offending is to be regarded as serious or minor depending on the "status" of the parties involved. Quince notes that offending against a person of "high mana" will be regarded as more serious than offending against a person of lesser status. For example, rape is regarded as a breach of the inherent tapu of a woman which in turn upsets "the spiritual, emotional and physical balance within the victim herself and within the relationships she had with her community and tipuna (ancestors)."[54] Quince notes that recompense will be required to restore her wellbeing and repair the relationships damaged by the offending.[55]

Joseph, however observed that tikanga Māori approaches to criminal offences such as murder (kōhuru), infanticide (te patu tamaiti), rape (pawhera), domestic violence (tutū tara ā-whare/ whakaino i roto i te whare), swearing in public (kanga/te oati i roto i te iwi) and theft (tahae) are not too dissimilar to the approaches adopted within New Zealand's contemporary criminal law.[56] As the tikanga processes referred to above suggest, if each of these offences were to be addressed within the context of the iwi or hapū, then they will predominantly (subject to certain procedural variations depending on the nature and seriousness of the offending) be dealt with in accordance with the fundamentals of New Zealand's contemporary criminal justice processes. Tikanga therefore is a legal structure that gives effect to principles and protocols rather than rules that regulate behaviour for Māori.[57]

The principles that guide the application of tikanga Māori harbour many similarities with concepts that are fundamental to New Zealand's substantive criminal law. For example, the core principle behind Māori customary law can be seen with the use of the term "tika" which is a reference to something that is right or just.[58] Quince refers to the principles of tapu (sacredness and the protocols that must be respected),[59] mana (leadership, authority, control and influence),[60] noa (something which

[53] Quince (n 9) at 339.
[54] Joseph (n 2) at 9.
[55] Quince (n 9) at 339.
[56] Joseph (n 2) at 4-17
[57] Valmaine Toki *Will Therapeutic Jurisprudence Provide a Path Forward for Maori?* (2005) Waikato Law Review, vol. 13, 169-189 at 169.
[58] Refer Māmari Stephens, Mary Teresa Boyce (eds.) *He Papakupu Reo Ture: A Dictionary of Māori Legal Terms* (Lexis Nexis NZ, 2013) and Pa Mikaere Ryan *The Raupō Dictionary of Modern Māori* (Raupō Publishing 2012).
[59] Refer NZLC (n 31) at 36-40.
[60] Refer discussion in NZLC (n 31) at 32-36. The issue of mana and whether a person's mana exists beyond their death is being considered by the Supreme Court in the appeal of *Ellis v R* [2019] NZSC Trans 31 (refer in court discussion at 52-58 and further in a continuation of that hearing in *Ellis v R* [2020] NZSC Trans 19 (where

is off limits or not safe to use or enter), utu (reparation or restoration) and, muru (redress for wrongdoing) as other essential aspects of tikanga for Māori. The application of these principles, in combination, prescribe the lawfulness or otherwise of an act or mode of conduct and dictates the appropriate course of action or response by the iwi or hapū.[61]

The application of traditional tikanga within the existing criminal justice system is problematic as the essential aspects of tikanga are not found in written law but, more accurately, are a set of "social" or "cultural" principles that vary between iwi and hapū. A barrier to the recognition of tikanga within the criminal law arises from the reality that there is no specificity in tikanga as to the range of offences covered, there is no clarity as to the availability of possible defences or the existence of other substantive criminal law processes and structures such as the right of appeal, fair trial rights, custodial facilities and a sufficiently varied system of sentencing options. Moreover, the interpretation and application of tikanga principles will vary between iwi and hapū and therefore cannot be assumed to have general application to all Māori. The precise scope of these principles is not clear, especially in regard to their application within modern criminal law.

The application of a communal approach to the resolution of disputes within the iwi or hapū context does not accord with the adversarial system of justice that is employed by the substantive law. A conflict therefore arises when Māori seek to be dealt with in accordance with their tikanga. There is, I suggest, an institutional reluctance to depart from the adversarial system of justice.[62] As noted by Heath J in *R v Mason*, it was unlikely that a criminal trial process could ever accommodate tikanga Māori as the "adversarial contest [was] inherently inconsistent with the nature of tikanga Māori".[63] Although Heath J will have been referring specifically to the processes for determining the substantive issues before the court such as the criminality and culpability of the defendant, such process will conflict with tikanga processes where a communal approach to the resolution of disputes is the norm. Although the Court of Appeal in *Mason* commented that "on [the] evidence, tikanga is not presently a viable legal process for serious crime even if continuity of custom could be demonstrated"[64] this, I suggest, was again a reference to the determination of the substantive issues before the court. The approach which appears to have been favoured by the Courts when faced with a conflict in cultural values is to reject tikanga when dealing with serious offending[65] and acknowledge

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in-depth in court discussions of tikanga and mana have been thoroughly canvassed). A decision by the Supreme Court in *Ellis* is not due for several months and may not be available prior to submission of my thesis.

[61] Quince (n 9) at 337-342.

[62] See for example, Justice Paul Heath *One Law for All -Problems in Applying Maori Custom Law in a Unitary State* [2011] Yearbook of New Zealand Jurisprudence, vol. 15, 13.

[63] *R v Mason (Mason No. 1)* [2012] NZHC 1361 at footnote to [31].

[64] *Mason No. 1* (n 63) at [41].

[65] For example *R v Knowles* [1998] CA146/98, per Keith J. Also note comments by Hammond J in *Police v Knowles* [1998] 15 CRNZ 423 (HC).

some relevance of tikanga Māori where the offending is of a less serious nature or where it becomes a consideration in sentencing.[66]

The colonial legal system imposed concepts that were unfamiliar to Māori such as its focus on individualistic rather than communal or collective principles. While the tikanga system addressed issues of fault and blame in a holistic manner, the emphasis of the substantive law was placed on individual blame and fault. Under the tikanga system, the "hearing" of the matter is held on the marae or in a special wharenui (also referred to as a wharerunanga) where discussion will take place between elders and other members of the iwi or hapū as to the most appropriate course for resolving a dispute. Joseph observes that how an iwi or hapū deals with offending, will require a consideration of all of the surrounding circumstances, the motivations for the criminal conduct, the relationship between the parties, the nature and extent of the harm caused and the personal circumstances and mana of the offender and victim.[67] Jones noted that Māori customary law operated on the basis of collective responsibility, interconnectedness and restoration.[68] A fundamental aspect of this process are the interests of the victim and their right to justice.[69] Any negotiations as to how the matter is to be resolved will focus on the principles of redress and compensation (utu).[70]

For Māori, the colonial legal system did not adhere to the whanau concept of restoring "the balance that has been disturbed" and takes away from iwi or hapū the ability to resolve these issues communally. This can be illustrated with the "alienation of the victim" within the Pākehā criminal justice processes where specific offences are regarded as having been committed against the "State" or the victims of offending were more likely to be non-Māori. The Māori system of justice was therefore unsuitable for addressing these offences as there was no methodology within tikanga for dealing with the concept of the "State" being the victim nor scope within tikanga for dealing with non-Māori.

An important distinction between the Pākehā system of criminal justice and tikanga is the separation of the formal criminal justice processes from the community and a limited focus on concepts such as reparation and restorative justice.[71] Under the tikanga system, assessments of the punishment or consequences for committing an offence will involve a consideration of the varying degrees of knowledge, malice or foresight in the commission of the offending as well as the "mana" of the persons (the perpetrator, the victim and their respective whanau) involved. Quince suggests that the

[66] For example *Mika v R* [2013] NZCA 648 per Harrison J.
[67] Joseph (1999) (n 2) at 5-17.
[68] See, Jones (2009) (n 9) at 45-62.
[69] Pratt (n 1) at 35.
[70] Pratt (n 1) at 36-37.
[71] See Quince (n 9) at 341.

Māori system of punishment is forward-looking with the focus being on repairing relationships and accounting for past wrongs.[72] The range of consequences for offending under the tikanga system is extremely wide but imprisonment was not a sentencing option because Māori regarded such a sanction as abhorrent.[73] For example, Joseph remarks that the punishment for rape will require severe sanctions which can be as stark as a sentence of death and he provides the example of the execution of the perpetrator of a rape being undertaken by the offender's brother to remove the "stain and blemish … from the aristocracy of ancient bloodlines".[74] Quince however notes that the range of "consequences" for offending can be less definitive than being sentenced to death and may involve measures such as the loss of treasures or resources, public shaming and humiliation.[75]

For Māori, the significance of tikanga as a system for addressing "offending" within Māori communities has diminished to a point where no iwi or hapū can presently claim to be in a position to operate a viable Māori criminal justice system. Although the Māori Community Development Act 1962 has mandated Māori Committees the jurisdiction to deal with "minor criminal offending" within Māori communities, such authority has not been utilised by iwi or hapū. It must also be acknowledged that the existing substantive criminal law already adequately provide the rules and processes for application to any person who appears before the criminal courts, regardless of their culture and ethnicity.

[72] Quince (n 9) at 340
[73] See for example Joseph (2009) (n 37) at 17. Also Williams (n 36) at 9.
[74] Joseph (1999) (n 2) at 9.
[75] Quince (n 9) at 339-340.

3.3 The Societal Rationale for the Disconnection of Māori from their Traditions

The societal causes for the disconnection of Māori from their traditional cultural practices, values and norms are numerous and complex. For the purposes of the ensuing discussion, I narrow the focus of the societal (or institutional) rationale to examining the assimilation and urbanisation processes that have disadvantaged Māori. Although the processes I refer to impact society as a whole, I narrow my analysis further by examining the vast divergences in consequences arising from these processes for Māori and Pākehā social groupings within New Zealand society. The impact of these processes have been culturally devastating for Māori but have enhanced the ability of Pākehā to establish themselves in New Zealand and then dominate all spheres of New Zealand's political institutions, social structures, strategic businesses and ownership of vast tracts of land formerly "held" by Māori. These policies of assimilation have operated to alienate Māori from their traditional landholdings, caused Māori to concede their autonomy in favour of the newly established constitutional and legal justice systems, and coerced Māori to move in large numbers into the towns and cities. These processes have resulted in a developing disconnection between Māori and their traditional customs, practices, economic support base and cultural influences.

3.3.1 Cultural Assimilation

A principal cause for the decline in importance of tikanga for Māori and the disengagement of Māori from their traditional cultural influences arises from the myriad of processes that have forced Māori to forgo their cultural affiliations and being coerced into assimilating within Pākehā culture. Cultural criminologists,[76] cultural historians,[77] and criminal law researchers,[78] have resolutely argued that a major cause for the loss of autonomy for Māori and the undermining of the ability of Māori to administer their traditional practices, social structures and legal systems, lie with the social policies and practices of assimilation used by European colonisers and successive governments of Aotearoa New Zealand.

There is considerable overlap between the processes of assimilation that have disadvantaged Māori. Several labels have been attached to these processes. Cultural theorists and historians have labelled these processes as "colonialism", "colonialisation",[79] "acculturation"[80] and assimilation. In reviewing

[76] Quince (n 9) at 342, 343
[77] Pratt (n 1) at 46-55, Dawson (n 9) at 56-60, and Jones (2009) (n 9) at 56-60.
[78] Sam McMullan *Māori Self-Determination and the Pākehā Criminal Justice Process: The Missing Link* (2011) Indigenous Law Journal, vol. 10, issue 1, 73-100 at 84-87
[79] See for example, Catherine Soanes, Angus Stevenson *Concise Oxford English Dictionary* (Eleventh Revised Edition, Oxford University Press, 2006) at 282. Also see Michael Sommer *Colonies-Colonisation-Colonialism: A Typological Appraisal* (2011) Ancient West and East, vol. 10, 184-193.

the government's policies of assimilation in their 1962 report for the Department of Maori Affairs, Booth and Hunn attempted to soften the references to these policies by labelling "the dynamic process by which Māori and Pākehā are being drawn together, in the physical sense of the mingling of two populations as well as in the mental and cultural senses where differences are gradually diminishing" as "integration".[81] Although Booth and Hunn suggested that the primary emphasis of integration as a policy was "the making of a whole new culture by the combination and adaptation of … two pre-existing cultures", the reality was that, regardless of the label, the underlying processes required Māori to forego their land, traditional processes, principles and systems in favour of complying with "the Pākehā way of doing things".[82] Although various terms are used interchangeably within relevant literature to describe these processes, they all address the same fundamental aims of exploitation of Indigenous populations and are predominantly "one-way traffic" in favour of absorbing Māori within colonial Euro-Christian culture. I examine these processes under the umbrella of assimilation.

The colonialisation processes initiated in the early 1800s by British institutions promoted policies and practices whereby New Zealand was occupied by settlers from European countries, political control was acquired (through, for example, the signing of the Treaty), and the Indigenous people were exploited economically.[83] The dominant Euro-Christian population over the early years of its development as a nation, and the social policies of successive governments, promoted values, norms and systems fundamental to New Zealand's Pākehā Euro-Christian population. Such policies have allowed the Pākehā majority to assume political control and dominance of state institutions, ownership of strategic land holdings and businesses.[84] Thomas and Nikora suggest that these policies of assimilation were "marked by paternalism and prejudice".[85] The policies of assimilation and integration,[86] were administered for the benefit of non-Māori settlers but disadvantaged Māori resulting in Māori being dispossessed of their land-holdings, alienation from their rural communities,[87] and being disinherited from their traditional economic base. These policies and "the accompanying practices which involved monolingualism and monoculturalism were seen as

[80] See for example, Thomas K Fitzgerald *Maori Acculturation: Evolution of Choice in a Post-Colonial Situation* (1974) Oceania, vol. 44, no. 3, 209-215.
[81] Booth, Hunn (n 14). Also see Dan Morrow *Tradition and Modernity in Discourses of Māori Urbanisation* (2014) Journal of New Zealand Studies, NS 18, 85-105.
[82] Thomas, Nikora (n 14) at 234-235.
[83] See for example Sommer (n 79). Also Dianne Northcott *Colonialism, Rangatiratanga and the Pursuit of Mana* (White Ribbon Promotions, 1995).
[84] See for example Sommer (n 79). Also Northcott (n 83).
[85] Thomas, Nikora (n 14) at 234. Also see Booth and J Hunn (n 14) and Ranginui Walker *Reclaiming Māori Education* at 23-25 in Jessica Hutchings, Jenny Lee-Morgan *Decolonisation in Aotearoa: Education, Research and Practice* (New Zealand Council for Educational Research, 2016).
[86] Booth, Hunn (n 14). Also see Morrow (n 81), 85-105.
[87] Refer for example, Dawson (n 9) at 59; Ranginui Walker *Maori Identity* at 35-52 in David Novitz, Bill Willmott *Culture and Identity in New Zealand* (Government Print, Wellington, 1989).

appropriate for New Zealand society by the majority of Pakeha",[88] but were detrimental to the social status,[89] welfare and wellbeing of Māori.[90] These policies of assimilation also coerced Māori towards an urban existence.[91]

Assimilation occurs between cultures, not only because of the application of mono-cultural policies of assimilation but also because such policies operate to disadvantage Māori socially and economically thereby compelling Māori to yield to the consequences of assimilation.[92] The policies of New Zealand governments that promoted the assimilation of Māori into European processes can be seen with the impacts of the Education Act 1877 which established a national system of secular and compulsory primary schools administered by the Department of Education.[93] The paternalistic objective of the Education Act was to phase out Native Schools in communities that had become "Europeanised" despite Māori opposition to such policies. Although the number of Native Schools increased into the 20th century, Māori attendance at Native schools decreased while their attendance at Board Schools increased over the ensuing decades simply because of the large numbers of Māori moving into the cities in search of employment.[94]

A further example of these assimilation policies arise from the insistence by governments (until the 1980s) that the English language be the primary language of communication in schools and other educational institutions.[95] For many decades, Māori were discouraged from speaking te reo in public, leading to the gradual loss of traditional languages for Māori. The consequences of past monolingual policies (despite the revival of te reo since the 1980s) is that only one out of five of those who claim Māori ethnicity are able to hold a conversation about everyday things in te reo Māori.[96] The Census trends suggest that there will be a continuing decrease in the number of Māori who will be able to converse in te reo.

The paternalistic approach of Pākehā institutions can also be found in the administration of social and welfare policies that impacted Māori. In arguing that government departments have applied universal policies in a paternalistic fashion to influence the autonomy of Māori, Mitchell provides the example of Māori receiving government beneficiary support. Mitchell argues that in administering special

[88] Thomas, Nikora (n 14) at 234.
[89] Bergh et al (n 16).
[90] Durie (n 34).
[91] Refer for example the health statistics referred to by Lindsay Mitchell *Te Oranga o te Iwi Maori: A Study of Maori Economic and Social Progress - Maori and Welfare* (New Zealand Business Roundtable, May 2009) at 28-32 and Mason Durie *Measuring Māori Wellbeing* (1 August 2006) New Zealand Treasury Guest Lecture Series, Wellington.
[92] See for example Durie (n 34).
[93] Walker (1989) (n 87).
[94] Walker (1989) (n 87) at 23-25.
[95] Walker (1989) (n 87).
[96] Statistics NZ *2013 Quick Stats About Māori* (Statistics New Zealand Census 2013).

benefit assistance that is sought by a large percentage of Māori, government departments' control the income of beneficiaries by sporadically supervising their wellbeing through the defining of "hoops" (criteria that require the application of discretion by State employees) that beneficiaries must go through to receive welfare assistance.[97]

Within the context of the criminal law, policies of assimilation, such as the suppression and exclusion of Māori legal practices,[98] and institutional racism,[99] have resulted in the disproportionate representation of Māori in criminal justice statistics.[100] Webb argues that the "barrage of assimilation policies" and how these policies were administered by State agencies resulted in the marginalisation and cultural destruction of Māori and uses the criminal justice statistics to substantiate these contentions.[101] In adopting a similar argument, Quince notes that in modern times (using 1999 and 2005 statistics), a trend of serious habitual offending by Māori is reflected in statistical profiles where Māori are 3.3 times more likely to be apprehended for a criminal offence than a non-Māori, Māori adults are 3.8 times more likely to be prosecuted than non-Māori and 3.9 times more likely to be convicted of an offence. Nine times as many Māori than non-Māori are remanded in custody awaiting trial and of all the cases that resulted in a conviction (in 2005) where the ethnic identity of the offender was known, 43 per cent involved Māori.[102] These statistics are confirmed in commentary by Webb,[103] and within research by Morrison et al in 2008,[104] and by Newbold in 2016.[105]

Another example of these policies of assimilation can be seen with the processes adopted by governments in alienating Māori from their traditional landholdings. The Māori conception of land ownership focused on communal use of land for the benefit of the collective (iwi or hapū) and subject to group control (usually under the stewardship of the iwi).[106] The European conception of landholding was based on individual ownership and strict delineation of ownership rights.[107] In the 1860s, the New Zealand government sought to encourage the conversion of land traditionally held by

[97] Mitchell (n 91) at 28-32.
[98] See Pratt (n 1) at 43-46.
[99] Brittain, Tuffin (n 38) at 99. Also see Harry Blagg *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, Sydney, 2008).
[100] Refer Chapter Two, Part 2.3. Also see Mitchell (n 91) at 7-11.
[101] Robert Webb *Māori, Pacific peoples and the social construction of crime statistics* (2009) MAI Review 3, 1-4. Also see Brittain, Tuffin (n 38).
[102] Quince (n 9) at 333-4. Also refer Brittain, Tuffin (n 38) at 99-100.
[103] Webb (101).
[104] Bronwyn Morrison, Nataliya Soboleva, Jin Chong *Conviction and Sentencing of Offenders in New Zealand: 1997 to 2006* (April 2008) Ministry of Justice.
[105] Greg Newbold *Crime, Law and Justice in New Zealand* (Routledge 2016) at 147-149.
[106] See Alex Frame *Property and the Treaty of Waitangi: A Tragedy of the Commodities?* at 224-238 of Janet McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford 1999). Also see Toon van Meijl *Changing Property Regimes in Māori Society: A Critical Assessment of the Settlement Process in New Zealand* (2012) The Polynesian Society, vol. 121, no. 2, 181-208 at 192-196.
[107] Dawson (n 9) at 59. Also see Richard P Boast *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921* (Victoria University Press 2008).

Māori into freehold land. This conversion of land ownership was achieved through the passing of the Native Lands Acts of 1862 and 1865 which created the Native Lands Court. Māori were encouraged to alienate their landholdings (by selling, gifting, leasing or mortgaging) their lands to settlers. Māori were unfamiliar with the European concepts of alienating land and mistakenly believed that they were only assigning a licence or right to use the land when the reality was, they were being permanently deprived of their interests in their land. The New Zealand government also passed the Public Works Acts of 1864 and 1876 which allowed the State to confiscate Māori landholdings for roading, railways, airports and other civic projects.[108] Taonui observed in his research that the Crown often favoured the taking of Māori land over general land for these purposes because it could pay the owners less compensation or none at all.[109] The outcome of these policies was the widespread alienation of Māori from their lands, the loss of their economic base and alienation from their traditional support structures.[110]

An aspect of the land alienation policies in the mid-1800s which operated to the detriment of Māori was the impact of these policies on Māori voting rights. New Zealand's first parliamentary election was held in 1853. Only a few Māori were able to vote because voters were required to be male, over 21 years of age and be a "British subject who owned or rented property worth a moderate amount of money".[111] Māori were therefore disqualified from voting because, despite their claims to customary ownership of vast tracts of land in New Zealand, such concept of land ownership fell outside the criteria to vote. Because Māori could not vote, they were therefore unable to participate in the political processes and unable to influence social and political concerns. Although four Māori electorates (without the need to meet property ownership criteria) were later created to allow Māori a say in political issues, the limited number of Māori seats also muted their influence in Parliament. All Māori men over 21 years became eligible to vote in 1867 and all Māori women were eligible to vote from 1893.

In failing to recognise Māori customary rights, the Courts were complicit in further alienating Māori from their traditional landholdings. Although the earliest cases to consider native title defended the justiciability of customary landholdings within the municipal courts by insisting that such matters fell within the parameters of the common law,[112] the denial of Māori land rights by the Courts was no

[108] Boast (n 107).
[109] Rāwiri Taonui *Te Ture – Māori and legislation – Administering Māori land* (update 13 July 2012) Te Ara – Encyclopedia of New Zealand (online).
[110] See for example Mitchell (n 91) at 16-27. Also see judicial acknowledgement of this in *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission* [1999] CA208/98 at [40] and [43], per Gault J.
[111] New Zealand Constitution Act 1852.
[112] See *The Queen v Symonds* (1847) NZPCC (SC) 387 and *In re the Lundon and Whitakers Claims Act 1871* (1872) 2 NZCA. Refer the discussion of these cases by John Tate *Pre-Wi Parata: Early Native Title cases in*

more apparent than in the 1877 case of *Wi Parata v The Bishop of Wellington (Wi Parata)*.[113] The Court in *Wi Parata* criticised the reference to the "Ancient Custom and Usage of the Māori people" in s 4 of the Native Rights Act 1865 and pointedly queried whether "such a body of customary law did in reality exist". Prendergast CJ reasoned that if there "had been a body of law or custom capable of being understood and administered by the Court of a civilised country … then the British Government would surely have provided for its recognition".[114] In this regard the Court of Appeal's reasoning is erroneous in that native title to land is premised upon "ancient custom and usage" which predated the acquisition of sovereignty by the Crown in 1840. The precedent provided by *Wi Parata* was that native title was entirely within the jurisdiction of the Crown's prerogative powers and therefore was not enforceable against the Crown as the Crown was the "sole arbiter of its own justice" on matters pertaining to native title.[115] Accordingly, the concept of native title was beyond the jurisdiction of the Courts. [116]

The consequences of Pākehā settlement and the assimilation policies by governments have had a devastating effect on Māori culture. The detriments to the Māori way of life and loss of autonomy have been manifested by alienation from their lands, the loss of significance of te reo for a large majority of those who claim Māori descent and the promotion of marginalised status for Māori within the hierarchy of the society created by the dominant Pākehā group.[117]

3.3.2 Urbanisation

A consequence of the assimilation processes discussed above is the urbanisation of Māori. It may also be argued that it was a foreseen and intended aspect of government policies to alienate Māori from their rural communities. In being dispossessed of their traditional landholdings and therefore their ability to live off their lands in rural-based iwi and hapū communities, urbanisation policies focused on coercing Māori to move into urban areas for employment, lifestyle and education reasons.[118] The challenges for urbanised Māori was that they had to cope with and adapt to a society where, criminal offending was administered by the police and courts and punishment for criminal offending was

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New Zealand (April 2003) Centre of Full Employment and Equity, University of Newcastle, Working Paper No. 02-14.

[113] *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur. (NS) 72.

[114] *Wi Parata* (n 113) at 79.

[115] Tate (n 112) at 2.

[116] *Wi Parata* (n 113) at 78-79.

[117] Walker (1989) (n 87) at 49. Also see Bergh et al (n 16).

[118] Moana Rarere *The Determinants of Tribal Population Growth in the New Zealand Census* (2012) Master's Thesis, University of Waikato; Moana Rarere *Beyond te iwi Māori: Understanding patterns of tribal identification in the New Zealand Census, 1991-2006* (November 2012) Paper presented at the Māori Association of New Zealand Conference, Christchurch, New Zealand.

undertaken in ways that were foreign to Māori.[119] Walker observed that when Māori were living within their tribal enclaves, their identity, culture and language were taken for granted and it was readily assumed that the basic elements of Māori identity and culture would be transmitted to subsequent generations.[120] Walker observed that migration into the towns and cities exposed "Māori, for the first time, to the full assimilationist ethos of metropolitan society" where Māori had to learn the necessary survival skills for metropolitan society by adapting to regular employment, "living in an all-cash economy with all that implied in terms of coping with … rent, mortgages and consumer spending."

The extent to which Māori have become urbanised, I suggest, has been culturally overwhelming. Morrow notes that at the end of the Second World War, 26 percent of Māori lived in urban areas, but by 1986, nearly 80 percent of Māori had become urban dwellers.[121] Although the 2013 Census indicates that 84 percent of Māori lived in urban areas and many Māori continue to claim affiliation with their traditional iwi or hapū, 1 out of every 6 persons claiming Māori descent did not know their tribal affiliations and have come to regard themselves as "urban Māori".[122] Barcham suggests that Māori are no longer purely tribal and living in urban environments has forced them to adapt by creating new forms of social networks and institutions in order to fulfil their social needs.[123] Walker notes that because Māori were sharing "a common suburban social space with Pākehā", there was heightened consciousness of Māori identity and the need to ensure its continuity as a culture through the creation of urban networks, cultural associations, Māori sports clubs and tribal affiliate groups.[124] Barcham refers to the creation of these new social institutions as "iwi-isation" but notes that the acceptance of these Māori institutions as an identity unto themselves requires reconciliation with traditional concepts.[125]

The urbanisation processes have therefore made it difficult for urban Māori to participate in the traditional social mechanisms offered by their customary law and practices leading to a diminishing of their connections with their traditional customs and practices.[126] For Māori, the social policies of assimilation by New Zealand's dominant Euro-Christian population and the promotion of policies that

[119] Refer Pratt (n 1).
[120] Walker (1989) (n 87) at 43.
[121] Morrow (n 81) at 85.
[122] Paul Meredith *Urban Māori* (updated 17 February 2015) Te Ara - Encyclopedia of New Zealand (online). Also Statistics New Zealand *2013 Quick Stats About Māori* (New Zealand 2013).
[123] Manuhuia Barcham *The challenge of urban Maori: Reconciling conceptions of indigeneity and social change* (1998) Asia Pacific Viewpoint, vol. 39, no. 3, 303-314.
[124] Walker (1989) (n 87) at 49. Also see Meredith (n 122).
[125] Barcham (n 123) at 303.
[126] Dawson (n 9) at 59. The impacts of urbanisation on Māori was also noted by the Courts in *Manukau Urban Maori Authority* (n 110) at [43], per Gault J and *Nikau v Tatchell* [2018] NZFC 1239; [2018] NZFLR 276 at [94] per Judge Coyle.

alienated Māori from their landholdings, economic base and traditional support structures has resulted in the "loss of identity"[127] and "loss of mana" for Māori.[128]

The significance of the discussion regarding the assimilation and urbanisation of Māori is the extent to which such processes have impacted the connection that Māori have with their culture and whether traditional cultural factors continue to influence the behaviour of Māori. The alternative scenario may well be that assimilation and urbanisation processes have so impacted urban Māori that a contemporary Māori culture has evolved, and fresh cultural factors now influence the behaviour of urban Māori. In the context of the criminal law, I suggest that the contemporary impacts of assimilation and urbanisation should now become the focus when assessing the connections that any individual has with their claimed culture rather than a reliance on an antiquated conception of tikanga. If, as illustrated above, Māori have assimilated or urbanised into the Pākehā way of life, then to what extent can Māori still claim to be connected with their traditional customs and practices? If Māori (or an individual from any other culture) are to rely on cultural influences as rationale (whether, for example, by way of excuse or justification) for behaviour that is regarded as criminal, then I suggest that there will be a need for substantiation by way of evidential support for the contention that the alleged offender has acted on the basis of the claimed cultural factor.

The concepts of assimilation and urbanisation impact all minority populations worldwide. The relevance of these factors within the criminal law is that these and other related societal factors impact the connections or disconnections that individuals have with their traditional culture. Whether a defendant can claim that a cultural factor has impacted or influenced their allegedly criminal conduct or that he or she has acted in reliance on a cultural influence will depend on the nature and depth of connections they have with their traditional culture.

[127] See for example Walker (1989) (n 87) at 43, 49; Pratt (n 1) at 41-44.
[128] See for example Dawson (n 9); Jones (n 9).

3.4 The Legal, Jurisdictional and Constitutional Impediments to Recognising Tikanga Māori

As illustrated earlier, the establishment of a legal system based on the English framework, the introduction of the common law, the creation of a criminal code and the development of a supporting criminal justice structure for New Zealand, have all operated to subvert the systems that had been used by Māori to address criminal behaviour within Māori communities. Although tikanga was a significant aspect of the way behaviour was regulated and addressed within Māori communities, its decline in use, I suggest, primarily arises from the reality that the substantive criminal law has emasculated and confiscated from Māori the jurisdiction to address criminal offending within the iwi and hapū environment.

Given the magnitude and nature of the divergences between the Māori system of criminal justice and the colonial legal system highlighted earlier (part 3.2), expressions of uncertainty by the Courts as to the relevance and precise nature of Māori customary law is perhaps expected. What may be troubling, however, is that this uncertainty about the relevance and significance of tikanga within the law originated as early as 1841 and persists today. I highlight here the legal, jurisdictional and constitutional complexities and obstacles involved in seeking more meaningful recognition of Indigenous or minority cultural factors within criminal law. Although, I focus the discussion here on the relevance of tikanga within the criminal law, the impediments to the recognition of culture has far wider consequences for the acknowledgement of cultural factors fundamental to other cultural ethnicities.

3.4.1 Legal Uncertainties: Should Customary Law be Recognised by the Court?

There is, I suggest, a vast divide between the perspective that tikanga Māori is a fundamental aspect of New Zealand's legal landscape,[129] and the limited recognition afforded to tikanga within criminal law. Acknowledgement by the courts that Māori tikanga is a relevant consideration within the criminal law is tempered by contradicting judicial statements and substantive law provisions which either limits recognition or diminishes the sphere of application for tikanga Māori.[130] To illustrate the nature of this cultural divide, I focus on the example of how tikanga Māori contentions are viewed by the courts, however, the contentions equally apply within a wider context to any culture.

The uncertainties as to whether tikanga should be recognised by the courts was apparent in the earliest case to consider this issue in *The Queen v Symonds*, where Chapman J validated the common law

[129] NZLC (n 31) at 17, 18. Also see *Takamore v Clarke* (CA) (n 31) and Ruru *First Laws* (n 37); Wright (n 32).
[130] For example see *Takamore v Clarke* [2012] NZSC 116 at [94] and [95] per Ellis CJ and [150] per McGrath J.

status of native title by relying on "the settled principles of law" and the "common law of England".[131] Chapman J however fuelled uncertainty on the issue of customary title by making no reference to specific statutes, royal proclamations or discretions of the Crown in support of his endorsement of indigenous rights. This uncertainty in approach can also be seen in *Re The Lundon and Whitakers Claims Act 1871*, where the Court of Appeal stated that "the Crown was bound, both by the common law of England and by its solemn engagements (the Treaty of Waitangi), to a full recognition of native proprietary right", yet, the Court of Appeal also expressed some uncertainty as to the nature of such right.[132]

This uncertainty in approach by the Court of Appeal has been overshadowed by the trenchant denial of Māori customs by Chief Justice Prendergast in the 1877 case of *Wi Parata v The Bishop of Wellington (Wi Parata)*.[133] The Chief Justice was emphatic in his denial of tikanga when he concluded that "a phrase in a statute cannot call what is non-existent into being …no such body of law existed".[134] In commenting that "it was for Parliament to effect the changes in the law that would guarantee the protection of Maori rights" Prendergast CJ has not only ignored the reality that the rights of Māori were already to be protected in accordance with any other "British subject" but he was also inviting Parliament to differentiate Māori from other British subjects. Prendergast CJ affirmed his denial of Māori custom in *Rira Peti v Ngaraihi Te Paku* in ruling that native districts where Māori custom was the law, and which were subject to the provisions of the New Zealand Government Act 1846, were never validly appointed because Māori were British subjects governed by the law of the land and not by their customary usages.[135] The significance of tikanga within New Zealand law has been in a state of flux since the late 1800s and, although *Wi Parata* was frequently held to be wrongly decided,[136] it was a decision that was relied upon by later courts to justify the Court's reticence in recognising Māori customary law and practices.

It was not until there was legislative recognition of native title by statute in, for example, the Treaty of Waitangi Act 1975 and the Te Ture Whenua Maori Act 1993, that decisions such as *Attorney-General v Ngati Apa (Ngati Apa)*,[137] was able to definitively hold that *Wi Parata* was wrongly decided.[138] The Court of Appeal in *Ngati Apa* emphatically rejected the proposition in *Wi Parata* by stating that:[139]

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[131] *Symonds* (n 112) at 390.
[132] *Re The Lundon and Whitaker Claims Act 1871* (n 112).
[133] *Wi Parata* (n 113). Refer earlier discussion in part 2.3(a).
[134] *Wi Parata* (n 113) at 79. Also see Williams (n 36).
[135] *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235 at 238-9. Also see Joseph (n 37) at 80.
[136] See for example, *Nireaha Tamaki v Baker* 1901] AC 561, (1901) NZPCC 371 and *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 312.
[137] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).
[138] Ruru (2017) (n 37).
[139] *Ngati Apa* (n 137) at 693, per Tipping J.

> when the common law of England came to New Zealand, its arrival did not extinguish Māori customary title … title to it must be lawfully extinguished before it can be regarded as ceasing to exist.

As the discussion above (in part 3.2) demonstrates, there is a divergence between the values and protocols of Māori and the values and systems that are fundamental to New Zealand's substantive law and legal justice framework. The cultural expectations of New Zealand's dominant Euro-Christian population are formed because of (or moulded by) a multitude of factors, inclusive of but not limited to, societal values and norms, cultural practices, geographical factors and historical influences.[140] These dominant values, cultural practices and law will, in some respects, conflict with the morals, values and culture of New Zealand's Indigenous population and its minority groupings. These conflicts in cultural values have proven to be problematic and difficult to reconcile within the courts. Although recent majority decisions by the Supreme Court suggest limited acknowledgement of the importance of tikanga within the common law, judicial commentary continues to vacillate as to the nature and scope of such impacts.

While not a case dealing with the criminal law but the burial customs of Māori, *Takamore v Clarke* (*Takamore*)[141] illustrates the contrast in approach to the relevance of tikanga within New Zealand law. In appraising whether custom played a role within the development of the common law, the majority in *Takamore* stated that the relevant statutory context must ensure that "due weight is given by the common law to the tikanga concerning Māori burial practices".[142] Accordingly, a compromise had to be found between the requirements of tikanga and the burial preferences of the deceased individual, his spouse and children. In asserting the relevance and significance of tikanga, the majority stated that:[143]

> the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation. Personal representatives are required to consider these values if they form part of the deceased's heritage, and, if the dispute is brought before the Court because someone is aggrieved with the personal representative's decision, Māori burial practice must be taken into account.

Whereas the majority in *Takamore* had rejected the submission that the common law only applies to the extent that it is not inconsistent with tikanga, Elias CJ, in her dissenting judgment, suggests that the common law should generally be more accommodating of the importance of tikanga because:[144]

> Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only 'so far as applicable to the circumstances of the … colony'.

[140] Refer Abercrombie et al (n 15). Also, see Bergh et al (n 16) at 25-34 and Pratto et al (n 17) at 741-763.
[141] *Takamore* (SC) (n 130).
[142] *Takamore* (SC) (n 130) at [152].
[143] *Takamore* (SC) (n 130) at [164].
[144] *Takamore* (SC) (n 130) at [94].

Elias CJ however qualifies her position when commenting further that "where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or fundamental principles and policies of the law". As the cases discussed below suggest, it is this conflict in cultural values which has been contentious for the Courts.

Although there is now scope whereby the courts will recognise Māori cultural factors in various other areas of the law,[145] the recognition of tikanga within the criminal law faces a number of observable hurdles arising from provisions within the substantive criminal law and constitutional enactments that expressly (for example, ss 204A (4) of the Crimes Act 1961),[146] or impliedly (such as ss 5 and 9 of the Crimes Act 1961) exclude the recognition of customary law and practices. A fundamental tenet of the criminal law is implied in ss 5 and 9 of the Crimes Act 1961 which requires that no-one can be convicted of an offence unless at least part of the offence occurred in New Zealand and unless the offence is defined by statute. Because the Crimes Act 1961 provides no express acknowledgement of Māori customary law, ss 5 and 9 therefore operate to exclude the use of tikanga Māori processes for addressing criminal offending in the iwi or hapū context. Although there are some implicit requirements that Māori tikanga or other cultural factors be acknowledged by the criminal courts, the primary effect of ss 5 and 9 of the Crimes Act 1961 is not displaced in circumstances where a defendant (or Appellant) seeks to be prosecuted under customary law.

Although the courts have not provided a definitive declaration regarding the relevance and significance of Māori tikanga within the criminal law or a clear framework for dealing with cultural claims, the developing approach by the courts is that, where relevant, tikanga will be recognised by the courts. However, the significance of cultural factors to the determinations of the courts will depend on the facts and circumstances of each case. Before I examine the relevance and significance of tikanga within the criminal law, it will be necessary to address the constitutional and political quandary that is at the heart of regular attempts by defendants (and Appellants) to challenge the jurisdiction of the criminal courts.

3.4.2 New Zealand's Constitutional Arrangements and the Jurisdictional Quandary

While the societal factors examined above have contributed to the suppression and dissipation of the significance of the Māori "way of life", the regression in relevance and significance of Māori legal

[145] For example, resource management law (see *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 (SC)); civil procedure (see *Ngāti Whātua Orakei Trust v Attorney-General* [2018] NZSC 84).
[146] I examine the provisions of the criminal law that criminalise culture specific behaviour in Chapter Five (part 5.2) and in more detail in Chapter Seven.

systems, I suggest, has also arisen as a consequence of New Zealand's constitutional arrangements.[147] The constitutional framework introduced by European settlers and the incompatibility of tikanga with the fundamentals of the introduced legal system have operated to stifle the recognition of tikanga within criminal law. As the discussion below illustrates, the constitutional arrangements continue to impact contemporary Māori, and this has manifested itself in numerous challenges to the jurisdiction of the courts to deal with offending by Māori.

New Zealand's early constitutional structure introduced the Westminster system of government and established a criminal justice system based on the model developed in the United Kingdom that also introduced English common law into Aotearoa New Zealand.[148] The Westminster system established a highly centralised framework of law-making authority which challenged Māori sovereignty and self-determination.[149] It was difficult and complex for Māori to comprehend that the Crown (the New Zealand Parliament) was the sole sovereign body, thereby superseding the collective autonomy of Māori to address offending within their iwi or hapū. As noted by McHugh, the period up to the 1970s was "the Age of Leviathan" where the New Zealand constitution "undertook a sovereign-centred view of itself and its history".[150] The consequence of this view was that any challenge to the authority and jurisdiction of New Zealand's Parliament and the courts was rejected outrightly. McHugh contends that this was a time when relations with Māori in terms of allowing any recognition of Māori autonomy, was a legally and politically "non-justiciable area" and therefore Māori "lacked any constitutional status or legal rights arising from their aboriginality."[151] Maaka and Fleras affirm this view in noting that although Māori tribal and social groupings regarded themselves as autonomous, there was no acknowledgement of this by the New Zealand Parliament.[152] McHugh does concede that legal and political changes during the "time of claims" (the 1980s to the 2000s) and "the Settlements time" suggest a moderation of the steadfast approach to the rejection of Māori autonomy.[153] I suggest that there is considerable synchronicity between McHugh's "sovereignty" timeframe and the changes in approach by the courts to the recognition of minority and Indigenous cultural factors within criminal law. To provide context to the discussion to follow, I limit my analysis here to providing a

[147] Quince (n 9) at 341. Also see McMullan (n 78) at 84; Dawson (2009) (n 9); Jones (2009) (n 9).
[148] Refer Jones (2009) (n 9). Also Carwyn Jones *New Treaty, New Traditions: Reconciling New Zealand Māori Law* (UBC Press, Toronto, 2016) at 64-80; Dawson (2009) (n 9); Chris Sibley, James Liu *Attitudes towards Biculturalism in New Zealand: Social Dominance and Pakeha Attitudes towards the General Principles and Resource-Specific Aspects of Bicultural Policy* (2004) New Zealand Journal of Psychology, vol. 33, no. 2, 88-99.
[149] Roger Maaka, Augie Fleras *Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa* at 89-109 of Duncan Ivison, Paul Patton, Will Sanders *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press 2002).
[150] Paul McHugh *Sovereignty this Century – Maori and the Common Law Constitution* (2000) Victoria University of Wellington Law Review, vol. 31, 1-26.
[151] McHugh (n 150) at 6-16.
[152] Maaka, Fleras (n 149) at 91-98.
[153] McHugh (n 150) at 23-27.

summary of the constitutional arrangements that have disadvantaged Māori before highlighting the merits and bases for the challenges to the jurisdiction of the criminal courts to deal with offending by Māori.

An example of the limitations placed on the recognition of customary law can be found in s 71 of the New Zealand Constitution Act 1852 (the 1852 Act) which provided that "the laws, customs and usages of the aboriginal or native inhabitants of New Zealand" are to be maintained "so far as they are not repugnant to the general principles of humanity". Although this qualification on the use of Indigenous customs may appear on the face of it to be directed at promoting rule of law principles, assessments of the "principles of humanity" will, in all likelihood, be made in terms of Eurocentric values (for example the reasonable person test) and therefore, in circumstances where there is a conflict, tikanga principles will be rendered subordinate to Universalist principles. The 1852 Act was repealed in 1986, however, the essence of s 71 was retained within s 5 of the New Zealand Bill of Rights Act 1990 (NZBORA). Cultural rights such as the right to manifestation of religion and belief, are preserved by the NZBORA however such rights and freedoms can, under s 5 of the NZBORA, be made subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Although the Court of Appeal has suggested in *R v Iti* that interpretation of the term "reasonable" might be informed by customary rights, this point was not fully argued in that case.[154] The most likely approach to this issue may lie with the position adopted by the majority ruling of the Supreme Court in *Takamore* where the circumstances of each case will dictate the relevance and significance of cultural factors.[155]

Section 5 of the NZBORA, I suggest, has not advanced the recognition of Indigenous rights in New Zealand since the enactment of the 1852 Act, but continues to promote an approach which limits the acknowledgement of cultural factors by the courts. I contend that these requirements within constitutional documents to test indigeneity or minority cultural factors against "principles of humanity" encourage the manipulation of minority culture and the promotion of negative stereotyping and cultural perceptions within the criminal law. For the purposes of the present discussion regarding the constitutional and jurisdictional conflicts, I focus on an examination of the defects in the challenges to the jurisdiction of the criminal courts that have been based on constitutional arguments to give context to later discussion.

A major obstacle to the recognition of Māori culture and cultural factors within the jurisdictional challenges, I suggest, arise from a misunderstanding by Māori defendants of the precise nature of their

[154] *R v Iti* (2007) 23 CRNZ 572 at [50].
[155] *Takamore* (SC) (n 130) at [164].

claims to be dealt with in accordance with their tikanga.[156] These challenges to the jurisdiction of the criminal courts have been erroneously based on "Māori sovereignty" claims that often rely on promises made by the Crown in the Treaty of Waitangi 1840 or a misinterpretation of rights protected under New Zealand's constitutional enactments and substantive law.[157] The criminal courts have, more appropriately, classified these claims as political and constitutional and therefore should be considered in the context of civil or constitutional law rather than the criminal law and are accordingly rejected.[158]

In a number of recent criminal hearings, defendants (and Appellants) have challenged the jurisdiction of the criminal courts to deal with their offending on the basis of claims of a right to not only be judged by Māori but also that they be subject to Māori customary law.[159] For example, defendants have advanced "mana" arguments in challenging the jurisdiction of the courts in the context of offending under the Land Transport Act 1998, the Fisheries Act 1996, the Misuse of Drugs Act 1975 and various provisions of the Crimes Act 1961. The essence of these challenges to the jurisdiction of the criminal courts are based on mana, mana whenua or mana motuhake arguments where it is contended that Māori are autonomous and therefore cannot be subject to the law made by Parliament. In these cases, defendants purport the existence of an alternative legal system for Māori and argue that Māori are autonomous in dealing with criminal offending by Māori. As illustrated below, the courts have roundly rejected these claims as being "plainly unsound legally",[160] misconceived,[161] "unarguable",[162] and having "no substance".[163]

For example, in the context of the Land Transport Act 1998, mana whenua claims were made regarding a conviction for refusing an evidential blood test in *Te Hiwi v Police*.[164] It was contended on behalf of the Appellant that because "all of the land around Hamilton belongs to his hapū … his people can do whatever they want on their land" and therefore the provisions of the Land Transport Act could not apply to the Appellant.[165] No evidence was adduced to confirm these cultural claims other than in-court discussion with the Appellant's father. Although the Court of Appeal entertained

[156] For example, *Wallace v R* [2011] NZSC 10; *Yates v R* [2019] NZCA 155; *Kawiti v R* [2014] NZCA 222; *Underhill v R* [2011] NZCA 301; *Harris v R* [2011] NZCA 86; *R v Takao* (2004) CA379/03; *R v Mitchell* (2004) CA68/04; *R v Miru* (2001) CA65/01.
[157] For example, *Reti v Police* [2012] NZHC 1524 (High Court), *Knowles* (HC) (n 65), *Mika* (CA) (n 66), *Mason* (CA) (n 36).
[158] See for example *Phillips v R* [2011] NZCA 225 at [8]-[11] per Randerson J. Also see *Mika* (CA) (n 66).
[159] For example, *Knowles* (HC) (n 65) per Hammond J, *Knowles* (CA) (n 65) per Keith J; *Mason* (CA) (n 36) per Ellen France J; *Mika* (CA) (n 66) per Harrison J.
[160] *Wallace* (SC) (n 156) at [2].
[161] *Dickie v R* [2012] NZHC 3419 at [7] per Heath J.
[162] *Phillips v R* [2013] NZCA 580 at [3] per Harrison J.
[163] *Martin v R* [2017] NZHC 1407 at [15] per Woolford J.
[164] *Te Hiwi v Police* [2016] NZHC 817 (HC), per Woodhouse J.
[165] *Te Hiwi* (n 164) at [5].

this contention on the basis that it was a challenge to the sovereign power of New Zealand's Parliament to make law, the court referenced a long list of earlier decisions where similar cultural contentions were rejected outright by the courts.[166]

Similarly, mana whenua arguments advanced in support of a jurisdictional challenge in the context of offences under the Fisheries Act 1996 were unequivocally rejected in the case of *Rangitaawa v R*, where the Appellant argued that because his hapū (Te Whanau Rangitaawa) had declared independence he was then only subject to "native customary law values and practices". In dismissing the appeal, Allan J stated that "challenges of that sort cannot be entertained by the Court … Māori sovereignty arguments have no proper basis."[167]

In the context of the Crimes Act 1961 and Misuse of Drugs Act 1975, mana whenua arguments have been advanced in support of a challenge to the jurisdiction of the courts where the defendant (Appellant) has also sought to be tried in accordance with tikanga Māori. In these cases the courts have rejected the jurisdictional arguments either because the defendant (Appellant) has misconstrued the basis for their claims,[168] the suggested alternative court or marae for hearing the case does not exist,[169] or the legal basis for their jurisdictional challenge was erroneous.[170]

The Court of Appeal (and High Court) rulings in *Knowles v R* provide an illustration of the obstacles encountered by Māori defendants seeking to be tried in accordance with their tikanga. The Appellant in *Knowles* claimed that she had a customary right to use cannabis and to be tried by her Māori people according to their law and in accordance with tikanga.[171] Mrs Knowles' jurisdictional claims relied on s 71 of the Constitution Act 1852 which required that "the laws, customs and usages of the aboriginal or native inhabitants of New Zealand" be maintained. This argument was roundly rejected by the Court of Appeal as the 1852 Act was repealed by the Constitution Act 1986 (the 1986 Act) and s 15(1) of the 1986 Act bestowed on the Parliament of New Zealand, full power to make law. Because New Zealand's Parliament has enacted the Misuse of Drugs Act 1975 (MODA), the courts are therefore obliged to give effect to the terms of MODA. Keith J noted that although other statutes recognise the role of customary law, such recognition could not be applied to offences under MODA

[166] For example, *Phillips* (2013) (CA) (n 162); *Mitchell* (CA) (n 156); *Underhill* (HC) (n 156).
[167] *Rangitaawa v R* (2013) HC Whangarei, CRI-2013-488-03 at [9].
[168] *Wallace* (SC) (n 156) at [2]; *Underhill* (CA) (n 156) at [5] per Stevens J; *Hapi v Police* [2015] NZHC 2191at [4] per Asher J.
[169] *Harris* (CA) (n 156), *Yates* (CA) (n 156) at [9], [10] per Clifford J
[170] *Hapi* (n 168); *Takao* (CA) (n 156) at [9] to [12] per O'Regan J; *Wiki v R* [2012] NZHC 2474 at [4] per Toogood J.
[171] *Knowles* (CA) (n 65) per Keith J.

as the "absolutely prohibitive" terms of MODA "leaves no room at all for the operation of any relevant customary law".[172]

The Court of Appeal rulings in *Toia v R* extend the approach adopted in *Knowles* (regarding offences covered by MODA) to the provisions of the Crimes Act 1961.[173] In *Toia*, the Court of Appeal was asked to consider whether the Courts had jurisdiction over the Appellant who was of Māori descent and had been convicted in the lower court of sexual violation.[174] In reliance on the combined effect of the Constitution Acts of 1846, 1852 and 1986, the Treaty of Waitangi 1840, the Maori Community Development Act 1962 (MCDA) and various other related Acts of Parliament, the Appellant sought to be tried on his marae.[175]

In delivering the Court of Appeal's rulings in *Toia*, Randerson J noted that the reasons for the wholehearted rejection of Mr Toia's sovereignty claims was that, first, the crimes with which the Appellant was charged all fall under the Crimes Act 1961 which, in terms of ss 5 and 9, applies to all offences for which the offender may be proceeded against and tried in New Zealand and to all acts done or omitted in New Zealand. The Court of Appeal rejected Mr Toia's claim that there was scope for his offending to be dealt with under the MCDA and ruled that the offences contemplated by Parliament to apply under the MCDA were "minor offences". Therefore the jurisdiction afforded to Māori institutions under the MCDA could not apply to the more serious offence of sexual violation. Accordingly, the only avenue available for dealing with Mr Toia's offending was under the Crimes Act. Second, the Crimes Act 1961 was enacted by the New Zealand Parliament which has sovereign power to legislate. The implication here is that there was no other scope whereby Mr Toia's offending could be prosecuted. Third, the duty of the Courts is to interpret and apply enactments of the legislature. No other institution has been given similar jurisdiction to interpret and apply criminal law. Fourth, the claims (based on protections offered by the Treaty of Waitangi and the Te Ture Whenua Maori Act 1993) that the Courts of New Zealand do not have jurisdiction over Maori incorporations, their members or lands vested in such incorporations has been rejected in New Zealand on a number of occasions.[176] Neither the Treaty of Waitangi nor the Te Ture Whenua Maori Act 1993 give rise to legal authority such as that exercised by the courts in the criminal jurisdiction.[177]

[172] *Knowles* (CA) (n 65). Also, see *Saleh v Police* [2015] NZHC 1055, HC Whangarei, Ellis J; *Mason* (CA) (n 36); *Waretini v Police* [2014] NZHC 2669 (Faire J)
[173] *R v Toia* [2007] NZCA 331 per Randerson J.
[174] *R v Toia* (jury trial in District court before Kiernan J, December 2005 and sentencing in High Court by Williams J on 10 August 2006).
[175] *Toia* (CA) (n 173) at [8] to [10]
[176] For example see *Miru* (CA) (n 156) at [4] – [8] & [19] and *Knowles* (CA) (n 65).
[177] *Miru* (CA) (n 156) at [8].

Within the context of this jurisdictional discussion, it should be noted that the MCDA allows Maori communities to deal with minor offences.[178] The MCDA deals with the regulation of unruly or disorderly behaviour and the prevention of drunkenness within Māori meetings, dances, tangi(s), hui(s), or other gatherings.[179] Similar provisions regulating unruly and disorderly behaviour are already a part of the Summary offences Act 1981 and prosecuted under the criminal jurisdiction of the courts.[180] Although jurisdiction has been given by the MCDA to Māori Committees to deal with minor offences in the context of Māori communities, they have not been utilised by Māori and there has been no prosecution under the provisions of the MCDA since its passing into law in November 1962. The rulings by the Court of Appeal in *Toia*, I suggest, has drawn a demarcation line in the recognition of tikanga by implying that cultural factors are more likely to have relevance in dealing with minor offences but will not be a consideration in the context of offending as serious as sexual violation.

In *Mason v R*, the Court of Appeal affirmed the position taken in *Toia* that the Crimes Act 1961 was the primary legislative articulation of New Zealand's criminal law and therefore dealt with all criminal offending in New Zealand.[181] In the High Court, Mr Mason pleaded guilty to one charge of murder and one charge of attempted murder and sought to be "treated in accordance with tikanga Maori" regarding such offending.[182] In declining Mr Mason's application to be dealt with in accordance with his cultural affiliations, Heath J noted at [37] that the combined effect of ss 5 and 9 of the Crimes Act 1961 was that the "customary system has been extinguished" and "it was not possible to regard the customary system as an existing parallel system".[183] On appeal, the Court of Appeal reasoned that because the Crimes Act 1961, the Bail Act 2000, the Sentencing Act 2002 and the Parole Act 2002 provide adequate coverage for the consideration of cultural factors,[184] tikanga was therefore "not presently a viable legal process for serious crime even if continuity of custom could be demonstrated".[185] The Court of Appeal affirmed the approach adopted by the sentencing judge in rejecting Mr Mason's requests to be dealt with in accordance with his tikanga Māori.[186] In sentencing Mr Mason, Heath J considered the relevance of tikanga (kaupapa) Māori and concluded that:[187]

> it was difficult to understand how kaupapa Maori [would] apply in the circumstances … in this case, cultural considerations are relevant, but they have little weight in the circumstances in which I have to

[178] MCDA, ss 30-36.
[179] MCDA s 33.
[180] For example, Summary Offences Act 1981, ss 3, 4, 5, 6, 37.
[181] *Mason v R* (CA) (n 36) at [20] to [28] per Ellen France J.
[182] *Mason No. 1* (HC) (n 63) at [2].
[183] *Mason No. 1* (HC) (n 63).
[184] *Mason* (CA) (n 36) at [35].
[185] *Mason* (CA) (n 36) at [41].
[186] *Mason No. 1* (HC) (n 63) at [41].
[187] *R v Mason* [2012] NZHC 1849 at [6] – [8] (*Mason No. 2*).

> decide … while cultural values are relevant to sentencing, there is one law for all in New Zealand. Nobody is above the law. All are subject to the same sanctions for criminal offences.

The comments noted above by Heath J in *Mason No. 1* (on jurisdiction) and in *Mason No. 2* (on sentencing), and subsequently endorsed by the Court of Appeal, I suggest, invites meticulous endeavour to resolve the quandary of how indigenous (or other cultural) factors should be applied within the criminal law. Despite the clarity of the court's rulings in rejecting the challenges to the court's jurisdiction in *Knowles*, *Toia* and *Mason*, the courts continue to be solicited into determining challenges to its jurisdiction based on cultural arguments.

I disagree with an approach by the courts whereby the relevance of culture is based on the seriousness of the offending. Whether the court takes into account a defendant's culture and cultural factors must be based on the relevance of such factors to the issues to be determined rather than the degree of seriousness of the offending. Further, the significance of culture to the determinations by the court should not be discounted on the basis of the seriousness of the charge but rather on an assessment of the value and weight to be attached to the cultural factors.

The quandary that arises in regard to the jurisdictional challenges is that there is incontrovertible historical, constitutional and legal basis for the grievances that are at the heart of these objections by Māori to the authority of the courts. As the discussion above demonstrates, there is an underlying connection between the constitutional arrangements that have alienated Māori from their traditional cultural connections and the feelings of injustice Māori continue to experience when subjected to the criminal justice system. Although these jurisdictional challenges have perhaps not been articulated with sufficient clarity, I suggest that the regularity of the challenges to the jurisdiction of the criminal courts will perpetuate, not necessarily because of dissatisfaction with New Zealand's constitutional framework or sovereignty situation that cannot now be altered, but rather because Māori perceive the criminal justice system as being unfair and discriminative to Māori.

Further, I suggest that the objections to the jurisdiction of the courts rest not on a challenge to Parliamentary sovereignty or authority of the courts but rather an insistence that Māori culture be sufficiently acknowledged by the courts and recognised in the context of assessing criminality and culpability. In chapters six and seven, I elaborate and develop these contentions in the context of the substantive criminal law.

3.5 The Evidential Perplexities of Tikanga Māori

New Zealand's criminal law provides no specific framework for the introduction, interpretation and application of cultural evidence. Although the Evidence Act 2006 offers some general rules regarding the admissibility of evidence, I argue here that evidence of a cultural nature requires a nuanced approach which is not provided by the Evidence Act.

Despite the regularity with which the courts are asked to deal with the concept of culture and cultural claims, the criminal law provides no delineation of the concept of culture and no clear parameters have been provided by the courts for the dissemination of cultural claims. At the heart of the complexities in dealing with cultural contentions, I suggest, is evidentially substantiating the cultural factors that have impacted allegedly criminal conduct or behaviour. A consequence of the lack of guidance from the courts for dealing with cultural evidence are the complications encountered by defendants (and defence counsel) in substantiating cultural claims because of the abstract and multifaceted nature of specific cultural concepts and factors. For example, tikanga concepts can be assigned a different meaning depending on the circumstances, the parties involved, their relationship to each other and the protocols and practices applied by a specific iwi or hapū. All of these factors, I suggest, require a unique and nuanced approach to culture on each specific set of circumstances.

A further consequence of this deficiency in guidelines, I suggest, is that judges are therefore left to deal with cultural contentions on an ad hoc basis and at times left with no alternative but to apply their personal cultural perspective to cultural claims with which they may be unfamiliar and often in the face of very limited evidential foundation. The caselaw discussed below illustrates the complexities encountered by the judiciary in assessing the relevance and significance of cultural contentions to the determination of substantive criminal law issues. I also demonstrate that the ad hoc approach by judges has led to critical deficiencies in gathering relevant evidence to substantiate cultural contentions, misconceptions and misapprehensions of cultural assertions, inconsistencies in judgments, inequality of treatment and unfairness.[188] To illustrate the difficulties encountered by the courts in gathering cultural evidence and the variance of approach to substantiating cultural claims, I focus on the complexities faced by the courts in ascertaining the nature of cultural contentions pertaining to communal ownership of cultural "taonga";[189] the concept of "mana";[190] the cultural deprivation of Māori;[191] and the complexities of Māori burial customs.[192]

[188] Khylee Quince *Mana and Domestic Violence: D v Police* (1999) Indigenous Law Bulletin, vol. 4, issue 25, 10-12 at 11.
[189] *Saxton v R* [2009] NZCA 498 (CA).
[190] See for example, *Fane v R* [2015] NZCA 561 per Asher J; *Hamed v R* [2011] NZSC 101 (SC). See also *Takamore* (CA) (n 31) at 130 regarding the meaning of "mana".
[191] *Mika* (CA) (n 66).

The New Zealand Law Commission (NZLC) in their 2001 report into Māori customs and values,[193] alludes to the difficulties that arise when judges are being asked "to assess the mores of a society still largely foreign to them".[194] The NZLC provides the examples of *Police v Dargaville,*[195] *Re Wakarua,*[196] and *Re Stubbing,*[197] to illustrate the nature of these difficulties for the judiciary. I suggest that each of these cases highlight the negative consequences of judges failing to make adequate inquiry into the relevance and significance of cultural factors to the circumstances of the case before them and then applying their personal cultural perspective to cultural concepts with which they may have limited understanding.

In the unreported District Court decision of *Police v Dargaville*, Judge Everitt discharged Mr Dargaville without conviction and granted an order for name suppression in respect to a charge of assault on his partner. Everitt J reasoned that "mana is one of the concepts that is accepted, not perhaps 100 per cent understood by non-Māori people, but it is understood sufficiently for me to say that I accept that a loss of mana by D will affect him personally and it will affect his people that he represents." In adopting this rationale, Everitt J has not only misconstrued the concept of "mana" but he has also miscalculated the wider impacts of his decision not only on Mr Dargaville, but also the victim, the whanau of the respective parties and the wider Māori communities.[198] The decision in *Dargaville* engendered so much outrage and criticism from academics, politicians, social commentators, women's groups, media and even Mr Dargaville's iwi, that it not only served to highlight Mr Dargaville's "offending" in a very public manner but also emphasised the erroneous rationale adopted by Everitt J regarding various tikanga concepts.

Quince commented that Judge Everitt raised the issue of the defendant's mana of his own volition without being prompted by the defendant thereby purporting to apply tikanga concepts inappropriately and incorrectly.[199] Because Everitt J raised the mana issue himself, the judge was therefore signifying that he intended to apply his own understanding to the cultural concepts as no further cultural information or evidence was presented by the defendant or sought by the court. The misapplication of the concept of "mana" by Everitt J therefore not only operated to highlight Mr Dargaville's "offending" because it ignored the "tapu" and "mana" of women, but also "did more to diminish [Mr Dargaville's] mana" due to the failure by the court to appreciate the Māori concept of

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[192] *Takamore* (SC) (n 130). Also *Takamore* (CA) (n 129) at [12], [77], [89], 258].
[193] NZLC (n 31).
[194] NZLC (n 31) at 4.
[195] *Police v Dargaville* (1999) Unreported, Kaikohe District Court, per Judge Everitt.
[196] *Re Wakarua* (1988) 4 FRNZ 650.
[197] *Re Stubbing* (1988) 4 FRNZ 392.
[198] Quince (1999) (n 188) at 10-12.
[199] Quince (1999) (n 188) at 10-12.

dispute resolution which required that Mr Dargaville's community (and that of the victim's) "be informed of any physical or spiritual weakness amongst its members".[200] Quince therefore argues that Everitt J's ruling in *Dargaville* was not only in contravention of established common law principles in terms of s 19 of the of the Criminal Justice Act 1985 but also specific Court of Appeal and High Court rulings.[201] Quince argued that Everitt J's ruling in *Dargaville* misconstrued tikanga Māori to the detriment of all parties involved in the offending.[202]

Similarly, in *Re Stubbings*[203] (a decision regarding cultural adoptions), and *Re Wakarua*[204] (in dealing with a family protection application and the maintenance of grandchildren), the High Court noted the significance of Māori cultural practices to the circumstances of the claimants and respondents. However, in both cases, the Courts proceeded to make a final determination despite the fact that there was a lack of relevant evidence on Māori whāngai (adoption) or atawhai (fostering) customs.[205] In failing to undertake in-depth inquiries into the nature of the cultural arrangements entered into by the parties, the judges in both of these cases have effectively ignored the significance of cultural factors and applied their personal cultural perspective to the determination of the substantive issues. I suggest that in both of these cases, the court has ignored the true intentions of the parties and therefore reached decisions which were, from the perspective of the parties, unintended and culturally inappropriate.

In the cases discussed above, the courts have assumed an understanding of the cultural circumstances in the absence of a detailed evidential inquiry into the nature and impacts of the cultural factors which, I suggest, has resulted in determinations that were culturally incongruous.

By way of contrast, in cases such as *Mika v R*,[206] *Knowles v Police*,[207] and *Mason v R*,[208] the courts indicated a willingness to consider cultural arguments, however, the defendants (and their defence counsel) were not able to evidentially substantiate their cultural assertions.

In *Knowles*, the defendant was convicted of possession of a class C drug (cannabis) for supply in the District Court.[209] It was contended on appeal against conviction to the High Court that Ms Knowles

[200] Quince (1999) (n 188) at 12.
[201] For example *Stewart v Police* (1989) 12 TCL 28/4, High Court, Dunedin per Justice Smellie; *Police v Roberts* [1991] 1 NZLR 205 at 210 (CA); *Fuller v Police* (1998) BCL 598, High Court, Wellington.
[202] Quince (1999) (n 188) at 12.
[203] *Stubbing* (n 197).
[204] *Wakarua* (n 196).
[205] *Stubbing* (n 197) at 401 and *Wakarua* (n 196) at 656.
[206] *Mika* (CA) (n 66).
[207] *Knowles* (HC) (n 65) per Hammond J.
[208] *Mason* (CA) (n 36).
[209] *Knowles* (HC) (n 65) at 424.

was using the cannabis "in a manner that was customary among Maori".[210] In the High Court, Hammond J noted that "a custom has to be proved" by the proponent and a lawfully recognised custom must have four essential attributes.[211] These attributes are first, it must be immemorial, second, it must be reasonable; third, there must be certainty as to its general nature, the locality where it is obtained and the persons to whom it affects and fourth, it must have continued as a custom without interruption since its immemorial origins. Hammond J dismissed the appeal on the grounds that, first, Ms Knowles had the burden of proving the existence of the claimed custom, however there was "a quite inadequate factual foundation" for that challenge and second, there was no evidential foundation for the contention that such custom had been guaranteed under art 2 of the Treaty of Waitangi or any other constitutional instrument.[212] Hammond J took the view that the Misuse of Drugs Act 1975 did not envisage the recognition of cultural uses of cannabis by Māori, especially where there is no evidential foundation for such claims.[213] Although Ms Knowles sought to appeal to the Court of Appeal on the basis of her customary rights to use cannabis, Keith J declined to grant leave but did comment that the critical point in this case was that the Misuse of Drugs Act 1975 "by its prohibitory terms … leaves no room at all for the operation of any relevant customary law."[214]

Another example where counsel has raised cultural contentions without supporting cultural evidence is *Mika v R*. Counsel for Mr Mika contended both at sentencing,[215] and on appeal,[216] that "Mr Mika was of Māori heritage and thus socially disadvantaged".[217] It was argued that because Mr Mika was a socially deprived Māori, he was therefore entitled to a quantifiable discount to his sentence to reflect such deprivation. The error in approach by counsel for Mr Mika was a reliance on an assumption that the court would have some inherent knowledge of the deprivation suffered by Māori without supporting evidence and then asking the court to deal with a cultural contention that was largely unsubstantiated. I suggest that obvious hurdles for Mr Mika and his counsel was to evidentially substantiate that Mr Mika had sufficient connections with his Māori culture; that as a person of Māori descent he personally suffered from such deprivation and that such deprivation impacted his offending. The opportunity for Mr Mika and his counsel to present cultural information or specific evidence relating to Mr Mika's personal, family, whanau, community and cultural background was available under s 27 of the Sentencing Act 2002, however, such opportunity was not utilised by defence counsel either at the High Court sentencing or for the appeal to the Court of Appeal. Mr Mika's counsel sought to have the court rely on caselaw from Australian and Canadian authorities,

[210] *Knowles* (HC) (n 65) at 425.
[211] *Knowles* (HC) (n 65) at 426.
[212] *Knowles* (HC) (n 65) at 426.
[213] *Knowles* (HC) (n 65) at 424-426.
[214] *Knowles* (CA) (n 65) per Keith J.
[215] *R v Mika* [2013] NZHC 2357 (HC) per Gendall J at [59] to [65].
[216] *Mika* (CA) (n 66) at [6] per Harrison J.
[217] *Mika* (HC) (n 215) at [59] to [65]; *Mika* (CA) (n 66) at [6] to [14].

however, Harrison J noted that those cases were "decided in very different statutory contexts which means they are of no assistance to this appeal" and duly rejected the social deprivation argument.[218] I discuss the variability of approach by the criminal courts to the acknowledgement of cultural factors contained in s 27 reports in part 5.5.1 below.

The cases discussed above highlight the obvious difficulties that arise when little or no evidence is adduced to clarify the relevance and significance of cultural factors. Substantiating a cultural claim is complex and requires the consideration of a vast array of cultural elements. To undertake a comprehensive analysis of the numerous, multifaceted and complex tikanga concepts would be too unwieldy, therefore, in the interests of conciseness, I illustrate the complexities in substantiating Māori cultural concepts by way of an analysis of the difficulties encountered by the courts in dealing with the tikanga notion of 'mana' and its associated concepts.

As discussed earlier (part 3.4.2) and further below (in part 3.6.4), the tikanga concept of "mana" is complex. As stated by the NZLC, the concept of 'mana' is a reference to leadership which encompasses authority, control, influence, prestige and power that is "ascribed through whakapapa and acquired through personal accomplishments".[219] Although the courts have on numerous occasions been asked to make determinations on the relevance and significance of this concept to issues of criminality and culpability, there continues to be a variance of approach to the treatment of mana by the courts. The concept of 'mana' is not unique to Māori but is almost universally regarded as an intangible "supernatural force or power" that shapes the perception of people and their status.[220] In this regard, judges may well have a personal understanding of the concept of mana, however, as the discussion to follow will illustrate, mana is a multifaceted concept that is applied in various ways according to the surrounding circumstances and therefore cannot be assumed to mean the same thing in every context. Although there is an accepted understanding of "mana", the abstract nature of mana and its application to a variety of contexts, I suggest, presents challenges in how the courts should treat mana. Accordingly, the evidential requirements for establishing 'mana' in a particular set of circumstances may not apply to an understanding of mana in another situation. How mana will be perceived will depend on the persons involved, their status and relationship to each other and the

[218] *Mika* (CA) (n 66) at [13].
[219] NZLC (n 31) at para 137.
[220] See Matt Tomlinson, Ty Kāwika Tengan (eds.) *New Mana: Transformations of a Classic Concept in Pacific Languages and Cultures* (ANU Press 2016) at 1-36. Also Robert Blust *Proto-Oceanic *mana Revisited* (2007) Oceanic Linguistics, vol. 46, no. 2, 404-423 and Raymond Firth *The Analysis of Mana: An Empirical Approach* (1940) Journal of the Polynesian Society, vol. 49, no. 49, 482-510. Note also that the Supreme Court is presently considering whether the Māori tikanga concept of mana ought to be extended to allow an appeal by a deceased appellant to continue after his death in *Ellis v R* [2020] NZSC (hearing 20 June 2020) (n 60) but a ruling may not be available prior to completion of my thesis.

cultural factors involved, therefore it cannot be assumed that mana can be applied uniformly in all situations.[221]

For Māori, the concept of mana influences and manipulates how a situation or set of circumstances are to be regarded. While there is a general understanding of the term 'mana' by Māori, it is a concept that can be applied in a variety of contexts. For example mana can be associated with the exercise of power and authority over land (mana whenua),[222] burial practices (mana of the deceased),[223] tribal taonga (for example, the mana of Ngai Tahu regarding the ownership of pounamu),[224] the sea and its resources (mana moana), and control over one's own destiny (mana motuhake). Because the concept of mana cannot be presumed to mean the same thing in every situation or set of circumstances, I maintain that the courts must have regard to the evidential requirements of each cultural contention pertaining to mana and its associated concepts.

Some recent decisions suggest that the courts are prepared to undertake in-depth inquiries regarding the relevance and significance of cultural concepts. I highlight these complexities for the courts in reference to the cases of *R v Mason*, *Fane v R*, and a line of decisions dealing with the concept of 'mana whenua'.

In *R v Mason (No. 1)*, Heath J undertook a thorough overview of various tikanga concepts in the course of addressing a jurisdictional claim by Mr Mason that he should be dealt with in accordance with his tikanga Māori.[225] Expert cultural evidence was provided by Moana Jackson by way of affidavit and supplementary oral testimony. Heath J also referenced commentary from cultural academics, Dr Robert Joseph and Dame Joan Metge.[226] In reliance on the expert cultural evidence, Heath J acknowledged the concepts of 'mana' and 'mana whenua' as the source of authority or power that is exercised by Māori[227] but ultimately held that there was no alternative process for dealing with criminal offending by Māori because ss 5 and 9 of the Crimes Act 1961 had essentially extinguished the customary system.[228] As illustrated earlier in part 3.4.2, the use of mana arguments in the context of jurisdictional challenges is erroneous and "plainly unsound legally".[229]

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[221] Refer Tomlinson, Tengan (n 220), Blust (n 220). Refer in-court discussions in the Supreme Court appeal of *Ellis v R* [2020] (n 60).
[222] See for example *Hamed* (SC) (n 190) at [[118], [123]; *Mason No. 1* (HC) (n 63) at [21] per Heath J; *Iti et al v R* [2012] NZCA 492 (CA) per Ellen France J at [96], [97]; *R v Bailey et al* (2009) High Court Auckland 7/10/2009 per Winkelmann J at [113]; [115]; [139]; [140]; [156]; [160]-[162].
[223] *Takamore* (CA) (n 31) at [12], [77], [89], [258].
[224] *R v Saxton* (2007) District Court, Christchurch, CRI 2004-002-000741, per Judge MacAskill at [268].
[225] *Mason No. 1* (HC) (n 63) at [2].
[226] *Mason No. 1* (HC) (n 63) at [21] to [26].
[227] *Mason No. 1* (HC) (n 63) at [21].
[228] *Mason No. 1* (HC) (n 63) at [37].
[229] *Wallace* (SC) (n 156) at [2].

In *Fane v R*, the Court was asked to take into account (in assessing Mr Fane's culpability), the level of provocation Mr Fane experienced because of the circumstances which had resulted in the denial of his mana as a father to his daughter.[230] Mr Fane's daughter was removed from his care by the Child, Youth and Family Service (CYFS) and placed in the care of her maternal grandfather (the victim) and his partner. Counsel for Mr Fane contended that the broader context in which the offending took place arose from the victim assuming the role of caregiver for the child and this amounted to an infringement of Mr Fane's "emotional psyche" or a denial of Mr Fane's mana as a father.[231] It was argued by counsel for Mr Fane that the denial of mana has huge impacts on people of Māori descent and, for Mr Fane, the firing of the shotgun at the victim was a culmination of the frustrations he felt arising from that loss of mana.[232] Although a considerable volume of cultural information was made available for the court's consideration, no cultural or expert evidence was adduced by the Appellant's counsel to support the claim that a loss of mana in these circumstances would engender an extreme act of violence (such as shooting someone in the face) or whether there was any characteristic (medical, physical or psychological) specific to Mr Fane that would make him more susceptible than anyone else to react to these circumstances in such an extreme manner.

In contrast with *Mika* where no cultural evidence was proffered to assist the court in its determination of the cultural issues, the Court of Appeal in *Fane*, had the benefit of cultural information from various affidavits by Mr Fane and members of his family detailing aspects of Mr Fane's heritage, family background and frustrations with the removal of his children.[233] The Court of Appeal also had regard to the sentencing notes from the High Court where the sentencing judge had the benefit of "an unusual quantity of material" and a "full presentence report and a comprehensive psychiatric report" which provided some detail on Mr Fane's cultural background.[234] Despite this unusual collection of cultural information before the sentencing court, Asher J also notes that no cultural report under s 27 of the Sentencing Act 2002 was either sought or provided by defence counsel.[235] Asher J observed further that at sentencing, "Mr Fane had presented his own three-page handwritten statement" to the judge and "did not ask that anyone else be allowed to speak for him".[236] Despite the copious amounts of cultural information made available for the court's consideration in both the High Court and Court of Appeal, it was held that there was insufficient evidence to establish a "connection" between the claimed cultural factors and the substantive issues to be addressed by the court. In affirming the approach taken by Heath J in sentencing Mr Fane, the Court of Appeal took the view that "Mr Fane's violence [was not] … any more proportionate and understandable" because of any evidence as to the

[230] *Fane* (CA) (n 190).
[231] *Fane* (CA) (n 190) at [22].
[232] *Fane* (CA) (n 190) at [22] to [24].
[233] *Fane* (CA) (n 190) at [25] to [32].
[234] *Fane* (CA) (n 190) at [25].
[235] *Fane* (CA) (n 190) at [27] to [29]. Also see *R v Fane* [2012] NZHC 1807 (HC) per Heath J.
[236] *Fane* (CA) (n 190) at [29] to [33].

influences of tikanga Māori.[237] The Court of Appeal in *Fane* also rejected, in the circumstances of this case, the contention that the "denial of mana in Tikanga Māori terms" was a factor which provided context for the offending or went to the issue of provocation either as a factor relevant to culpability or in mitigation. The Court of Appeal found that the nexus between Mr Fane's cultural background and his serious and unprovoked attack, by shooting the victim in the face, was not established and therefore could not mitigate the culpability of his offending.[238]

To illustrate the variety of situations whereby mana can be relevant to the court's considerations I examine here a line of decisions dealing with the concept of mana whenua. It also demonstrates the inconsistent and extemporized approach by the courts towards the gathering of cultural evidence. While these cases highlight the misapplication of mana and mana whenua arguments in the context of challenges to the court's jurisdiction, I suggest this discussion will be important to the discourse that follows regarding the value of tikanga concepts to the determination of culpability and substantive issues such as the reasonableness of an accused person's actions or an honest belief about a particular set of circumstances. The cases examined here demonstrate the inevitability of cultural contentions being rejected by the courts where no cultural evidence or a limited amount of cultural information is placed before the court.

For example in *Crockenberg and others v Police*, the defendants advanced a mana whenua argument in contending that their iwi, Ngāti Kahu, held Māori customary rights over the land on which the Kaitaia airport was situated, therefore, they could not be trespassing when entering the airport grounds.[239] The issue for the court was whether the Appellants were present on the land for the purposes of a protest or whether their presence amounted to an illegal "occupation" of the land. The difficulties for the Appellants arose from the fact that they did not give evidence regarding their specific intentions in "occupying" the airport lands but relied on expert cultural evidence presented by a cultural academic (Professor Margaret Mutu) and a local kaumatua (Reverend Lloyd Popata) regarding the strong cultural connections that the Appellants had with the airport lands and the collectively held subjective belief within Ngāti Kahu over the land on which the airport is sited. Although Muir J queried whether evidence of a collectively held subjective belief within a particular group, given by an elder representative of that group, can establish an honest belief on the part of individual defendants,[240] he ultimately accepted that "the combined evidence" established a strong ancestral connection by the appellants to the airport lands which may give rise to an honest belief in Ngāti Kahu's right to have the lands returned to them but it does not establish an honest belief in a

[237] *Fane* (CA) (n 190) at [41]
[238] *Fane* (CA) (n 190) at [35] to [41] & [46]
[239] *Crockenberg and others v Police* [2017] NZHC 2704 (HC) per Muir J, at [2] and [4].
[240] *Crockenberg* (n 239) at [39].

legal right of interim occupation. Muir J took the view that there was "a disjunction between the evidence called in support of the alleged honest belief and the nature of the belief asserted on appeal" but accepted that there is a special body of knowledge held by the iwi as a collective that can be adduced through iwi elders.[241] The significance of the *Crockenberg* ruling is that the court accepts that tikanga Māori informs and influences the common law.

Another example of an unsuccessful claim of mana whenua due to the insufficiency of supporting cultural evidence and an inadequate basis for cultural claims can be found in *Maori Trustee v Smith*.[242] In *Smith*, the Māori Trustee sought arrest orders (with the support of the police) to enforce an injunction that was granted by the Māori Land Court for the removal of the respondents from a property which the respondents had previously occupied subject to a licence to occupy but had since expired in 2014. The expiry of the lease was confirmed by the Māori Land Court in a 2016 decision and the Māori Trustee was granted an order for recovery of the land.[243] The respondents claimed that they possessed mana whenua over the subject property however the Māori Land Court ultimately rejected their claims on the basis that they held the property under a lease and the lease (which was administered by the Māori Trustee) was not renewed. Although there was a limited cultural background to the claim of mana whenua, the evidence before the Māori Land Court favoured the return of the land to the Māori Trustee to be administered on behalf of the beneficiaries of a trust that included the Appellants. Ultimately, the mana whenua arguments raised by the Appellants in this case was rejected by the court due to the insufficiency of evidence in support of the cultural claim but more significantly, because the claimed mana whenua could not override the significance of the Māori Trustee's obligations to administer the land for the benefit of all the beneficiaries.

The contrast in approach to the gathering of cultural evidence cannot be more apparent in a comparison of the cases discussed above and the approach adopted by Judge MacAskill in the District Court rulings in *R v Saxton*.[244] In *Saxton*, Judge MacAskill was mindful of the difficulties that can arise if judges draw conclusions based on their personal understanding of Māori concepts without full discussion of evidence describing the concepts and its implications.[245] The judge therefore undertook a comprehensive exercise involving the consideration of an "immense amount of cultural evidence adduced by the Crown and the Defence"[246] which was then augmented and supplemented with the further "need for time-consuming legal research beyond the scope of counsel's submissions".[247] In considering the vast collection of cultural evidence, Judge MacAskill was then able to fully appraise

[241] *Crockenberg* (n 239) at [39], [40].
[242] *Māori Trustee v Smith* [2019] NZHC 322, per Grice J.
[243] *Māori Trustee v Smith – Waipoa 5A2* (2016) 62 Tairawhiti MB 122 (62 TRW 122).
[244] *Saxton* (DC) (n 224) at [87].
[245] *Saxton* (DC) (n 224) at [58].
[246] *Saxton* (DC) (n 224) at [8].
[247] *Saxton* (DC) (n 224) at [10].

himself of the Māori concept of ownership,[248] the mana of Ngai Tahu,[249] the concept of tikanga,[250] and various related Māori cultural concepts.[251] The in-depth analysis of the cultural evidence allowed Judge MacAskill to make some clear, definitive and culturally appropriate determinations regarding the various cultural contentions raised in this case.

In addressing an appeal against conviction and sentencing, the Court of Appeal in *R v Saxton*, was engaged in largely academic discussion regarding the admissibility of the extensive volumes of oral cultural evidence from both the prosecution and defence during the District Court trial.[252] It was accepted by the parties and the Court of Appeal that much of the evidence was strictly hearsay and in many respects the oral evidence was vague. There was also a concern that "some of the experts called by each side will have had ties or connections which may have influenced the view they held on a particular matter".[253] Because the prosecution and defence had both introduced oral cultural evidence during the trial without objection, it was not then open for the respective parties to argue that such cultural evidence should not have been ruled admissible by the trial judge.[254]

In accepting that the admissibility of cultural evidence may require the consideration of extenuating factors not usually condoned with other forms of evidence, the Court of Appeal appears to be suggesting special rules may need to be considered for evidence of a cultural nature. Although the Court of Appeal in *Saxton* did not provide specific guidelines for the introduction, interpretation and application of cultural evidence, the implication of the rulings was that evidence of a cultural or customary nature do not fall neatly within the sphere of the Evidence Act 2006 and will therefore require a nuanced approach to recognise that evidence of a cultural nature will, for example, often require oral testimony, likely breach rules of hearsay, require oral evidence to be given by persons who may hold partisan views of a situation and, involve a customary factor that attaches to a small group of people.[255] As the Court of Appeal in *Saxton* noted, "in these circumstances, the weight and value of the testimony will need to be assessed carefully … and the judge will also need to be alert to the possibilities of lack of detachment, misinterpretation and misconception."[256]

Because cultural concepts are complex and multifaceted, their relevance and significance to the determination of substantive criminal law issues cannot be assumed but will require evidential

[248] *Saxton* (DC) (n 224) at [40], [48].
[249] *Saxton* (DC) (n 224) at [62], [286], [350].
[250] *Saxton* (DC) (n 224) at [35], [58], [48], [60] to [62], [69],
[251] *Saxton* (DC) (n 224) at [48].
[252] *Saxton* (CA) (n 189) at [77] to [94] per Robertson J.
[253] *Saxton* (CA) (n 189) at [92].
[254] *Saxton* (CA) (n 189) at [94].
[255] *Saxton* (CA) (n 189) at [92] to [94].
[256] *Saxton* (CA) (n 189) at [92] and [93].

substantiation. As illustrated above, the application of a judge's limited cultural perspective to a cultural factor with which there is inadequate cultural knowledge may result in decision-making that is culturally incongruous. On the other hand, the presentation of copious amounts of information or evidence as to culture will be ineffective unless there is a clear focus on addressing the connection between the cultural influences and the defendant's allegedly criminal actions.

3.6 The Relevance and Significance of Tikanga Māori within the Criminal Law

In discussion above, I have underscored the complexities faced by the courts in recognising culture and cultural factors within the criminal law. However, there is a developing appreciation by the courts that Māori tikanga (and cultural factors that are fundamental within other cultures) can be a relevant consideration in assessments of criminality and culpability. As my cultural audit of the criminal law (in Chapters Five and Six) will demonstrate, the range of cultural factors that are relevant within the criminal law is vast. I therefore limit the discussion here to the tikanga concept of mana and mana whenua to illustrate the various areas of the criminal law where such concepts will have relevance in the determination of substantive law issues. I progress the discussion in this section to highlighting the developing acceptance of cultural arguments by the courts to the determination of issues such as reasonableness, honest belief and colour of right.

3.6.1 The Relevance of Tikanga to Assessments of Reasonableness

Tikanga considerations will be relevant to assessments of reasonableness within the criminal law because cultural factors can provide, within the context of specific cultural settings, indicators of the rationale or motivation for a person's actions.[257] For example, a number of recent intertwined decisions focusing on the activities of persons associated with the Tuhoe iwi highlight the significance of the concept of mana and mana whenua to determinations regarding the reasonableness of the conduct of the various defendants and in determining whether police search and surveillance activities were reasonable.

The earliest of these cases is a prosecution for discharging a firearm in a public place in *R v Iti*.[258] Mr Iti was charged under s 51 of the Arms Act 1983 (the Arms Act) in relation to the possession and discharge of a firearm in a public place. It was not disputed by Mr Iti that he was in possession of a firearm and that he had discharged the firearm. The issue for determination by the court was whether the firearm was discharged in a public place and whether the discharging of the firearm was for a "lawful purpose". It was argued on Mr Iti's behalf that the discharge of the firearm was in the context of a cultural welcoming of the Waitangi Tribunal onto the marae in accordance with Tuhoe tikanga and that the atea (the place within the marae where the firearm was discharged) was not a public place.[259] Although the argument regarding whether the atea was a public place was rejected by the court,[260] there was some acceptance by the court that the discharging of the firearm in the context of

[257] I enlarge on this contention in Chapter Seven, part 7.4 and further in part 7.5.1.
[258] *Iti* (CA) (n 154).
[259] *Iti* (CA) (n 154) at [24] to [50].
[260] *Iti* (CA) (n 154) at [24] to [39].

the welcome to the Waitangi Tribunal was reasonable. The Court of Appeal acknowledged that the cultural evidence regarding Tuhoe tikanga had sufficiently "informed" the Court and clarified the reasonableness of Mr Iti's actions in discharging the firearm. The Court of Appeal reasoned that because Mr Iti's intent was to welcome the Waitangi Tribunal onto the marae in a culturally appropriate manner, the requirement (under s 48 of the Arms Act) that there be a "requisite harm" as a consequence of the discharge of the firearm could not therefore be established and the charges against Mr Iti must accordingly be dismissed. The Court of Appeal however issued a caution that this decision was decided on the basis of its unique setting where the prosecution had failed "for want of requisite proof" but was in no way to be regarded as encouraging the discharging of firearms in similar circumstances.[261] In a subsequent prosecution of various members of Tuhoe and their supporters regarding the possession of weapons in the case of *Iti and others v R*, the Court of Appeal recognised the relevance of mana whenua and mana motuhake contentions in clarifying the altruistic motivation of the defendants in possessing weapons.[262] Although the court found that such motivations could not excuse what had occurred in this case, it ruled that the cultural factors could be considered as mitigation in sentencing.

In subsequent prosecutions involving Mr Iti and persons associated with the Tuhoe iwi, mana whenua arguments were again advanced by the defence and acknowledged by the courts in providing guidance on assessing the reasonableness of police search and surveillance activities and the entitlement of the defendants to privacy. These cases are intertwined and arise from largely the same set of facts and circumstances where various members of Tuhoe and their supporters were prosecuted in relation to the possession of firearms and participating in terrorist activities. The issues before the courts largely focused on the admissibility of evidence from the search and surveillance activities of police and the entitlement of Tuhoe to undertake cultural activities on private property. The evidential considerations were undertaken in the High Court by Winkelmann J in *R v Bailey*,[263] with the issues tested through the Court of Appeal in *Iti and others v R*,[264] and to the Supreme Court in *Hamed v R*.[265]

In *R v Bailey*, mana whenua arguments were advanced to demonstrate the respondent's "reasonable expectations of privacy" and their entitlement to undertake activities on land that was owned on behalf of Tuhoe.[266] The lands on which the Tuhoe activities took place was Māori freehold land held by the Tuhoe-Waikaremoana Maori Trust Board (the Trust), but parts of the land were also subject to leases held by various entities for forestry purposes. There was accordingly some conflict between the

[261] *Iti* (CA) (n 154) at [65], [66].
[262] *Iti and others* (CA) (n 222).
[263] *Bailey* (HC) (n 222) re admissibility of evidence, per Winkelmann J.
[264] *Iti and others* (CA) (n 222).
[265] *Hamed* (SC) (n 190).
[266] *Bailey* (HC) (n 222) at [113]; [115]; [138]; [139]; [140]; [156]; [160]-[162].

mana whenua claims of the Tuhoe individuals involved, and the rights of the Trust and leaseholders of the land.

In the course of these hearings, the police asserted that Mr Iti and his associates were undertaking their activities without authority of the owners and therefore had no entitlement to privacy. The Court noted that some of the defendants were also beneficiaries of the Trust and although it was accepted that those with mana whenua no longer had rights of entry onto the land without the Trust's permission, Tuhoe would most likely be given special consideration because of their connections with the land.[267] Expert cultural evidence was given by Mr Tama Nikora (a Tuhoe Kaumatua) regarding the people who were entitled to exercise rights of mana whenua over the land. The court accepted Mr Nikora's evidence that "the class of those with mana whenua is wider than the class of owners (the Trust) or the registered beneficial owners" and Mr Iti was one of the people that held mana whenua over the subject lands.[268] Mr Temara gave evidence to the effect that those with mana whenua "are entitled to invite manuhiri onto the land, but … other manuhiri must announce their presence".[269] It was therefore contended by the Tuhoe experts that "those who attended camps in the Rangitihi area would then have had a subjective expectation of privacy".[270] The counter argument regarding the police search and surveillance activities was that, where the police search and seizure activities were beyond the scope of their warrants (or not on public property), then permission to enter Tuhoe land must be sought from the Trust or those who held mana whenua over the land. Because the police (as manuhiri) had not obtained the necessary permissions to enter certain Tuhoe lands, the police were therefore acting "unreasonably" in the gathering of evidence.

Because these proceedings then progressed through various appeals on numerous issues, definitive rulings were eventually made by the Supreme Court in *Hamed*. The Supreme Court in *Hamed* recognised that mana whenua over Tuhoe land was held by Mr Iti.[271] Further, the cultural evidence was a relevant consideration to determination of the issue of reasonableness of the police search and surveillance activities. If the entry of police onto Tuhoe land to install covert surveillance cameras was not authorised by the owners of the land or not within the scope of the issued warrants then any search or evidence arising from such activities must be regarded as unreasonable and therefore inadmissible as evidence.

[267] *Bailey* (HC) (n 222) at [156].
[268] *Bailey* (HC) (n 222) at [13], 139] and [161].
[269] *Bailey* (HC) (n 222) at [140].
[270] *Bailey* (HC) (n 222) at [162].
[271] *Hamed* (SC) (n 190) at [118] per Blanchard J.

3.6.2 Honest or Mistaken belief

The existence of cultural factors pertaining to a particular group or a collective understanding of a situation founded on an honestly held customary belief will, I suggest, be a relevant and significant consideration within criminal law. I demonstrate this by reference to the case of *Crockenberg and others v Police* where the defendants advanced mana whenua arguments in contending that their iwi, Ngāti Kahu, held Māori customary rights over the land on which the Kaitaia airport was situated, therefore, they could not be trespassing when entering the airport grounds.[272] Muir J found that the strong cultural connections that the Appellants had with the airport lands may have given rise to an honest belief in Ngāti Kahu's right to have the lands ultimately returned to them but it did not establish an honest belief in a legal right to interim occupation.[273] The court noted that because there was uncertainty as to the legal effect of a 1994 Cabinet Paper that purported to suggest that the airport land could be included in a pending settlement of the Muriwhenua claim (a wider claim that includes Ngāti Kahu) with the Waitangi Tribunal, it was possible that the Appellants had been acting under a mistaken belief as to the law.[274] Muir J was sympathetic to the notion that "tikanga Māori informs and influences the common law of New Zealand",[275] but ultimately held that a defence of honest belief could not be founded on the available facts and the convictions for trespass must therefore stand.[276]

3.6.3 Tikanga and Claim of Right

Cultural factors will also be a relevant consideration in assessing whether a claim of right defence can be substantiated. As noted by the High Court in *Brown and Edney v Police*, a belief arising from a colour of right must be genuinely held, it must be honest, and although it need not be reasonable, reasonableness may be relevant in determining whether the defendant's assertion of belief is credible.[277] If a defendant seeks to rely on a customary factor to establish a right, justification or excuse from the law, then he or she bears the onus of proving the existence of the claimed cultural factor.[278] Because a colour of right is entirely subjective, the sole question is therefore whether the belief was honestly held. As illustrated above, a defendant's understanding of tikanga or other cultural factors may give rise to a genuine belief that a legal right exists. Although the cultural claims raised in the cases discussed above have largely been rejected by the courts because of a lack of evidential support, I contend here that where the evidential hurdles can be overcome through the introduction of

[272] *Crockenberg* (HC) (n 239) per Muir J, at [2] and [4].
[273] *Crockenberg* (HC) (n 239) at [43].
[274] *Crockenberg* (HC) (n 239) at [46] to [48].
[275] Muir J referenced the comments of the Supreme Court in *Takamore* (SC) (130) at [164].
[276] *Crockenberg* (HC) (n 239) at [50].
[277] *Brown and Edney v Police* (1984) 1 CRNZ 576, at 578 (HC) per Henry J.
[278] *Knowles* (HC) (n 65) and affirmed in *Knowles* (CA) (n 65).

relevant and significant cultural evidence, then the courts will more likely give favourable consideration to the relevance of cultural factors to claim of right contentions.

These issues were considered by the Court of Appeal in *R v Saxton*.[279] The defendants in *Saxton* were charged with theft of pounamu (greenstone) and the issue of whether the defendants had an honest belief that they possessed a cultural right to remove pounamu owned by Ngai Tahu was extensively canvassed by the courts. In the District Court it was accepted that cultural factors could be a relevant consideration in the context of a claim of right defence and this was affirmed by the Court of Appeal.[280] In essence, the defendants (Appellants) claimed that they honestly believed that they had a customary right over the pounamu and therefore their removal of the pounamu did not amount to a theft from Ngai Tahu. The difficulties for the defendants in *Saxton* was that their claim of a cultural right was based on a tentative connection with Ngai Tahu through the defendant David Saxton's relationship (as a long-term partner) of Debbie Cain. Debbie Cain is the daughter of Cyril Cain and Cyril Cain, being a member of the local hapū, was accepted as possessing a customary right to "collection of pounamu up to what an individual can carry".[281] Cyril Cain's own evidence regarding his asserted right to take pounamu was not strong as various proposals for the removal of large quantities of pounamu had yet to be formally approved by Ngai Tahu.[282] The issue for determination by the court was whether the large quantities of pounamu removed by David Saxton and Morgan Saxton could be an extension of the limited right granted to Cyril Cain to remove small quantities of pounamu.

The colour of right claim by David Saxton and Morgan Saxton was rejected by the District Court (and affirmed by the Court of Appeal) because the defendants could not evidentially substantiate their cultural connection with TRONT (Ngai Tahu), the owners of the pounamu. Further, the removal of the pounamu was most likely for the personal advantage of the defendants rather than a collective cultural purpose for the benefit of the Ngai Tahu iwi. More importantly, however, is that the evidence adduced for the court's consideration clearly showed that David Saxton and Morgan Saxton did not have any reasonable cause to believe they possessed a cultural right to remove pounamu because they did not obtain formal approval from Ngai Tahu to remove the pounamu,[283] they employed extreme measures to hide the large quantities of pounamu,[284] their record keeping and financial accounts regarding the pounamu removed was "misleading and fallacious",[285] and instead of being confident

[279] *Saxton* (CA) (n 189) at [56] to [76].
[280] *Saxton* (DC) (n 224); *Saxton* (CA) (n 189) at [15] to [55].
[281] *Saxton* (CA) (n 189) at [72].
[282] *Saxton* (CA) (n 189) at [71].
[283] *Saxton* (CA) (n 189) at [63].
[284] *Saxton* (CA) (n 189) at [64] to [66].
[285] *Saxton* (CA) (n 189) at [67].

about the existence of their customary rights they were instead anxious about the police activities in investigating the thefts of pounamu.[286]

3.6.4 Mana and Mana Whenua

Tikanga concepts will also be relevant in the context of determining issues of criminal procedure. Various criminal law statutes such as the Sentencing Act 2002, the Bail Act 2000 and the Bill of Rights Act 1990 give general recognition to cultural factors without providing specific guidelines for the interpretation and application of culture within criminal law. While there is developing acknowledgement of specific tikanga concepts within the criminal law, their significance is muted, due in large part, to misunderstandings of the nature of the cultural claims and their conflict with wider aspects of the substantive law.

For example, in *Maori Trustee v Smith*, the Maori Trustee sought arrest orders (with the support of the police) to enforce an injunction that was granted by the Māori Land Court for the removal of the respondents from a property which the respondents had previously occupied subject to a licence to occupy but had since expired in 2014.[287] The expiry of the lease was confirmed by the Māori Land Court in a 2016 decision and the Māori Trustee was granted an order for the recovery of the land.[288] The respondents claimed that they possessed mana whenua over the subject property. However, the Māori Land Court ultimately rejected their claims on the basis that they held the property under a lease and the lease (which was administered by the Māori Trustee) was not renewed. Although there was a limited cultural background to the claim of mana whenua, the evidence before the Māori Land Court favoured the return of the land to the Māori Trustee to administer on behalf of the beneficiaries of a trust that included the Appellants. Ultimately, the mana whenua arguments raised by the Appellants in this case was rejected by the court due to the insufficiency of evidence in support of the cultural claim but more significantly, because the claimed mana whenua could not override the significance of the Māori Trustee's obligations to administer the land for the benefit of all of the beneficiaries.

[286] *Saxton* (CA) (n 189) at [68] to [69].
[287] *Māori Trustee v Smith* (HC) (n 242) per Grice J.
[288] *Māori Trustee v Smith* (MLC) (n 243).

Summary

Although the primary sources and influences for the development of New Zealand's criminal law emanate from the dominant Euro-Christian culture, New Zealand's criminal law is multi-faceted, complex and also incorporates cultural factors that are intrinsic to and fundamental to New Zealand's Indigenous Māori and other minority cultures. The principles and processes that underpin the concept of tikanga Māori are an important underlying feature of New Zealand's culture and its significance within various aspects of the criminal law cannot be ignored. The comprehensive incorporation of tikanga is a vital component in addressing Māori cultural dislocation in Aotearoa New Zealand. Although tikanga Māori was established to address offending by Māori within the context of the iwi or hāpu, tikanga processes and concepts feature prominently but inconsistently within New Zealand's substantive criminal law and criminal justice system. As demonstrated here, tikanga principles and practices are already a significant part of the culture of New Zealand's substantive criminal law.[289] In many respects, tikanga processes operate in conjunction with or supplement the application of the same principles (such as reciprocity, deterrence and punishment) and practices (such as, restorative justice) that are applied by the substantive criminal law. Their incorporation represents a powerful testimony for the adoption of an express definition of culture in the criminal law.

Far from being a monocultural legal system, I argue that New Zealand's criminal law is a confused mix of cultural factors. This confused mix of cultural factors is further complicated by the fact that there is limited acknowledgement of the relevance and significance of cultural factors within the criminal law. In instances where the criminal courts have been obliged to deal with cultural contentions, the court's approach to culture has been inconsistent and ad hoc, resulting in claims of unfairness and inequality of treatment. Although I have focused in the foregoing discussion on the societal, constitutional and legal obstacles that have hindered the acknowledgement of tikanga Māori within the criminal law, I argue that these impediments to the recognition of culture also operate to limit the acknowledgement of cultural factors that are significant to other cultures. For example, the impacts of cultural assimilation and urbanisation equally apply to the evolution and development of other cultures. Equally, other cultures will have similar values and traditions that are significant to their way of life but are concepts that are evidentially difficult to substantiate for the purposes of the criminal law.

In Chapters Five and Six, I undertake an audit of New Zealand's criminal law not only to emphasise the reality that New Zealand's criminal law is not monocultural but also to highlight deficiencies in the recognition of culture. These cultural deficiencies within the criminal law, I suggest, underscores

[289] Refer earlier discussion in part 3.2 and further discussion of the significance and relevance of tikanga concepts to assessments of reasonableness, mistake, claim of right, mana and mana whenua in part 3.6.

the need for a structured methodology in dealing with culture and cultural factors within the criminal law beyond the existing improvised and ad hoc approach. Before I undertake my cultural audit of New Zealand's criminal law, it will be necessary to define culture and cultural factors for the purposes of the criminal law.

Part Two: Defining Culture for the Criminal Law

Chapter Four:
Delineating Culture and Cultural Factors

A definition of culture is necessary for three principal reasons.

The first reason arises from the reality of New Zealand's changing demographics indicating an emerging diversity of ethnicities and cultures that is unparalleled. The statistical data highlighted in Chapter Two demonstrates that the growth of ethnic diversity in New Zealand is inevitable thereby necessitating an approach to the development of New Zealand's criminal law which is not dominated by the Euro-Christian perspective. The changing demographic structure of New Zealand's population is predicted to present significant changes to all facets of society including the provision of core state services. Along with challenges to the delivery of core societal concerns in education, health, welfare services and the construction of necessary infrastructure, the criminal justice system will also face increasing pressure to more effectively address the demands of cultural diversity that will be a superdiverse New Zealand.

Second, express recognition of culture in criminal law is required to bring together the currently disparate elements of culture in the criminal law of Aotearoa New Zealand. As illustrated in Chapter Three, the societal, constitutional, legal and jurisdictional challenges faced by Māori in seeking cultural recognition in criminal law mirror the cultural difficulties faced by other cultures. Addressing these issues, I argue, will require express recognition of culture by the substantive criminal law in the determination of criminality and culpability.

The third reason is illustrated through the development of New Zealand's substantive criminal laws in which cultural perspectives have been included, likely implicitly, in the framing of offences and defences. The criminal law, both legislatively and in case-law, grapples with culture every day, even if it seeks to deny it. Further, as illustrated, notions of culture are being applied by judges in the courts, albeit inconsistently and without guidance from a definition. As outlined, academic approaches to culture are varied and there is no easily discernible definition that can be called in aid by judges in their application of culture where it is deemed relevant to particular offences and defences. With no definition of culture, judges in particular are left prone to accusations of bias as recourse to cultural evidence can only be ad hoc. The inconsistencies and deficiencies in recognition of culture by the courts, I argue, will be an ever-increasing problem unless the courts and legislators adopt a clear definition of culture.

Having established the basis as to why a definition of culture is crucial, I examine here the essential characterisations of culture and isolate the common features of the definitions adopted within the recognised research and literature that are relevant within criminal law. I construct a definition of culture and cultural factors suitable for application within criminal law in two stages. First, I demarcate and eliminate those references to culture that, I argue, are not pertinent to the determination of criminality. Second, I isolate the elements of culture that will be relevant and significant to the determination of criminality and culpability within criminal law. In developing a workable definition of culture and cultural factors, my objective is to provide a clearer understanding of the relevance and significance of culture to the determination of criminality and culpability.

4.1 Characterising Culture

Before I embark on an analysis of the elements that must form the definition of culture for the requirements of the criminal law, I examine, by way of background, the origins and vast array of understandings and approaches to culture that, I contend, will have limited relevance for the purposes of the criminal law. I contend that these characterisations of culture, while in common usage, will not be relevant to the determination of criminality and culpability.

4.1.1 The Origins of Culture as a Concept

The term "culture" has ancient origins and was initially based on the Latin words "cultura",[1] "culturer", "colere"[2] and "culturare", which all refer to cultivation or the fostering of growth. Although the term "culture" as a reference to the maintenance of conditions for growth, or something which has been cultivated from such processes, has been utilised within the disciplines of science, the origins of culture as a reference to "other people" is uncertain. Almagor and Skinner have suggested that the Greeks were the first to use the word "barbarous" to refer to any group of people who spoke a different language and were therefore culturally different.[3] Other cultures later used the term barbarian or a variation of that term to refer to "other people". The Chinese used the word "Yi" when referring to a barbarian. The Japanese previously used the word "nanban" to refer to the people of South and Southeast Asia. However, Lindin notes the use of the term "nanban" was extended in 1543 to mean "Southern Barbarians" in referring to the Portuguese explorers, missionaries and merchants that arrived in Japan. The term nanban is no longer in common usage in Japan.[4]

The modern usage of the term "culture" within the English language was first articulated by English-speaking scholars in the late 1800s when Tylor referred to culture as "that complex whole which includes knowledge, belief, art, law, morals, custom and any other capabilities and habits acquired by man as a member of society".[5] Nineteenth century anthropologists, such as Tylor,[6] and Morgan,[7] compared Western cultures to indigenous populations from around the world (whom they referred to as "primitive", "barbarian" and "savage") and adopted the view that Western civilization was the

[1] Used by the Roman orator Cicero (about 45 BC) when referring to a cultivation of the soul as "cultura animi" in Marcus Tullius Cicero *Tusculan Disputations* (Dodo Press 2009) translated by C D Yonge.
[2] In Latin, meaning to "inhabit, care for, till or worship".
[3] Eran Almagor, Joseph Skinner (eds.) *Ancient Ethnography – New Approaches* (Bloomsbury 2013) at 29.
[4] Olof G Lidin *Tanegashima – The Arrival of Europe in Japan* (Nordic Institute of Asian Studies 2002) at 20.
[5] Edward Tylor *Primitive Culture* (1871) (Cambridge University Press digital version 2010) vol. 1 at 1 (accessed 10 November 2016) (1st published London 1871).
[6] Tylor (n 5).
[7] Lewis Henry Morgan *Ancient Society or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilisation* (First printed 1877) reproduced in 1985 from an edition published by Bharti Library, Booksellers and Publishers, Calcutta in 1944.

ultimate stage of development of a society. This approach towards other cultures was first labelled by Bulhan in the 1980s as "Eurocentrism" or "ethnocentricism" in referring to "Eurocentric" psychology which was derived from the values and norms of "a white, middle-class male minority".[8] Wallis has suggested that the concept of "eurocentrism" or "ethnocentricism" reflected an attitude or worldview that has spanned several hundred years where other cultures are compared negatively with, or regarded as inferior to, the pre-eminence of European culture.[9] As illustrated in Chapter Three, the predominant approach by European states, as was the case with Māori in Aotearoa New Zealand, was to acculturate and assimilate indigenous cultures into the cultural traditions of Europeans. Eurocentric theories promoting the superiority of European cultures and maligning the "primitiveness" of indigenous cultures are now largely regarded as obsolete.

In direct contrast with the Eurocentric approaches referred to above, more inclusive conceptions of culture are favoured, and the preservation of cultural, ethnic and religious rights are universally promoted by international human rights treaties, conventions and declarations. For example, art 27 of the ICCPR, provides that persons belonging to ethnic, religious and linguistic minorities are not to be denied the right to enjoy their culture, to practice their own religion and to use their own language.[10] Further, the UNDRIP promotes the protection of indigenous rights.[11] Although the ICCPR, UNDRIP and ICESCR [12] promote the preservation and protection of culture and cultural rights, these multilateral treaties do not specifically define culture but rely on "evolving interpretations" in international law and differing notions of culture adopted by academic disciplines.[13] The danger in applying an "evolving" interpretation of culture is that different interpretations may arise depending on how culture is characterised. As illustrated below, culture, in the modern world, is conceptualised and characterised in a variety of ways.

4.1.2 Conceptualising Culture within Different Academic Disciplines

Contemporary understandings of culture diverge immensely. This divergence of approach can be demonstrated by way of an examination of the differing understandings of culture within different academic disciplines. It is not within the scope of my research that an in-depth analysis of each approach to culture by the various academic disciplines be undertaken. It will suffice to note that an

[8] Hussein Abdilahi Bulhan in *Frantz Fanon and the Psychology of Oppression* (Springer US 1985).
[9] Refer Wilson D Wallis *Culture & Progress* (University of Chicago Press, 2007 reprint) at 15-21.
[10] *International Covenant on Civil and Political Rights* (came into force 23 March 1976).
[11] *United Nations Declaration on the Rights of Indigenous Peoples* (adopted by the General Assembly of the United Nations on 13 September 2007).
[12] *International Covenant on Economic, Social and Cultural Rights* (adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976).
[13] See for example, Marcella Ferri *The Recognition of the Right to Cultural Identity under (and beyond) International Human Rights Law* (2018) The Journal of Law, Social Justice and Global Development, issue 22, 1-26.

overview of the varying approaches to culture by different academic disciplines affirm a divergence in the research of culture and a contrast in perspectives adopted by each discipline towards culture. In researching culture, Baldwin et al concluded that different academic disciplines adopt varying understandings of culture and therefore approach research into culture from contrasting perspectives.[14] In acknowledging the existence of a multiplicity of definitions across various disciplines, significant insight into the nature of culture can be garnered in examining the work of leading scholars, many of which are in the field of social and cultural anthropology, psychology, sociology and within the field of cultural evolutionary theory.

Weston observed that for some commentators, the term culture is often used interchangeably with "customs", "traditions" and "cultural practices".[15] Donnelly suggests that other commentators extend use of the term culture to refer to the imposition of a religious perspective on a cultural grouping without clarifying the distinction (if any) between religious beliefs and culture.[16] Donnelly provides an example of this by reference to the condemnation of certain elements of African culture by the All Africa Council of Churches. For the purposes of this discussion, I focus on the use of the term "culture".

What was regarded as culture by anthropologists in the first half of the 20th century (when research was dominated by hypothesis centred on the distinction between primitive and civilised cultures)[17] has changed markedly in recent decades where the predominant focus has shifted to an examination of local cultures versus global cultures.[18] The former refers to the study of specific cultures and the latter is concerned with a universal human rights culture. Featherstone observes that global culture is widely regarded as a reflection of Western values.[19] This has developed into a significant body of discourse regarding the recognition of cultural rights and the comparative merits of cultural relativism and universalism.[20] Within these cultural distinctions has also developed the theories of collectivist and

[14] John Baldwin, Sandra Faulkner, Michael Hecht, Sheryl Lindsley *Redefining Culture: Perspectives Across Disciplines* (Lawrence, Erlbaum Associates Publishers 2006), Part II, 77-127.
[15] Burns H Weston *The Universality of Human Rights in a Multicultured World* at 39-53 in Richard Pierre Claude, Burns H Weston (eds.) *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press 2006).
[16] Jack Donnelly *Cultural Relativism and Universal Human Rights* (1984) Human Rights Quarterly, vol. 6, no. 4, 400-419 at 412.
[17] Franz Boas *Race, Language and Culture* (The Free Press, New York 1940); Margaret Mead *Coming of Age in Samoa* (New American Library 1949); Ruth Benedict *The Chrysanthemum and the Sword: Patterns of Japanese Culture* (Charles E Tuttle Co. 1954) and Ruth Benedict *Patterns of Culture* (Houghton Miflin Co. 1934)
[18] Refer for example, Weston (n 15) and Donnelly (n 16).
[19] Mike Featherstone *Global Culture: Nationalism, Globalization and Modernity* (Sage, London 1990). Also, Nicholas Loubere *Is China Conforming to a Westernized Global Culture? An Assimilation Theory Analysis of Chinese-Western Cultural Relations* (2010) Graduate Journal of Asia-Pacific Studies 7:1, 70-83
[20] This discourse is perhaps best demonstrated by reference to the arguments and counter-arguments proffered by Donnelly and Goodhart. Refer Jack Donnelly *The Relative Universality of Human Rights* (2007) Human Rights Quarterly, vol. 29, no. 2, 281-306 and Jack Donnelly *Human Rights: Both Universal and Relative (A Reply to Goodhart)* (2008) Human Rights Quarterly, vol. 30, no. 1, 194-204. Also see Michael Goodhart

individualist cultural orientations.[21] Triandis distinguishes between the individualist cultures where social behaviour is largely determined by personal goals and individual attitudes and values, while in collectivist cultures social behaviour is largely determined by goals, attitudes and values that are shared by the collective (societies, communities or groups).[22]

The Society for American Archaeology has stated that the objective of archaeology is to aid the understanding of, not only where and when people lived, but also why and how they lived.[23] Binford observed that archaeologists study ancient cultures and the artefacts they unearth reflect past cultural knowledge, skills and practices.[24] Binford therefore suggests that archaeologists favour the view of culture as a:[25]

> partitive concept … a historically derived system of culture traits which is more or less a separable and cohesive segment of the whole that is culture … [and] is shared by … designated individuals or … a group or society.

Spillman observed that the systematic analysis of culture through examination of the elements which symbolise and define culture is often referred to as the sociology of culture.[26] Gephart (in providing his perspective on the writings of Max Webber) suggests that there is a clear distinction between a legal and sociological approach to culture where the legal culture of a society is reflected in its substantive laws and the sociological approach to culture requires the determination of the "validity" or the role that the legal rules play in people's lives.[27] In advancing Sociology as an avenue whereby an understanding of the various elements of culture can be achieved, Swidler suggests that Sociologists therefore tend to view culture as:[28]

Neither Relative nor Universal: A Response to Donnelly (2008) Human Rights Quarterly, vol. 30, no.1, 183-193.

[21] Harry Triandis *Collectivism v Individualism: A Reconceptualization of a Basic Concept in Cross-Cultural Social Psychology* at 60-95 in Gajendra K Verma and Christopher Bagley (eds.) *Cross Cultural Studies of Personality, Attitudes and Cognition* (Palgrave MacMillan UK 1988). Also see Geert Hofstede *Culture's Consequences: Comparing Values, Behaviours, Institutions and Organisations Across Nations* (Second Edition, Thousand Oaks Sage Publications 2001) at 209-21, 225-273.

[22] Refer Triandis (n 21) at 65-72. Also refer discussion in Chapter Five (5.2).

[23] Refer Society for American Archaeology *What is Archaeology?* (Available at http;//www.saa.org/for the Public/Resources/ForEducator/pdf) last accessed 3 March 2016. Also, see Alfred Louis Kroeber, Clyde Kluckhohn *Culture: A critical review of concepts and definitions* (1952) Peabody Museum of Archaeology and Ethnology, Harvard University, vol. 47, no. 1, vii, at 223; Cornelius Holtorf *Archaeology is a Brand: The Meaning of Archaeology in Contemporary Popular Culture* (Routledge, Taylor & Francis Group 2007)

[24] Lewis R Binford *Archaeological Systematics and the Study of Culture Process* (1965) American Antiquity, Vol. 31, No. 2, Part 1, at 203-210.

[25] Refer Binford (n 24).

[26] Lynette Spillman (ed.) *Cultural Sociology* (Wiley-Blackman 2002).

[27] Werner Gephart *Law, Culture and Society: Max Weber's Comparative Cultural Sociology of Law* (Vittorio Klosterman Publishers 2015), (translated from German by Johannes Nanz), Chapter Two, 39-52 at 48-49. Also see Roger Cotterrell *Law, Culture and Society: Legal ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) at 15-28.

[28] Ann Swidler *Culture in Action: Symbols and Strategies* (1986) American Sociological Review, vol. 51, 273-286 at 273.

> the publicly available symbolic forms through which people experience and express meaning [as a vehicle that includes] … beliefs, ritual practices, art forms, and ceremonies, as well as informal cultural practices such as language, gossip, stories and rituals of daily life.

Boas, Meads and Benedict suggest that the study of culture from an anthropologist's perspective focus on cultural variations and in many respects, was a response to the ethnocentric theories of the 19th century espoused by Tylor and Morgan.[29] Hudelson observed that anthropologists studied cultures with a view to understanding the behaviour of cultural groups, how they functioned as a society and how they were able to preserve and perpetuate their culture.[30] Hudelson therefore argued that anthropologists were inclined to define culture as:[31]

> the shared set of (implicit and explicit) values, ideas, concepts and rules of behaviour that allow a social group to function and perpetuate itself.

In research by Kluckhohn and Kroeber, the authors found that there were 164 different definitions of "culture".[32] In examining the nature of these definitions, commencing with Tylor's 1871 delineation of culture (referred to above), Kluckhohn and Kroeber analysed each definition on the basis of their descriptive, historical, normative, psychological, structural and genetic characteristics;[33] and concluded that the general features of the definitions analysed were integration within a community, their historical development, uniformities, causalities, values and relativity.[34] In more recent research, Peoples and Bailey observe that the definitions of culture, although numerous, possess various key characteristics, namely, that culture is socially learned, widely shared, symbolic (in that it represents differences in ways of thinking and behaving) and is essential in "completing the psychological and social development of individuals".[35]

Despite the variability of academic approaches to culture, I acknowledge that the features of culture common to academic approaches highlighted by Peoples and Bailey will aid the construction of a definition of culture for the criminal law. I allude to the significance of these shared characteristics of culture in part 4.2 below.

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[29] Refer Boas (n 17), Mead (n 17), Benedict (1954) (n 17).
[30] Patricia Hudelson *Culture and Quality: An Anthropological Perspective* (2004) International Journal for Quality in Health Care, Vol. 16, No. 5, at 345-346. Also refer James Peoples, Garrick Bailey *Humanity: An Introduction to Cultural Anthropology* (Cengage Learning 10th edition 2015) at 23-30
[31] Hudelson (n 30) at 345-346.
[32] Kroeber, Kluckhohn (n 23) vol. 47, no. 1, vii, at Part II, 41-78 and 149.
[33] Kroeber, Kluckhohn (n 23) at 41-70.
[34] Kroeber, Kluckhohn (n 23) at 159-174.
[35] Peoples, Bailey (n 30) at 21-23.

4.1.3 The Tangible Aspects of Culture

References to culture in the modern world are innumerable and various understandings of culture have been applied to a variety of suppositions when referring to the arts, architecture, literature, high culture and modern culture. The term ‘culture” has also been used as a reference to many aspects of everyday life such as work culture, office culture, sports culture, pop culture and social media culture.

Kroeber and Kluckhohn observe that “culture”, as a concept, is extremely difficult to define and note the reasons for this vary, but predominantly arise from the reality that in many respects culture is a dynamic and abstract concept when referring to intangible factors such as ideas, beliefs, values and norms that are attached to specific cultures.[36] Elder,[37] and Peoples and Bailey,[38] have also observed that culture represents a reference to tangible symbols of a culture through, for example, language, dance, music, traditional practices, ways of living and marital and religious practices. In isolating the factors relevant to constructing a definition of culture in criminal law, I suggest, that the distinction between tangible and intangible factors of a culture will be significant.

I acknowledge that the tangible aspects of a culture may be relevant to the initial stages of the relevance of culture framework that is advocated by my thesis (refer discussion in Chapter Seven, part 7.1) where there may be a need to clarify the viability of a culture. In that regard, the tangible aspects of a culture such as language, dress, dance, and traditional cuisine may assist with the inquiry into the validity of the claimed culture. Although, the tangible aspects of culture are relevant to identifying both the existence of a culture and an individual’s connections to that culture, I suggest that the physical features of a culture will not be relevant to nor admissible as an aspect of substantive criminal law (for example in clarifying the defendant’s *mens rea*) or as an element of a defence. As illustrated below in part 4.2.1, a vast array of factors, tangible and intangible, go to affirming the viability of a culture.

For example, an “outward” indicator of culture is language (sign, spoken or written). In recent times, the preservation of indigenous and other minority languages has been at the forefront of endeavours to preserve culture.[39] For example, in New Zealand, the Māori Language Act 1987 represented a significant step towards the revival and preservation of Māori culture through the promotion of “te

[36] Refer Kroeber, Kluckhohn (n 23). Also see Melvin Herskovits *Cultural Anthropology* (Knopf, New York 1955). Also, see Harry C Triandis, Eunkook M Suh *Cultural Influences on Personality* (2002) Annual Review of Psychology, vol. 53, 133-160 where the authors review some definitions of culture.
[37] Jack David Elder *Cultural Anthropology* (Routledge, Taylor & Francis Group 2015) at 27. Also see Herskovits (n 36) and Triandis, Suh (n 36) at 133-160
[38] Peoples, Bailey (n 30) at 30-37.
[39] William Balée *Inside Cultures: An Introduction to Cultural Anthropology* (Left Coast Press 2012) at 44-48 regarding the cultural capacity for language.

reo" (the Māori language). This recognition of an aspect of Māori culture has been enhanced further by the Māori Language Act 2016 in affirming the Māori language as the indigenous language of New Zealand and affording it the status of one of New Zealand's official languages. Although language is a fundamental aspect of a culture, its relevance as a factor which influences criminal behaviour will be negligible and therefore will have limited or no bearing on a definition of culture for application within the substantive criminal law.

Cultural factors such as an individual's language, art, food, living arrangements and other physical manifestations of a culture, I suggest, will be relatively straightforward to identify by way of cultural evidence but, more importantly, will have limited direct impact on an individual's cognitive processes. Accordingly, I contend that a definition of culture for the purposes of the criminal law will not require a reference to these physical representations of culture.

Because the focus of my definition will be on those cultural factors that impact a person's cognitive processes and therefore the rationale or motivations for allegedly criminal behaviour, I exclude from the definition of culture any references to high culture (for example, art, literature, architecture, opera), popular culture (books, films, wine culture, pop culture, celebrity culture) and any "manifestations of human intellectual achievement"[40] (for example, "internet culture", "social media culture", "sporting cultures"). Any references to culture in the agricultural or biological sense will have no relevance within criminal justice processes. I also suggest that the references to certain tangible "symbols" of culture such as dance, music and traditional foods will have no bearing on the requirements of a definition of culture for the purposes of the criminal law.

4.1.4 Notions and Comprehensions of Culture in Law

A difficulty in formulating the parameters of what is to be regarded as culture for the purposes of the criminal law arises from the accumulation of numerous references to a "type" of culture that has infiltrated the vernacular of New Zealand's courts. A consequence of the varying characterisations of "culture" discussed above is that a multitude of different uses are then applied to the understanding of culture. Without setting precise guidelines as to what is to be regarded as culture, the New Zealand courts have variously referred to and used the term culture in describing a variety of general references such as the "freedom of information culture" in *Rogers v TVNZ*;[41] a "culture of justification" in *Brooker v Police*;[42] a "gang culture" in *Pekepo v R*,[43] and *R v Wallace and others*;[44] a

[40] This is the alternative definition of culture used by Catherine Soanes, Angus Stevenson (Eds.) *Concise Oxford Dictionary* (11th Edition, Oxford University Press 2006)
[41] *Rogers v TVNZ* [2008] 2 NZLR 277 (SC) at [67].
[42] *Brooker v Police* [2007] 3 NZLR 91 (SC) at [210].
[43] *Tauvira v R* [2016] NZCA 559 at [35]; *Pekepo v R* [2011] NZCA 305 at [46].

"culture of transparency" in *Hosking v Runting*;[45] a "jail culture" in *R v Winterburn*;[46] "a culture of concealment" within a company in *R v Sullivan*;[47] a "culture of violence" and "army culture" in *AB v Attorney General*;[48] and a "Navy culture" in *P v Attorney General*.[49] Despite the myriad of widely accepted conceptions of culture, these approaches to culture will not be relevant to or able to be utilised within the substantive aspects of the criminal law.

As illustrated earlier, the New Zealand courts have applied the concept of culture in an ad hoc and inconstant fashion where the term "culture" has been used liberally to signify a common practice or course of conduct by a group of people (whose membership or connections with the group is unclear) and within a specific setting or environment. These uses of culture are descriptive of behaviour which can be attributed to or are recognised practices within a specific group or section of a society, will involve the use of some specialised skill, and arguably, are practices and behaviour that are transferred between individuals and groups. Some of the general references to culture by the courts are not necessarily enduring or able to be transmitted inter-generationally and will be descriptive of a common practice yet will be insufficient to support a contention regarding a defendant's subjective motivations or rationale for their behaviour.

In the cases referred to above, the references to "culture" by the courts are made without proper evidential support for the claimed cultural factor thereby diminishing their value to the issues to be determined by the courts. In most of the examples noted above, the use of the term "culture" may have some limited application during the procedural and sentencing aspects of criminal justice processes but will not be relevant or sufficiently probative for use within the substantive aspects of offences and defences. In the cases referred to above (where the court has referred to a "type" of culture to explain the nature of the participant's conduct), the concept of culture was not influential in the final determinations by the court. The defect in this inconsistent approach to culture is that there are no established rules for interpreting and applying culture within substantive criminal law.

Although these references to culture have been employed within the context of court proceedings, I suggest that these characterisations of "culture" do not assist in developing a framework for the recognition of cultural factors within criminal law. The difficulties which arise from references to innumerable types of culture and the breadth of uses for the term "culture" is that in many respects the meaning of a term which appears to have boundless applications is then clouded in uncertainty. An

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[44] *R v Wallace and others* (2009) HC.
[45] *Hosking v Runting* [2005] 1 NZLR 1 at [75].
[46] *R v Winterburn* (1998) CA 30/98 "just a jail thing" at 4.
[47] *R v Sullivan* [2014] NZHC 2501 at [7].
[48] *AB v Attorney-General* (2011) HC Wellington, CIV 2006-485-2304 per Joseph Williams J at [27].
[49] *P v Attorney-General* (2010) HC Wellington, CIV 2006-485-874, 16 June 2010, per Mallon J at [75].

example of this confusion can be seen where medical considerations have been labelled as "cultural" by the High Court in *R v Jones and Iti*.[50] In *Jones and Iti*, Duffy J referred to Ms Iti's medical diagnosis of being "currently stressed and suffering depression" as characterising one of "the social and cultural factors relevant to sentencing".[51] Although this mislabelling of cultural factors was not significant to the overall sentencing, it nevertheless demonstrates misunderstandings as to what is regarded as cultural within criminal law. The influencing factor that was most relevant to the offending in *Jones and Iti* was referred to by the sentencing judge as "a lifestyle that involved drinking, clubbing and casual sex, even group sex"[52] but this factor was not characterised as cultural.[53] The facts of this case established that this "lifestyle" was indeed cultural as it was a regular "night-clubbing" routine that was characteristic to both the defendants and the victims. Accordingly, I argue that the level of culpability of the respective defendant's must be assessed within the context of this "lifestyle" or cultural factor.

The significance of the cultural considerations in *Jones and Iti* is that it allowed the sentencing judge (and later the Court of Appeal) to clearly set the parameters for assessing the level of premeditation involved in the offending and in determining the point where consent to sexual activity was revoked or terminated. Although the High Court recognised this factor in sentencing, the judge assessed the lifestyle factor as neutral, whereas, in acknowledging the "lifestyle" factor as relevant to culpability, the Court of Appeal assessed this factor as aggravating and therefore allowed the Solicitor-General's appeal in increasing the terms of imprisonment for the Appellants.[54] *Jones and Iti* therefore demonstrates that although the courts do not specifically acknowledge a factor relevant to offending is cultural, such factors are nevertheless applied by the courts in assessing criminality and culpability.

As illustrated, various aspects of culture referred to above serve the purpose of identifying a culture, the cultural features of a specific culture and the traditions that are intrinsic to a particular culture. However, not all of these conceptions of culture will be relevant to assessments of criminality and culpability. A definition of culture and cultural factors for the purposes of the criminal law must, I argue, provide adequate guidance on the values, morals, norms, social, cultural expectations and other imperatives of a culture that impact an individual's rationalisation processes and therefore his or her behaviour. It is the impact of cultural factors on the cognitive (subjective) processes of an individual and therefore the rationale or motivations for potentially criminal behaviour that will move a court from having identified the existence of a culture in terms of any definition to deciding issues of

[50] *R v Jones and Iti* (2011) HC Hamilton, CRI 2010-019-000993, 20 May 2011.
[51] *Jones and Iti* (HC) (n 50) at [70].
[52] *Jones and Iti* (HC) (n 50) at [24], [25] and [26].
[53] Also refer *Solicitor-General v Iti and Jones* [2012] NZCA 27 (CA) at [5] and [6].
[54] *Jones and Iti* (CA) (n 53) at [54] and [55].

relevance and admissibility of components of a specific culture in the context of a particular determination to be made.

4.2 Constructing a Definition of "Culture" for the Criminal Law

In highlighting the cultural deficiencies that permeate the criminal law through my cultural audit (Chapters Five and Six below), the irregularities arising from the criminalisation of culture (Chapter Six) and the significance of culturally-derived emotions to the determination of criminality and culpability (Chapter Seven), it is possible to glean an understanding of the key attributes of culture that are relevant to the criminal law. Having illustrated in part 4.1 above the complex and widely contrasting characterisations of culture, I isolate in the following section, those elements that, I contend, are relevant to the construction of a definition of culture for the purposes of the criminal law.

Any methodology directed towards more meaningful recognition of culture within the substantive aspects of the criminal law must provide a clear definition of "culture" and "cultural factors". These definitions, I argue, will inform participants within criminal justice processes of the relevance of culture to the substantive aspects of offences and defences, promote a uniform approach to the recognition of culture in substantiating cultural contentions (by counsel or defendants), standardise judicial expectations regarding the nature and scope of admissible cultural evidence and to promote consistency in determination of cultural contentions by the criminal courts. The explicit acknowledgement of "cultural factors" within substantive criminal laws must therefore utilise language which will clearly define the nature of a culture and cultural factors.

As illustrated in part 4.1 above, the conceptions and characterisations of culture are vast and complex. Peoples and Bailey,[55] and Baleé,[56] suggest that "culture" as a concept, is too difficult to define due to its abstract nature and the complexities involved in forming a definition. However, care must be taken to remain true to the purpose for which this exercise is undertaken. The definition of culture I develop here is for the purposes of the substantive criminal law (offences and defences) from which will flow rules and principles for the application of culture and the recognition of cultural factors. Only those aspects of culture that are relevant to the forming of the *mens rea* element of offences or defences is of importance to this exercise. Drafting a definition of culture is therefore not for general purposes, whether academic, social or political. I charter a course through the various characterisations of culture with the objective of constructing a definition of culture and cultural factors which will support the contentions of my research.

I argue that a definition of culture for application within the criminal law must; first, affirm the existence of the claimed culture as a viable ethnic, cultural or national group where the cultural factors have been transmitted across society and passed on intergenerationally; second, refer to a clearly

[55] Peoples, Bailey (n 30) at 20-45.
[56] Also see Balée (n 39) at 69-90.

defined set of customs, ideas, values and norms (cultural factors); and third, that the defendant's actions were motivated (provoked, driven or stimulated) by the claimed culture and cultural factors. I analyse these elements of a definition of culture by first clarifying the significance of delineating the viability of a culture. I then enlarge upon my contentions as to why there must be a reference in my definition to; first, the need to recognise the distinction between ethnic and national cultures; second, why a specific reference to certain aspects of culture such as "sub-cultures" is not necessary; third, the need for an express reference to the intangible factors; and finally the requirement that the defendant's actions were induced by valid cultural factors.

4.2.1 The "Viability" of a Culture

Clear parameters as to whether a culture exists, I suggest, requires that a culture is sufficiently viable. Because my contention is that the claimed culture and associated cultural factors must have influenced or motivated the defendant's behaviour; a definition of culture ought to also clarify the "viability" or validity of a culture to which the defendant claims association. As illustrated in Chapter Seven, it is imperative that the asserted culture is valid, and the claimed cultural factor can be demonstrated to have influenced the defendant's behaviour.

My use of the term "viable" in the context of a culture, is a reference to being formally or legally recognised (whether internationally or domestically) as a separate culture or cultural grouping. I adopt the use of the term "viable" in line with its application by the Court of Appeal in *Mason v R*, in meaning something that is in existence, is operative and has validity.[57] This was also the approach taken by the Court of Appeal in *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission*.[58] The shared, enduring, established and transferable features of cultures, I suggest, affirms the requirement that a culture must be "viable". A court (or a Judge who has sufficiently probative knowledge of a particular culture) may take judicial notice of a well-known culture; however, situations will arise where evidence will be required to substantiate the existence of lesser-known cultures. For example, in countries such as Papua New Guinea (where approximately 886 different cultures exist),[59] and Vanuatu (where there are around 111 recognised separate cultures),[60] evidence will be required to substantiate the existence of a specific culture, the nature and impact of the asserted cultural factors and the connections a defendant has with a specific culture. I suggest that

[57] *Mason v R* [2013] NZCA 310 at [41] per Ellen France J.
[58] *Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 at [69] per Thomas J.
[59] The Joshua Project notes that there are 886 "People Groups" in Papua New Guinea (Refer hhttps://joshuaproject.net/countries/PP (Papua New Guinea).
[60] The Joshua Project notes that there are 111 "People Groups" and as many languages spoken in Vanuatu (Refer hhttps://joshuaproject.net/countries/PP (Vanuatu).

the viability of a culture will be vital when assessments are made regarding the significance of a cultural influence to a defendant's behaviour.

As illustrated above in part 4.1.2, despite the variability of characterisations and understandings of culture, some features that are common to these understandings of culture can be isolated. I note these commonalities are that cultures are continually evolving; they are a complex integration of cultural factors; cultures are a shared concept; cultural factors are socially learned and the factors that flow from a culture are transmitted inter-generationally. In examining these inter-related characteristics of culture, I argue that, in combination, these factors affirm the viability of a culture.

(a) Cultures are Continually Evolving

Cultural evolutionary theorists from Darwin,[61] through to more recent researchers such as Cavalli-Sforza et al,[62] contend that an essential understanding of culture is that it is "multi-dimensional" and "continually evolving". Lenzerine suggests that the dynamic nature of culture is complex and also incorporates a reference to the concept of intangible cultural heritage comprising immaterial (non-physical) manifestations of culture.[63] In researching the evolution of the relationship between New Zealand Māori and Pakehā, Lo and Houkamau observed that both cultures evolved, in part, as a consequence of their interactions with each other and therefore concluded that their respective cultures are conceptually elastic and capable of perpetual change.[64] Lo and Houkamau therefore conclude that because a society develops in line with changes in its environmental, political, social, historical, or economic factors; there will also be changes to cultural values, norms and societal expectations.[65]

Because historical factors such as the colonisation of developing nations by the European States,[66] the effects of globalisation,[67] enhancements in communication and other modern technological advances

[61] Charles Darwin *The Origin of Species* (1859) electronic resource edited by Morse Peckham (University of Pennsylvania Press 2006).
[62] Luigi Luca Cavalli-Sforza, Marcus W Feldman *Cultural Transmission and Evolution: A Quantitative Approach* (Princeton University Press 1981).
[63] See a discussion of the concept of ICH by Federico Lenzerini *Intangible Cultural Heritage: The Living Culture of Peoples* (2011) European Journal of International Law, vol. 22, no. 1, 101-120.
[64] See Kevin D Lo and Carla Houkamau *Exploring the Cultural Origins of Differences in Time Orientation between European New Zealanders and Māori* (2012) New Zealand Journal of Human Rights, vol. 12, issue 3 at 105-123. Also, see Lesley Newson, Peter Richerson, Robert Boyd *Cultural Evolution and the Shaping of Cultural Diversity* Part IV, chapter 18 at 454-476 in Shimotu Kitayama and Dov Cohen (eds.) *Handbook of Cultural Psychology* (The Guildford Press 2010).
[65] Refer Lo, Houkamau (n 64).
[66] Refer Benedict Stuchtey *Colonialism and Imperialism 1450-1950* (European History Online 2011) (available at http://ieg-ego.eu/en/threads/backgrounds/colonialism-and-imperialism - accessed 20 June 2016). Also, see Gareth Knapman *Race and British Colonialism in South-east Asia 1770-1870 – John Crawfurd and the Politics of Equality* (Routledge, Taylor and Francis 2016).

have so profoundly impacted the evolution of cultures, the concept of "culture" cannot therefore be confined by geographical, religious, political or ideological boundaries. For example, in the context of religious impacts, Hellyer contends that no state is completely devoid of religious diversity and therefore the impacts of religious diversity must be accounted for when assessing the nature and scope of a society's cultural factors.[68] Similarly, in the context of political considerations, Templeman argues that cultural diversity is a "permanent and valuable part of political societies" and therefore impact societies in different ways.[69] I suggest that any conception of culture must therefore recognise that cultures are not static concepts but continuously evolve as a consequence of the various factors that impact a particular society.

(b) Culture as a Complex Integration of Cultural Factors

Cultures, I suggest, can also be regarded as "integrated". The crux of this aspect of culture is that it represents the culmination or collection of the contributions made by individuals and sub-groups to the wider cultural grouping. As noted by Tylor, culture is a "complex whole" composed of many parts.[70] A culture therefore represents an amalgamation of the tangible and intangible contributions of its members, environmental, religious, political, social and other influences on the development of the culture as a whole. Elder suggests that culture is adaptive and recognises the flexibility of the human nature.[71] Therefore, he argues, humans adapt themselves to their environment or adapt their environment to themselves.[72] Matsumoto also recognises the significance of environmental factors in the development of cultures and asserts that the social interaction which takes place within a cultural grouping occurs because humans are social animals and therefore take advantage of the power of the group in solving the problems posed by their environment.[73] The solutions to a society's environmental and social problems, Matsumoto posits, represents the basis of the group's culture. Matsumoto therefore argues that the behaviour of individuals is profoundly influenced by their culture and the basic human need to meet the needs of their environment. This, Matsumoto contends,

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[67] Refer Roland Robertson, Kathleen E White *What is Globalization?* at 54-66 in George Ritzer (ed.) *The Blackwell Companion to Globalization* (Blackwell Publishing Ltd 2007). Also see Harry Blutstein *The Ascent of Globalisation* (Manchester University Press 2016) and Mohammed A Bamyeh *The Ends of Globalization* (University of Minnesota Press 2000).
[68] See H A Hellyer *Muslims and Multiculturalism in the European Union* (2006) Journal of Muslim Minority Affairs, vol. 3, 329-351 at 330.
[69] Sasja Templeman *Constructions of cultural Identity: Multiculturalism and Exclusion* (1999) Political Studies, vol. 1 at 17.
[70] Tylor (n 5).
[71] Elder (n 37)
[72] Elder (n 37) at 26-29.
[73] David Matsumoto *Culture, Context, and Behaviour* (2007) Journal of Personality, vol. 75, issue 6 at 1235-1319.

provides an explanation for the differences in the way people think and behave between human societies and cultural groupings.[74] Matsumoto therefore views culture as the:[75]

> set of ways that emerges when a group uses the basic tools inherent in its members to address the problems presented by the larger ecological context in which the group exists in order to meet biological needs and social motives … a solution to the problem of how to survive, given the problems in the environment, the physical and social needs that must be addressed, and the tools available.

(c) Culture as a Shared Concept

Various commentators such as Peoples and Bailey,[76] and Elder,[77] suggest that an essential element of culture is the understanding that it is shared. Peoples and Bailey refer to "culture as a collective phenomenon" which requires sharing, by a group of people, of a set of practices, a body of knowledge and range of skills which can be transferred from one generation to another or between cultural groupings.[78] Matsumoto also describes culture "as a shared system of socially transmitted behaviour that describes, defines and guides people's ways of life and may be passed on from one generation to another".[79] The significance of this characterisation of culture, I suggest, is its acknowledgement of the transference "from one generation to another". The reference to transference inter-generationally, I suggest, presupposes that a culture is enduring and perpetuated through the transmission of culture. Whether a culture is enduring and perpetuated over several generations, I suggest, is indicative of a culture that is viable, sustainable and functional. These qualities (as with the others discussed here), I argue, contribute to the plausibility and credibility of a culture's values, beliefs and norms in influencing the behaviour of individuals that are aligned with its cultural grouping.

Elder observed that the anthropological view of culture is that it is a system of shared beliefs, values, customs, behaviours and artefacts that members of a society use to cope with their world and with one another, and are transmitted from generation to generation through learning.[80] The explanations for this sharing of cultural information is referred to by Aunger as the exchange of information through "social learning".[81] Lyman and O'Brien contend that this concept of cultural learning was advocated

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[74] Matsumoto (n 73).
[75] Matsumoto (n 73) at 1291
[76] Peoples, Bailey (n 30) at 23-29.
[77] Elder (n 37) at 22.
[78] Peoples, Bailey (n 30) at 23.
[79] David Matsumoto, Hwang Hyi Sung *Cultural Influences on Nonverbal Behaviour* at 97-120 in David Matsumoto, Mark Frank, Hwang Hyi Sung (eds.) *Nonverbal Communication: Science and Applications* (Thousand Oaks California 2013). Also, see for further reading David Matsumoto *Culture and Nonverbal Behaviour* Chapter 12, 219-237 in Valarie Manusov, Miles Patterson *The Sage Handbook of Nonverbal Communication* (Sage Publications 2006). Also, Matsumoto (n 73) at 1286-1317.
[80] Elder (n 37).
[81] Robert Aunger *The Life History of Culture Learning in a Face-to-Face Society* (2000) Ethos, vol. 28, no. 3, 445-481 at 451-466.

by various anthropologists from Boas and his supporters to more recent cultural theorists.[82] Kroeber also focused on social learning in defining culture as:[83]

> the mass of learned and transmitted motor reactions, habits, techniques, ideas and values … and the behaviour they induce.

Boas emphasised the social aspects of culture and the interactions within a cultural grouping in defining culture as: [84]

> the totality of the mental and physical reactions and activities that characterize the behaviour of the individuals comprising a social group collectively and individually in relation to their natural environment, to other groups, to members of the group itself and of each individual to himself.

The consensus among the various characterisations of culture considered here, is that there is an inevitable aspect of sharing of cultural information within a cultural grouping. This, however, overlooks the reality that the transmission of cultural information within a society is a limitation which does not fit with modern societies where people are able to move more readily between territorial borders, the ease of travel between countries, the speed and variety in modes of communication and the many technological advances in the modern world that promote the exchange of information. Accordingly, I suggest, that a definition of culture must also have regard to the transference of cultural influences both within and outside of a society, the assimilation of individuals into more than one culture and the obsolescence of some cultures. The impacts of environmental factors, as can be seen with the consequences of climate change on the inhabitants of Kiribati[85] and through the loss of cultural lands that have impacted the lives of tribes in Brazil,[86] blatantly illustrate how cultures can be lost. Cultures may be lost, or cultural influences diminished due to the concepts of globalisation, assimilation and acculturation.[87] As Chounaid has noted, some ethnic groups (referred to as fourth world nations) have been disenfranchised of their lands and culture and do not

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[82] R Lee Lyman, Michael J O'Brien *Cultural Trait: Units of Analysis in Early Twentieth-Century Anthropology* (2003) Journal of Anthropological Research, vol. 59, no. 2, 225-250, at 227-242.
[83] Arthur L Kroeber *Anthropology: Race, Language, Culture, Psychology, Prehistory* (Harcourt, Brace & Co, New York 1948) at 8.
[84] Franz Boas *The Mind of Primitive Man* (MacMillan, New York 1963 - first published 1938) at 149.
[85] See for example, John Cauchi, Ignacio Correa-Velez, Hilary Bambrick *Climate Change, Food Security and Health in Kiribati: A Narrative Review of the Literature* (2019) Global Health Action, vol. 12, no.1, (published 7 May 2019). Also see Richard Bedford, Charlotte Bedford *International Migration and Climate Change: A Post-Copenhagen Perspective on Options for Kiribati and Tuvalu* at 89-134 in Bruce Burston (ed.) *Climate Change and Migration: South Pacific Perspectives* (Institute of Policy Studies 2010). Also see Philippe Boncour, Bruce Burston *Climate Change and Migration in the South Pacific Region: Policy Perspectives* (2009) Policy Quarterly, vol. 5, no. 4, 13-20.
[86] See for example, Jeffrey Hoelle *Quantifying Cultural Values Associated with Deforestation in the Brazilian Amazon* (2018) Journal of Land Use Science, vol. 13, issue 1-2, 166-181. Also see Marcos Pedlowski, Virginia Dale, Eraldo Matricardi, Eliomar Pereira da Silva Filho *Patterns and Impacts of Deforestation in Rondonia, Brazil* (1997) Landscape and Urban Planning, vol. 38, 149-157.
[87] Stephanie Chouinard *Stateless Nations* at 54-66 in Karl Cordell and Stephan Wolf (eds.) *The Routledge Handbook of Ethnic Conflict* (2nd ed. Routledge Taylor & Francis Group 2016).

possess their own state. I explored these issues in the context of New Zealand's indigenous Māori population in Chapter Three (part 3.3).

(d) Culture is Socially Learned and Transmitted Inter-Generationally

Peoples and Bailey suggest that individuals acquire their culture from growing up in a society or cultural grouping, therefore culture is socially learned.[88] Peoples and Bailey also assert that because culture is essential in completing the psychological and social development of individuals, it would not be normal for a person to not learn their culture.[89] The essence of the anthropological view of culture, according to Peoples and Bailey, is that individuals do not invent their culture or language because members of any given generation learn their cultural ideas and beliefs from previous generations. This cultural knowledge is then transmitted to future generations (sometimes with changes) and represents the evolution of a culture.[90] Elder takes the view that culture is not innate or inherited genetically as the fundamental character of culture is that it is socially transmitted.[91] This is a view which is shared by other commentators such as Peoples and Bailey, Elder and An-Naim. Elder argues that culture is not a trait of the individual but a representation of the cultural grouping.[92] An-Naim focuses on the transmission of culture "within a society" and therefore refers to culture as the "totality of values, institutions and forms of behaviour transmitted within a society".[93]

Elder takes the example of language to illustrate his contention that humans attribute "cultural" meanings to words, gestures and objects and then exchange those meaningful things with each other.[94] In analysing the transmission of cultural beliefs and norms through generations from an economist perspective, Bisin and Verdier argue that culture can also be manifested in physical ways which can be heard, felt and seen by way of language, cultural practices, dress, art, architecture, music or dance.[95] These characteristics will operate as symbols of a culture and accordingly must be recognised when formulating a definition of culture. In exploring the development in recent decades of processes for the preservation of what is referred to as cultural heritage, Ahmad describes the physical or visible representations of culture as "tangible cultural assets".[96]

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[88] Peoples, Bailey (n 30).
[89] Refer Peoples, Bailey (n 30).
[90] Peoples, Bailey (n 30) at 25-28.
[91] Elder (n 37) at 26.
[92] Elder (n 37) at 23.
[93] Abdullahi Ahmed An-Naim *Problems of Universal Cultural Legitimacy for Human Rights* in Abdullahi Ahmed. An-Naim and F. M. Deng (eds.) *Human Rights in Africa: Cross Cultural Perspectives* (Washington DC, Brooking Institute 1990), 331-369 at 332.
[94] Elder (n 37) at 26-29
[95] Alberto Bisin, Thierry Verdier *Cultural Transmission* (New York University 2005) (available at http://www.nyu.edu/econ/user/bisina/Palgrave_culturaltransmission2.pdf - accessed 1 November 2016) –.
[96] Yahaya Ahmad *The Scope and Definitions of Heritage: From Tangible to Intangible* (2006) International Journal of Heritage Studies, vol. 12, no.3, 292-300.

4.2.2 Ethnicity and Nationality

An aspect of relevance to the development of a definition of culture, I suggest, pertains to the nature of the cultural grouping that an individual claims affiliation. The cultural groupings referred to in the above discussion have intentionally been a general reference to any cultural grouping. Within the context of the criminal law, I suggest that there must be clear parameters for what is to be regarded as a cultural group and the associated cultural factors attached to that culture which have influenced the behaviour of an individual.

Eller notes that an issue which complicates the discussion about culture is its characterisation at times as also a reference to ethnicity or race.[97] Hicks refers to the concept of race as a reference to biological traits that are presumed to be inherited and visibly evident to others such as skin colour, hair texture and eyelid folds which are unhelpful in assessments of an individual's identity.[98] Hicks further notes that ethnicity, on the other hand, provides a much more helpful indicator of culture in that it is a reference to how an ethnic group is defined by its shared place of origin, history, language, religion, arts, cuisine and other cultural factors.[99] I suggest that the classification of people according to "race" based on physical characteristics is unhelpful in the context of the criminal law whereas the concept of "ethnicity" goes to the heart of providing a distinction between cultural groups as it signifies and identifies the members of a population group according to their common nationality or shared cultural traditions.

The concepts of cultural groupings and ethnic groups, I suggest, are distinct and should in no way be regarded as a reference to the same entity despite the reality that each may be a part of the other. Eller suggests that although ethnic groups are commonly associated with a particular religion, region or country of origin, there are no firm rules for what is to be regarded as an ethnic group and it is largely a reference to any social collectivity who are able to successfully claim identity and rights as a group.[100] Eller also observes that "ethnicity" is largely a modern reference and it does not matter whether a group is truly ethnic as the reference to ethnicity has become so central to social discourse (for example the reference to ethnic conflicts around the world) that the confusions about what is ethnic are no longer relevant.[101] The lack of a clear understanding of what is "ethnic" complicates any comparisons with the equally complex concept of culture. However, I suggest, the term "ethnicity" provides the clearest distinction between cultural groupings and can incorporate references to the

[97] Jack David Eller *Ethnicity, Culture and "The Past"* (1997) Michigan Quarterly Review, vol. 36, issue 4, 1-25.
[98] James W Hicks *Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?* (2004) Journal of American Academy of Psychiatry and Law, vol. 32, no. 1, 21-33 at 21.
[99] Hicks (n 98) at 22.
[100] Eller (n 97) at 1
[101] Eller (n 97) at 1

array of factors that characterise a cultural group whether those factors are religious, geographical, political, historical or biological.

For the purposes of this discussion, I refer to cultural groupings as inclusive of ethnic groups but in constructing a definition of culture I acknowledge that I must distinguish between ethnic groups (which can be differentiated on the basis of some unifying factor such as religion or genetic association) and national groups (which suggest a larger collective of cultures and ethnicities). As the discussion in Chapters Two and Three demonstrate, a New Zealand mixed identity can be distinguished from various cultural and ethnic groupings that comprise New Zealand's population. I suggest that the significance of the difference between ethnic and national groupings rest with the relevance of the supporting cultural evidence and the nature of the cultural contention advanced. For example, in *Police v Ranzamjoo*, Moore J was required to consider ethnic and religious factors in determining a culturally appropriate way in which two witnesses wearing burqas could give their testimony without offending their cultural imperatives.[102] In reaching a compromise between the cultural expectations of the witnesses' culture and the requirements of New Zealand's criminal law processes, Moore J had to distinguish between the imperatives of the minority ethnic culture and those of the "national" culture. For the purposes of constructing a definition of culture, I suggest that it will be necessary to refer to both ethnic and national cultures because (as discussed in Chapters Two and Three) the distinctions between these concepts are apparent in modern societies.

4.2.3 Subcultures

A factor which will require clarification in the development of a definition of culture is whether a liberal characterisation of culture should be adopted to include the notion of "subcultures". The Concise Oxford English Dictionary defines a subculture as "a cultural group within a larger culture, often having beliefs or interests at variance with those of the larger group".[103] Peoples and Bailey suggest that the anthropological view of subculture is that it explains the behaviour of some social groups and highlights the characteristics of members of various ethnic groups, religions and regions within a single society or country.[104] The sociological perception of subcultures is that they are groups that stand outside the "mainstream culture" and create a means of establishing a cultural boundary between the dominant culture and other cultures.[105]

[102] *Police v Ranzamjoo* [2005] 8 HRNZ 604 (DC, Auckland).
[103] Soanes, Stephenson (n 40).
[104] Peoples, Bailey (n 30) at 24-25.
[105] Laura Grindstaff, John R Hall, Lo Ming-Cheng *Handbook of Sociology* (Taylor Francis 2013) at 218-221.

Grindstaff et al note that the references to subcultures in the past have largely focused on cultures of delinquency, cultures of poverty or cultures of violence, but these assumptions are often inaccurate as individuals may claim membership to more than one subculture while also claiming association with the mainstream culture. Accordingly, Grindstaff et al argue that some associations with a subculture may be weak.[106] I suggest that the converse position will also apply where the influences of a subculture will be significant for some individuals because of the depth of their associations and degree of immersion in a subculture (as is the case with gang culture).[107]

The position my research takes is that subcultures will encompass references to "cultures within a culture" and include conceptions such as a "drug culture",[108] "gang culture",[109] Pacific culture,[110] and "Muslim culture".[111] These are all cultural variations that exist within a wider societal network and harbour cultural differences and characteristic of ethnic groups, regions and religions. Although these references to sub-cultures have been made by the Courts, an analysis of case-law indicate that the existence of these subcultures and their influences on the behaviour of individuals who claim association with these cultures, are largely ignored because these cultural influences are nevertheless assessed against the expectations and values of the judges concerned (who are, in the New Zealand context, predominantly aligned with the Eurocentric-Christian culture). I refer to my earlier discussion in this regard in Chapter Two (parts 2.2.3 and 2.3). Although it is arguable that cultural factors relative to subcultures can be as influential on the behaviour of individuals as would the cultural factors attached to the wider societal framework in which the subculture exists, I do not consider that a differentiation of subcultures will be necessary in providing a test or criterion for assessing the "viability" of a specific culture in a definition of culture or within the processes that support the recognition of culture within criminal law.

4.2.4 Customs, Values, Ideas, and Norms

An essential aspect of culture is referred to by social and cultural anthropologists as "cultural knowledge". Peoples and Bailey distinguish the various elements of cultural knowledge into norms, values, symbols, constructions of reality and worldviews.[112] Peoples and Bailey define "norms" as

[106] Refer Grindstaff et al (n 105).
[107] See for example, Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, 2013) at 285-295.
[108] *McInnes v R* [2012] NZCA 547 at [23] per Ellen France J. Also, see further examples in *Lord v R* [2012] NZCA 276 at [14] per Fogarty J; *R v Kahu* [2010] NZCA 120 at [32] per Rodney Hansen J.
[109] For example, see *Tauvira v R* (n 43) at [35] per Woodhouse J; *Huata v R* [2013] NZCA 470 at [29] per French J; *Muliipu v R* [2013] NZCA 257 at [22] per Miller J.
[110] *Teilauea v R* [2014] NZCA 391 at [5] per Stevens J.
[111] *R v Cox* (2005) CA204/05 at [50] per O'Regan J; *Denden v Police* [2014] NZHC 1814 (HC Auckland) at [11] per Duffy J and *Police v A* (2009) Manukau Youth Court, per Judge Malosi at [32].
[112] Peoples, Bailey (n 30) at 30.

shared ideals (or rules) about how people ought to act in certain situations; "values" as people's beliefs about the way of life that is desirable for themselves and their society; "symbols" as something that represents, connotes or calls to mind something else; "constructions of reality" implies that different people do not perceive the human and natural worlds in the same way and "worldviews" refers to how people "interpret reality and events, including their images of themselves and how they relate to the world around them".[113] The significance of differing "cultural knowledge" between cultures is its impact on how people behave. Because the values and norms of a specific culture therefore requires that individuals affiliated with that culture must behave in a particular way, such behaviour may conflict with the values and norms of another society (or culture) which requires a different way of behaving.

I suggest that a definition of culture must also require confirmation of the cultural influences that impact a defendant's conduct. In this regard, the focus will be on the "intangible" elements of a culture because these are the factors that impact an individual's cognitive processes and are therefore relevant to the determination of the *mens rea* of offences and elements of defences. For the purposes of the criminal law, I contend that a definition of culture must incorporate a reference to "*customs, values, ideas, norms, morals and behaviours*"[114] as these factors (individually and collectively) impact the rationalisation processes of an individual and therefore influences the motivation or provides the impetus behind a defendant's conduct.

There are numerous overlapping and distinctive understandings of "values" and 'morals". For example, Stankov distinguishes the concept of morality or the theories relating to moral culture with the value-based aspects of culture.[115] Various other commentators (for example, Sing,[116] and Gudykunst and Nishida)[117] have observed in their research that different cultures will not necessarily share the same perspectives on morals and values but also have values and morals which are shared with other cultures. An example of a value or moral that is shared by all cultures centre around the principle that human life is sacrosanct. Therefore, every legitimate (viable) culture endorses rules, laws, practices and processes whereby human life is protected and preserved. For example, the right to life is a fundamental right of all humans and is protected by various international human rights

[113] Peoples, Bailey (n 30) at 30-37.
[114] See further discussion of these factors in Matsumoto (2006) (n 79). Also see, Matsumoto (n 73) at 1286-1317.
[115] Dimitar Stankov *The Moral Culture of the Person*, Chapter IX, 95-104 in Vassilo Prodanov, A Sen Davidov (eds.) *Morality and Public Life in a Time of Change* (Council for Research in Values and Philosophy 2004).
[116] James J Sing *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law* (May 1999) Yale Law Journal Vol 108 No. 7, 1845-1884.
[117] William B Gudykunst, Tsukasa Nishida *The Influence of Culture and Strength of Cultural Identity on Individual values in Japan and the United States* (1999-2000) Intercultural Communication Studies, IX, 1-17 and Tseming Yang *Race, Religion and Cultural Identity: Reconciling the Jurisprudence of Race and Religion* (Winter 1997) Indiana Law Journal, Volume 73, Issue 1, 119-185 at 127-129.

laws[118] and domestic statutes.[119] As discussed in earlier chapters, values and morals may differ between cultures, for example, preferred religious affiliations, views on marriage or the circumcision of males and females.[120]

In defining values as "shared ideas or standards about the worthwhileness of goals and lifestyles", Peoples and Bailey emphasise the utility of understanding the beliefs held by cultural groupings in influencing the way of life that is desirable for them and their society.[121] Peoples and Bailey further observe that values have profound, although partly unconscious, effects on the behaviour of people.[122] Frey also acknowledges the processes and elements involved with the development of cultural values and their effects on the cognitive processes of individuals when making decisions as to how they should act in a given situation. Frey focuses on how the concept of "values" are developed, the effects of values on the judgements people make and their consequent actions in suggesting that values can be defined as:[123]

> learned, relatively enduring, emotionally charged, epistemologically grounded and represent moral conceptualizations that assist us in making judgements and in preparing us to act.

Frey analysed each aspect of his definition of values and concluded that values are learned, relatively enduring, not necessarily consciously known, tend towards consistency, are morally desirable, will be inundated with emotional feelings, establish a disposition to act in a specific manner and expressed in terms of certain epistemological criteria.[124] Frey's characterisation of "values" represents a useful summary of the various understandings of the term "values", and I therefore adopt Frey's description of values for the purposes of the present exercise.

The significance of a distinction between values and morals, I suggest, is their impact on an individual's cognitive processes and therefore their relevance to the determination of criminal culpability. As illustrated earlier, various commentators such as Triandis and Suh,[125] Gudykunst and Nishida[126] and Matsumoto[127] have argued that morals and values impact the personality and behaviour of individuals in different ways. In the course of this dissertation, I have alluded in general terms to the concept of morals and morality (for example, Chapter Seven (part 7.4) and Chapter Four (part

[118] Art 3 UDHR – right to life.
[119] For example, the Contraception, Sterilisation and Abortion Act 1977; Part 8, ss 158 – 182 of the Crimes Act 1961 specifically criminalises anyone from causing the death of another human being.
[120] For example, the discussions in chapters two and three (parts 2.6 and 3.2) Also Peoples, Bailey (n 30) at 31.
[121] Peoples, Bailey (n 30) at 31.
[122] Refer Peoples, Bailey (n 30).
[123] Rodney Frey *Eye Juggling: Seeing the World Through a Looking Glass and a Glass Pane (A Working Book for Clarifying and Interpreting Values)* (University Press of America 1994) at 19-24.
[124] Frey (n 123).
[125] Triandis (n 21); Triandis, Eunkook Suh (n 36).
[126] Gudykunst, Nishida (n 117) at 1-17.
[127] Matsumoto (n 79); Matsumoto (n 73).

4.2.4)) and in doing so I have used the terms "values" and "morals" interchangeably as a reference to the same concept. Both concepts, I argue, relate to or are concerned with the principles or rules of right conduct and therefore enable a distinction to be drawn between right or wrong conduct.

Although some of the commentators referred to here have highlighted distinctions between "values" and "morals", the position taken by my research is that these terms are so closely related that there is no utility in referring to them separately in a definition of culture for the purposes of the criminal law. For the purposes of the present exercise, I favour the use of the term "values" because it encompasses a wider scope of cultural factors and is not necessarily encumbered by the vast discourse regarding religious doctrine and moral laws. The religious doctrine versus moral laws discourse is both immense and prolonged and a detailed discussion is not within the scope of my thesis.[128] It will suffice to acknowledge that the use of the term "moral" might engender confusion because of any suggestion that religious doctrines might therefore define a culture when in reality it is perhaps one of many aspects of a culture and not all cultures are defined by an association with a well-established religion.

Another term which is used by researchers and commentators to refer to the accumulation of cultural knowledge and, I suggest, also impacts the cognitive processes of individuals, is the concept of "cultural norms". Peoples and Bailey contend that there is a distinction between values and norms as norms are the "shared ideals (or rules) about how people ought to act in certain situations" or in relation to other people, while values (as discussed above) refers to the beliefs that govern our motivations and "thus influence the reasons we do what we do".[129] Peoples and Bailey suggest that although norms imply that there is widespread agreement on how people ought to behave in a given situation, norms are regularly violated as "what is normative in one situation, need not be in other situations".[130] An example of a norm is how people greet each other in different societies. In some societies, touching is frowned upon and a bow will suffice whereas in other cultures, the shaking of hands, kissing on the cheek or hugging may be acceptable. In each of these examples, the extent to which the norm is observed or violated will engender either a negative or positive response. Peoples and Bailey therefore argue that norms operate as a measure whereby other people judge the behaviour of a person according to how close they adhere to certain standards of behaviour and accordingly engender a negative response from others when there is repeated failure to conform to the norm. On the basis of this argument, a distinction can therefore be drawn in that although norms influence the behaviour of individuals, the expectations of compliance with a "norm" may be at a lower level than the cultural expectations regarding "values" or "rules".

[128] See for example, Ryan McKay, Harvey Whitehouse *Religion and Morality* (2015) Psychological Bulletin, vol. 141, no. 2, 447-473.
[129] Peoples, Bailey (n 30) at 30-32.
[130] Peoples, Bailey (n 30) at 30-32.

4.3 Defining "Culture" and "Cultural Factors" for the Criminal Law

Having analysed the various characteristics of culture, I suggest, four principal elements must be acknowledged in a definition of culture for the purposes of the criminal law. First, the definition must require the identification of the claimed culture. As discussed above, I limit my categorisation of cultural groupings to ethnic groups (based on some unifying factor such as religious, societal or genetic associations) and national groups (in recognition of larger collectives of cultures and ethnicities). I argue above that subcultures can be subsumed within the categorisation of ethnic or national groups.

Second, the existence of a culture is dependent on its "viability". Although I have elected to use the term "viable" to summarise the various elements that reflect a particular culture, the essential features of a viable culture are that it is shared, socially learned, represents a body of cultural knowledge and requires adherence to specific patterns of behaviour. Aligned with the viability of a culture is the third requirement of a definition of culture that there be perpetuation of the culture through the sharing of cultural factors both between its members and with following generations.

The fourth requirement of a definition of culture for criminal law is that there must be a reference to the claimed culture and cultural factors having induced the behaviour of the defendant. Throughout my dissertation, and more specifically in Chapter Seven, I emphasise various examples of cultural factors that impact the cognitive processes of a defendant. These cultural factors provide rationale, reasoning and motivations for a defendant's actions. In encapsulating my numerous references to how culture and cultural factors have caused, impacted, influenced, prompted or motivated a defendant to act or behave in a particular manner, I use the term "induced" in my definition. The word "induce" is generally understood to mean "to lead or move by persuasion or influence" to some action or state of mind,[131] and therefore captures the essence of the impact of cultural factors on the rationalisation processes undertaken by a defendant.

I also propose that a separate definition of "cultural factors" is necessary because as a concept, culture is a conglomeration of a multitude of factors, conceptions and understandings (refer earlier discussion in part 4.1). The elements, characteristics and attributes that flow from and represent a specific culture (cultural factors) are distinguishable from references to the culture itself. A culture is a collective of many distinctive factors and constituent elements. For example, the feagaiga or mana concept is only one element of a wider collective of values, norms and morals that guide the behaviour of people within a culture. Religious and spiritual beliefs are other examples of different cultural factors that

[131] Catherine Soanes, Angus Stevenson (eds.) *Concise Oxford English Dictionary* (Oxford University Press, 2006).

drive or impel emotions, actions and behaviour. Because cultural factors are distinct elements, characteristics or attributes that flow from an originating culture, these factors must be clearly defined to distinguish each cultural factor from other constituent elements of a culture.

In acknowledging the key characteristics of culture discussed above, I define culture for the purposes of the criminal law as **"*a shared system of clearly defined customs, ideas, values, and norms of a viable ethnic or national group, which are transmitted across a society and passed on inter-generationally that have induced the defendant's conduct*"**.

In conjunction with my definition of culture, I define "cultural factors" for the purposes of the criminal law as "***those clearly defined cultural elements, characteristics and attributes which flow from and represent a specific culture that have induced the defendant to act in a particular way*".**

Part Three: New Zealand's Criminal Law – A Cultural Audit

Chapter Five:
Culture and New Zealand's Substantive Criminal Law

In this chapter I examine the current approach to culture by undertaking a cultural audit of New Zealand's criminal law. In doing so I illustrate the ways in which the law is influenced by culture both expressly and by implication. I conclude that culture plays an important, but entirely inconsistent and ad hoc role across various elements of the criminal law. A clear and express definition of culture was therefore needed to wrangle this ad hoc application into a principled approach in the criminal courts.

In undertaking my cultural audit, I refer to "culture" as "***a shared system of clearly defined customs, ideas, values and norms of a viable cultural, ethnic or national group which are transmitted across a society and passed on inter-generationally***". In this audit I refer to "cultural factors" as "***those clearly defined cultural elements, characteristics and attributes which flow from and represent a specific culture that have induced the defendant to behave (act) in a particular way***".

Although there are few express references to culture in New Zealand's criminal law statutes, I demonstrate that the criminal law is nevertheless steeped in culture and abounds with implicit requirements to recognise culture. In this chapter, I highlight the current ways in which cultural factors are considered at every stage of the prosecution, conviction and sentencing process. Because the substantive criminal law provides no clear structure or framework for the recognition of culture, the criminal courts have consequently applied an extemporised approach to culture and cultural contentions. Far from being culturally neutral, New Zealand's criminal law allows for cultural considerations in an ad hoc way. I contend that this ad hoc approach towards culture has resulted in incidences of inequality, misunderstanding, misinterpretation, discrimination and cultural bias. I refer to these irregularities in the criminal law's treatment of culture as cultural deficiencies and will explore the nature and scope of these deficiencies in later chapters. Although the criminal law may be steeped in culture, I highlight in the discussion to follow that the absence of a definition of culture has fostered the reality of an ad hoc adoption of culture and I therefore advocate for a systematic approach to culture within legislation and the common law.

New Zealand's criminal law, as it is currently constructed, is not only laden with implicit references to culture but also requires that a particular position be taken on cultural considerations. The cultural positions within the criminal law to which I refer will be found in the construction of the law itself (within the elements of offences and defences), the principles of the criminal law and through their

application by law enforcement agencies or judges in the New Zealand courts. Whilst the ambit of my argument in this thesis narrows to the application of the fundamental principles of the criminal law and the substantive criminal law, it is useful in this section to look at all facets of the criminal law, particularly as a definition of culture in the context of the criminal law will have wider import than the scope of any argument in my thesis.

5.1 The Explicit References to Culture in New Zealand's Criminal Law Statutes

New Zealand's principal criminal law statute, the Crimes Act 1961, and the statutes that deal with offending of lesser seriousness, such as the Summary Offences Act 1981 and the Land Transport Act 1998 make no specific reference to the term "culture". A small number of statutory provisions specifically apply the term "cultural" for a variety of purposes, however, the Crimes Act 1961 does not otherwise provide guidance as to how each of these culturally specific terms should be interpreted or applied within the criminal law.

For example, s 98AA (4) of the Crimes Act 1961, in defining the elements required to be proven on a charge of sexual exploitation of persons under the age of 18 years, expressly excludes from the requirements of "sexual exploitation" a recording or transmission of a "cultural performance … honestly undertaken primarily for purposes other than the exposure of body parts for sexual gratification". Section 98AA does not provide a definition of a "cultural performance", therefore, it will be open to participants within criminal proceedings to apply a variety of interpretations as to what can be regarded as a "cultural performance". The New Zealand criminal courts have yet to consider the concept of a "cultural performance" and although the Immigration and Protection Tribunal has referred to the term cultural performance in recognising an applicant's involvement in cultural activities within ethnic minorities, it is applied in a general context without setting any clear parameters for application of this term.[1]

Another example is provided by s 131A of the Crimes Act 1961 where reference is made to a "culturally recognised family group" for the purposes of offending under s 131 (regarding sexual conduct with a dependent family member). The reference to a "culturally recognised family group" will, I suggest, engender a variety of understandings as to what will constitute a family group from a cultural, ethnic or religious perspective, yet s 131A does not set any parameters or provide guidance for prosecutors, defence lawyers and the courts as to how a culturally recognised family group is to be applied within the criminal law. No New Zealand case has tested the boundaries or interpretation of what is to be regarded as a culturally recognised family group, but the wording of the section would, I suggest, invite consideration of a variety of cultural factors dependent on the relevance of such factors to the determination of what constitutes a family group within specific cultural and ethnic populations.

The only other reference to culture is provided by s 204A (4) of the Crimes Act 1961 which explicitly removes any prospect of a defence to a charge of female genital mutilation (FGM) being founded on a

[1] Refer for example *re EA (Sri Lanka)* [2017] NZIPT 801015; *re AS (Tonga)* [2014] NZIPT 501478; *re KD (Skilled Migrant)* [2014] NZIPT 202004.

"cultural, religious or other custom or practice". Because there has been no prosecution under s 204A, its application within the criminal law has yet to be tested.

The Criminal Procedure Act 2011, which sets out procedural directives and rules for the conduct of criminal proceedings, makes no explicit reference to the term "culture". Other procedural statutes allow for the consideration of "cultural backgrounds"[2] and "cultural aspects"[3] by the courts, however this is primarily within the context of sentencing offenders.[4] In prescribing the consequences for offenders arising from determinations by the criminal courts, a small number of criminal law statutes make limited references to culture. These include the range of available sentences as well as other sentencing outcomes specified in the Crimes Act 1961, the Summary Offences Act 1981, the Land Transport Act 1998, the Sentencing Act 2002, the Parole Act 2002 and the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHA). No definition of culture is provided by these statutes and no obvious boundaries or criteria are set by statute or the courts as to what is to be regarded as culture or "cultural". Section 8(i) of the Sentencing Act 2002 expressly allows the court to take account of an offender's cultural, family or whanau support and community associations in determining avenues for rehabilitation or in meeting the principles and purposes of the Sentencing Act. A process for the presentation of "cultural information" for sentencing purposes is provided by s 27 of the Sentencing Act 2002. In part 5.5 below I enlarge upon the relevance and significance of cultural considerations in the context of sentencing.

The limited express reference to culture and associated concepts within New Zealand's criminal law statutes does not detract from the reality that offences, specific defences and various principles significant to the application of the criminal law are culturally loaded or prohibit behaviour which is specific to cultural or ethnic minorities within New Zealand. As will be highlighted in discussion in Chapter Six (parts 6.1 and 6.2), the limited explicit references to culture in the criminal law statutes masks the considerable avenues whereby the courts are implicitly required to recognise culture within the criminal law.

[2] See for example, Children, Young Persons and their Families Act 1989, s 277 (5) and Sentencing Act 2002, ss 8 (i) and 27.
[3] As in *Churchward v R* [2011] NZCA 531 per Lovell-Smith J's consideration of "cultural aspects".
[4] For example, see the Crimes Act 1961, Sentencing Act 2002, Evidence Act 2006, Criminal Procedures Act 2011, Children, Young Persons and their Families Act 1989.

5.2 The Criminalisation of Culture-Specific Behaviour

Although New Zealand's criminal law statutes make no express reference to the term "culture" and only a small number of provisions make explicit references to the term "cultural", various sections of the Crimes Act 1961, the Summary Offences Act 1989 and the Land Transport Act 1998 are nevertheless culturally loaded and implicitly require the acknowledgement of culture and cultural factors. As alluded to in earlier discussion (Chapter Three, part 3.4.1), the limited scope for recognition of culture and cultural factors within New Zealand's criminal law is implicitly affirmed by the combined effects of ss 5 and 9 of the Crimes Act 1961. Section 5 restricts the application of the Crimes Act 1961 to all offences which an offender can be proceeded against and tried in New Zealand and s 9 states that offences are not to be punishable unless so provided under a New Zealand statute. Sections 5 and 9 accordingly limits the recognition of customary or cultural factors unless expressly or implicitly required by the criminal law statutes.[5]

The comparatively wide scope for and avenues by which culture can be recognised in the criminal law is implied within the elements of certain criminal offences. In this part I highlight the nature and scope of various culturally-loaded offences where the courts have recognised that culture or other cultural considerations will be relevant to the determination of criminality and culpability. I focus here on ss 204A and 204B which outlaw female genital mutilation (FGM); ss 205 and 206 which criminalises multi-partner marriages; s 123 of the Crimes Act 1961 (now repealed) which previously criminalised the publication of a blasphemous libel and ss 30-35 of the Maori Community Development Act 1962 (MCDA) which criminalises various behaviours but are restricted in application to Māori. I utilise these offences as exemplar in support of my contentions regarding the criminalisation of culture-specific behaviour in Chapter Six and the significance of cultural considerations in assessing criminality and culpability in Chapter Seven.

5.2.1 Female Genital Mutilation

Sections 204A and 204B were inserted into the Crimes Act 1961 on 1 January 1996 by s 3 of the Crimes Amendment Act 1995 to prohibit any medical procedure, "excision or infibulation", that results in the mutilation of the female genitalia. Any reliance on a cultural excuse or defence strategy based on "a cultural, religious, or other custom or practice" by way of a defence to a charge of FGM, is specifically taken away by s 204B (4) of the Crimes Act 1961.

[5] See for example *R v Mason* [2012] NZHC 1361 (*Mason No. 1*) at [29] to [37] per Heath J. Affirmed by the Court of Appeal in *Mason v R* [2013] NZCA 310 at [20] to [29] per Ellen France J.

Female circumcision is a deeply cultural practice within various communities in western and north-eastern parts of Africa, Asia, the Middle East and within some immigrant communities in Europe, North America and Australia that represents a sizeable proportion of the world's population.[6] Research by Webber and Schonfeld has found that, in the United States, female circumcision was a relatively standard medical procedure in the 19th and 20th centuries where various surgical procedures were performed on women to address diagnosis for hysteria, depression, nymphomania and frigidity.[7] Cullen-Du-Pont noted in her research that in 1998 about 168,000 girls living in the United States "had undergone or were at risk" of FGM.[8] A UNICEF report in 2013 which focused on 29 countries within Africa noted that, within the surveyed area, 125 million girls and women had undergone a form of FGM.[9] The 2013 UNICEF report also noted that in Somalia, Guinea, Djibouti, Egypt, Eritrea, Mali, Sierra Leone and the Sudan, the prevalence of circumcision procedures among the female population of these countries exceeded 88 per cent. A UNICEF report in 2016 estimates that the practice of FGM has increased to the point where at least 200 million girls and women in 30 countries have been subjected to a form of FGM.[10]

Although the stated intention in criminalising FGM in New Zealand was to outlaw female circumcision, there has been no prosecution under ss 204A and 204B. The criminalisation of female circumcision in New Zealand mirrors the approaches adopted in other common-law jurisdictions such as the United Kingdom, Canada, Australia and 26 states of the United States. Despite the criminalisation of FGM world-wide, there have been very few prosecutions for FGM.

All Australian states had, by 1997, criminalised the practise of FGM. In 2015, two women (one being the midwife that performed the procedure and the mother of the victims) were the first to be convicted of FGM in Australia and a male was convicted of covering up the acts by "ordering" members of his community to tell police that they did not practice FGM.[11] In 2014, the New South Wales legislature increased the penalty for an FGM conviction to a maximum of 21 years imprisonment. In March 2016, the three convicted of the FGM offences were sentenced to 15 months imprisonment with the option of home detention to be considered in a later hearing.[12]

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[6] Alison Dundes Renteln *Cultural Defense in International Criminal Tribunals: A Preliminary Consideration of Issues* (2011) South-Western Journal of International Law, vol. 18, 267-285.
[7] Sara Webber, Toby Schonfeld *Cutting History, Cutting Culture: Female Circumcision in the United States* (2003) The American Journal of Bioethics, vol. 3, issue 2, at 65-66.
[8] Kathryn Cullen-DuPont *Encyclopedia of Women's History in America* (Facts on File, second edition, 2000) at 85.
[9] UNICEF *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change* (UNICEF July 2013). (http://www.unicef.org/cbsc/files/UNICEF_FGM_report_July_2013_Hi_res.pdf).
[10] UNFPA-UNICEF *Accelerating Change by the numbers: 2016 Annual Report of the UNFPA-UNICEF Joint Programme on Female Genital Mutilation/Cutting: Accelerating Change* (UNFPA-UNICEF Jul 2017) at 23-31
[11] Refer BBC News *Australia convicts two over female genital mutilation* (12 November 2015).
[12] The Guardian Weekly *Three sentenced to 15 months in landmark FGM trial in Australia* (18 March 2016).

The United Kingdom (UK) criminalised FGM in 1985,[13] and subsequently extended the protections for potential victims of FGM (by way of protection orders)[14] and the broadening of criminal liability for any act or intended procedure amounting to FGM (by extending criminal liability to anyone who takes a UK national or permanent UK resident overseas for the purpose of FGM).[15] Despite the wide-ranging nature of the prohibitions against FGM in the UK, the first prosecution in the UK for FGM was heard in early 2015 and resulted in an acquittal.[16] In 1997 the practice of FGM was criminalised in Canada as an "assault causing bodily injury"[17] or "aggravated assault"[18] under s 268 of Canada's Criminal Code. As with New Zealand and the UK, there has not been a successful criminal prosecution for FGM in Canada.

In the late 1990s various states within the United States began to criminalise FGM and 26 states have since passed law specifically prohibiting the practice of FGM or the transporting of a female outside United States borders for the purpose of FGM. However, the first conviction for performing FGM in the United States was in 2006 when Khalid Adem was found guilty by a Georgia court of aggravated battery and cruelty to a child. Broussard records that Adem was alleged to have performed the female genital cutting procedure on his daughter in 2001, however, FGM was not an offence in Georgia until 2010.[19] Adem was subsequently sentenced to two terms of 15 years imprisonment but after serving 10 years was deported to his country of birth, Ethiopia, in March 2017. The only other prosecution for FGM that arises within the jurisdiction of the United States courts is a federal prosecution of Jumana Nagarwala in 2017. Nagarwala was a doctor who was charged with performing an FGM procedure in Michigan. The owners of the clinic where Nagarwala undertook the alleged procedure were also charged in allowing their premises to be used for an FGM procedure. This matter was set for trial in June 2018 but in November 2018, Judge Bernard Friedman ruled that the federal female genital mutilation law was unconstitutional, and further that Congress did not have the right to criminalise the practice of female circumcision.[20]

The variability in traditional approaches to female circumcision and the complexities in substantiating the elements of ss 204A and 204B of the Crimes Act 1961 underscore the difficulties and anomalies in prosecuting the offence of FGM.

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[13] Prohibition of Female Circumcision Act 1985 (UK).
[14] Refer the Female Genital Mutilation Act 2003 (UK) as amended by the Serious Crime Act 2015 (UK), s 73.
[15] Refer the Female Genital Mutilation Act 2003 (UK) as amended by the Serious Crime Act 2015 (UK), s 74.
[16] Refer The Guardian *FGM suspects appear in court in UK's first genital mutilation trial* (Monday 9 January 2015) and The Guardian *Doctor found not guilty of FGM on patient at London hospital* (4 February 2015).
[17] Refer Criminal Code of Canada 1985, s 267.
[18] Refer Criminal Code of Canada 1985, s 268.
[19] Patricia Broussard *Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming and Utilizing the Convention Against Torture* (2008) Duke Journal of Gender, Law and Policy, vol.15, issue 19, 19-47 at 20-22.
[20] *United States of America v Nagarwala et al* (17-CR-20274) US District Court, Eastern District of Michigan (filed 11/20/2018) per Judge Bernard Friedman.

The inclusion of FGM as an offence under the criminal law of New Zealand, I suggest, illustrates a willingness by the legislature to draw a line between acceptable cultural practices and harm to individuals. Far from a whim of the New Zealand legislature, this example shows that significant international efforts have been made to stamp out this practice. It provides us with a pragmatic example of the types of activity for which cultural practices are expressly confined. Whilst not all limitations on a cultural practice will require condemnation by the international community before criminalisation is seen as appropriate, a liberal margin of appreciation for conducting cultural practices exists within society meaning that individuals and communities are able to conduct their affairs as they see fit without fear of criminal legal control or prohibition.

5.2.2 Multi-partner Marriages

Another example where the New Zealand legislature has sought to limit what may otherwise be a permissible cultural practice in order to maintain consistency of cultural parlance within the country is the prohibition of multi-partner marriages. Multi-partner marriage is a practice that is traditional within many cultures and therefore is an accepted practice that is not criminalised within many legal jurisdictions. While polygamy is illegal in many countries, some countries either allow multi-partner marriages to be practiced under customary law,[21] or polygamy is illegal "de jure" (illegal but officially sanctioned).[22] Polygamy is illegal in most European countries or independent States that have a strong European colonial past. Although polygamy is criminalised in the United Kingdom, North and South America, Canada, various European States, and numerous States in the Oceania region, multi- partner relationships are nevertheless acceptable and not criminalised in many countries in Africa, Asia, and the Middle East. Elbedour et al note in their research that 850 societies around the world practice polygamy and it is accepted by a wide range of non-Western ethnic and religious groups.[23] The variability in approach to whether polygamy is illegal or lawful, I argue, rests with the cultural and religious attitudes to such practices.

The offence of bigamy was transmitted into New Zealand's criminal law from the United Kingdom by the Criminal Code Act 1893,[24] and has been retained within New Zealand's criminal law in the Crimes Act 1961. Marriage is regulated in New Zealand by the Marriage Act 1955 which defines marriage as "the union of 2 people, regardless of their sex, sexual orientation, or gender identity".

[21] For example, South Africa, Zimbabwe, Namibia.
[22] For example, Madagascar, Mozambique, Rwanda. In Australia, polygamous marriages cannot be performed but polygamous relationships are still common within some indigenous Australian communities.
[23] Salman Elbedour, Anthony Onwuegbuzie, Corin Caridine, Hasan Abu-Saad *The Effect of Polygamous Marital Status on Behavioural, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature* (2002) Clinical Child and Family Psychology Review, vol. 5, no. 4, 255-271 at 256.
[24] Criminal Code Act 1893 (57 Vict. 1893 No. 56), ss 204 and 205.

Accordingly, multi-partner marriages (polygamy) cannot be performed in New Zealand and would be unlawful under ss 205 and 206 of the Crimes Act 1961. Polygamous relationships are however given limited recognition by the Family Proceedings Act 1980 in the context of matrimonial separations and proceedings regarding the maintenance and welfare of children from polygamous relationships.

Being married to more than one person at the same time has been unlawful under New Zealand's criminal law since the late 1800s yet there have been few prosecutions. The early justifications for a law criminalising bigamy was articulated by Lord Penzance in the 1866 case of *Hyde v Hyde*, where he referred to marriage as the "voluntary union for life of one man and one woman to the exclusion of all others".[25] In a 1998 edition of Adams on Criminal Law, the author (Robertson), in affirming the commonly-held view of marriage, noted that the criminalisation of multi-partner marriages was because it represented "a threat to public morality and … compromises the institution of marriage'.[26] While this view may reflect the enduring perspective of the European-Christian population in New Zealand, recent developments in case-law and the introduction of various amendments to the definition of marriage suggest a changing worldview on the "institution of marriage'.

The perpetuation of the offence of bigamy within New Zealand's criminal law, I suggest, represents a preservation of the antiquated Euro-Christian cultural perspective that plural marriage reflects "opposition to modernity" [27] and an association with "pre-modern, pre-civilisation and tribal practices".[28] Seuffert contends that the resistance to polygamy primarily arises from the European imperative to separate its monogamous traditions from "the savagism of tribal practices to still evolving civilisations of white Europeans".[29] Seuffert argues further that polygamy is represented evolutionarily as pre-monogamy, and therefore also pre-modern. The view that polygamy was a "tribal" custom was verbalised in the 1909 decision of *Rex v Kingi*,[30] where Chapman J, in ascribing the practice of polygamy to Māori, commented that:[31]

> If the Maori people were permitted to go back to Maori custom with respect to marriages, and to call those unions marriages, that might include polygamous marriages … the Court does not recognise the so-called marriages.

The focus of *Kingi* was to consider the validity of the marriage of Mr Kingi to his bride who was under the age of 16 years. Mr Kingi was subsequently charged with having "carnal knowledge" with a

[25] *Hyde v Hyde* (1866) LR 1 P & D 130.
[26] Bruce Robertson *Adams on Criminal Law* (Brookers 1992) loose-leaf version, vol. 1 at CA205.02 (16/6/98).
[27] Nan Seuffert *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (Ashgate 2006) at 46.
[28] Nancy Cott *Public Vows: A History of Marriage and the Nation* (Harvard University Press 2000) at 114.
[29] Nan Seuffert *Shaping the Modern Nation: Colonial Marriage Law, Polygamy and Concubinage in Aotearoa New Zealand* (2003) Law Text Culture, vol. 7, article 9, 185-220 at 211.
[30] *Rex v Kingi* (1909) 29 NZLR 371 (per Chapman J) High Court, Wellington.
[31] *Kingi* (n 30) at 372.

female under the age of consent and was convicted by the court. The court's reasoning was that because the marriage was conducted by a rangatira (chief) in line with traditional Māori practices it was therefore invalid because the courts did not recognise Māori law and customs. Seuffert notes that the anomaly in the court's reasoning is that if the marriage had been performed under European law then the union would have been valid as European men were lawfully able to marry a female between the age of 12 and 16 years. Because Mr Kingi's customary marriage was not recognised by the court, the young woman he had "married" could not be legally regarded as his wife and therefore could be compelled to give evidence against him.[32] Chapman J's ruling was also in contravention of existing legislation that recognised Māori customary practices. [33] The significance of Chapman J's characterisation of Māori customary marriage practices (where Chapman J also chose to include polygamous relationships by Māori, although that did not appear to be relevant to the substantive issues to be decided) nevertheless demonstrates an early articulation of the enduring Euro-Christian attitude that monogamous unions must be encouraged in preference to other forms of marital relationship.

The characterisation of Māori in the blatantly Eurocentric and discriminatory terms applied by Chapman J in *Kingi* would, I suggest, have been totally inappropriate at the time, not only because the Privy Council in *Nireaha Tamaki v Baker*[34] had earlier rejected the line of authorities in New Zealand that failed to give recognition to Māori customary practices but, as illustrated earlier, Māori have assimilated into a developing multi-ethnic and culturally diverse New Zealand.[35] Further, inter-racial marriages and the inherent interactions between cultural groups within New Zealand society means that distinctions between cultural and ethnic groups are not always apparent.[36] A further reality of contemporary New Zealand society is that multi-partner marriages are rarely prosecuted. This suggests that polygamy has rarely been practiced in New Zealand regardless of the fact that New Zealand's population has been ethnically and culturally diverse since its establishment as a State in 1840.

[32] Seuffert (2006) (n 27) at 39.
[33] For example, Marriage according to Māori customs was recognised under the colonial legal system (Marriage Validation Ordinance 1842, 5 Victoriae 1842, No. 11) until 1988. Māori customary marriages were sufficient to validate inheritance of Māori land (this was later removed by the Māori Purposes Act 1951).
[34] *Nireaha Tamaki v Baker* [1901] AC 561. Also see discussion of this case by Seuffert (2003) (n 29) at 199-202.
[35] Refer earlier discussion regarding *Wi Parata* in Chapter two parts 2.3.1 and part 2.4.1 and *Rira Peti* in Chapter Two, part 2.4.1.
[36] Angela Wanhalla *Matters of the Heart: A History of Interracial Marriage in New Zealand* (Auckland University Press 2013). Also see Seuffert (2006) (n 27).

While several court cases worldwide have examined the rights of individuals to the recognition of same-sex marriages,[37] very few attempts have been made to pursue the acceptability of plural marriages (relationships) within common-law jurisdictions. In 1879, Morrison Waite J held in the case of *Reynolds v United States*,[38] that the "Free Exercise Clause" in the First Amendment to the United States Constitution did not protect the practice of plural marriage. In a 2013 ruling, the United States court in *Brown v Buhman*,[39] referred to the ruling in *Reynolds* as continuing to be "binding on the limited question of any potential free exercise right to the actual practice of polygamy". As seen in *Wilkinson v Kitzinger*, limiting the definition of marriage to traditional Christian conceptions remains the law in the United Kingdom.[40] In contrast to these enduring perspectives on the unacceptability of plural marriages within common-law jurisdictions, the changing perspectives in New Zealand on the "institution of marriage" have undergone some rapid and significant transitions in the past 20 years.

Although the New Zealand Court of Appeal ruled in the 1998 decision of *Quilter v Attorney-General*,[41] that same-sex marriages were not covered under the (then existing) definition of marriage in the Marriage Act 1955, the changing attitudes to marriage were endorsed by the Marriage (Definition of Marriage) Amendment Act 2013 which extended the definition of marriage to incorporate same sex marriages. Prior to the 2013 amendment, an alternative form of "marriage" allowing the union of same-sex or opposite-sex couples (referred to as "civil unions") were recognised under the Civil Union Act 2004. The purpose of the civil union legislation was to remove from existing legislation the provisions which were discriminatory in recognising the traditional marital status but disregarding the status of other forms of relationships. The 2013 amendment to the Marriage Act 1955 represented the formal recognition of same-sex marriages and other forms of relationships but did not alter the legal position of multi-partner marriages.

Den Otter advances several arguments for marriage to be a "more diverse institution" and comments that plural marriages may not be detrimental to nor harmful to the interests of women and children.[42] In other research, Hayase and Kao-Lee undertake a scientific analysis of the communal benefits of polygamous relationships and conclude that in certain parts of the world, polygamous relationships enhance the economic, social, health and psychological wellbeing of those who are members of

[37] For example, *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA). Also refer *Obergefell v Hodges* 135 Supreme Court 2584 (2015) (US).
[38] *Reynolds v United States*, 98 US 145, 166-167 (1879).
[39] *Brown v Buhman*, 947 F. Supp. 2d 1170, 1180-90 (2013).
[40] *Wilkinson v Kitzinger* [2007] 1 FLR 296 (UK Family Court) per Potter J.
[41] *Quilter* (n 37).
[42] Ronald Den Otter *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage* (2015) Emory Law Journal, vol. 64, 1977-2046. Also see similar arguments by Natali Exposito *The Negative Impact of Polygamy on Women and Children in Mormon and Islamic Cultures* (2017) Law Student Scholarship, Paper 888, 1-33 at 11-30.

polygamous communities.[43] Somerfield argues that the institution of marriage in New Zealand is legally less unique and socially less important than it has ever been before in history.[44] Somerfield suggests that although the traditional *Hyde v Hyde*[45] conception of marriage no longer has relevance in a modern society and is "superfluous to modern New Zealand", what remains are the elements of voluntariness and the union of people based on mutual affections which therefore gives greater recognition to other forms of relationships.

As the discussion here illustrate, the concept of marriage is profoundly based on cultural, ethnic and religious traditions and practices. As with the evolution of cultures, attitudes and perceptions towards the "institution of marriage" is constantly changing. As the case-law and evolution of substantive law demonstrate, the criminal law ought to similarly respond to the continuous evolvement of cultural expectations. As illustrated in Chapter Four, part 4.2.1(a), a fundamental aspect of culture is that it is continually evolving. The changing approaches to the acceptability (or non-acceptability) of marital relationships demonstrates an evolution of cultural expectations.

New Zealand law does not recognise a polygamous relationship as "marriage" for the purposes of establishing the elements of a prosecution for bigamy because a "relationship in the form of marriage" is restricted to a Christian marriage or a marriage authorised by the Marriage Act 1955. As noted earlier, the 2013 amendment to the Marriage Act 1955 recognises a wide range of "relationships in the form of marriage" however no such recognition is made regarding polygamous relationships. I suggest that this raises two distinct concerns in the context of the contentions arising from my thesis.

First, it is unclear whether New Zealand's criminal law would recognise a polygamous relationship as a valid first marriage for the purposes of a prosecution for bigamy. No New Zealand case has considered this position, however the decision of *R v Singh*,[46] where an English court held that a polygamous relationship would not be recognised for the purposes of a bigamy prosecution, would undoubtedly offer guidance to the courts if such an issue were to arise in New Zealand.

Second, because polygamy, as a practice is regarded as deeply religious within some cultures, it could be argued that the criminalisation of multiple-partner relationships as bigamy under ss 205 and 206 of the Crimes Act 1961 would therefore conflict with the religious freedoms that are protected by ss 13 and 15 of the NZBORA. No New Zealand case has considered this issue and therefore, some

[43] Yasuko Hayase, Kao-Lee Liaw *Factors on Polygamy in Sub-Saharan Africa: Findings based on Demographic and Health Surveys* (1997) The Developing Economies, XXXV-3, 293-327.
[44] Elizabeth Somerfield *For Better or Worse – The Changing Legal and Social Purpose of Marriage* [2014] New Zealand Law Student Journal, at 9.
[45] Refer *Hyde* (n 25).
[46] *R v Singh* [1962] 3 All ER 612 (Quarter Sessions).

guidance would have to be sought from other legal jurisdictions. To cloud this issue further, the Supreme Court of Canada in *Reference Re Section 293 of the Criminal Code of Canada*,[47] has held that while the religious rights of Mormon fundamentalist polygamists were protected by s 1 of the Canadian Charter of Rights and Freedoms 1982, these rights could justifiably be limited by the Charter.

The position adopted by the Canadian Supreme Court however contrasts with the approach taken by the courts in the United States where, for example in *Lawrence v Texas*,[48] a trial-level court in Utah issued a summary judgment ruling that a criminal prosecution against polygamous religious marriages violated the rights to freedom of religion under the First Amendment and due process rights guaranteed by the 14th Amendment to the United States Constitution.

From the discussion above, it is clear that, historically, the moral justification for the criminalisation of polygamy has been undermined by the liberalisation of the fraternity of marriage outside of the criminal law. Unlike FGM for example, polygamy is outlawed on moral or religious grounds. This illustrates another facet of New Zealand's criminalisation of otherwise permissible cultural practices. Although firmly based on moral principles, the fragility of the moral base in this example and within a country facing superdiversity, means that a line between the dominance of one particular culture (Euro-Western) over others is likely to cease. I argue that an expansive approach to legal moralism as a method of criminalisation, bounded by the harm principle and legal paternalism, will set New Zealand on a more productive path to a nuanced recognition of culture. I enlarge on these contentions in parts 6.1.1 and 6.2.3 of Chapter Six.

5.2.3 Blasphemous Libel

Religious beliefs are deeply cultural and vary widely along cultural and ethnic divides. Although this offence was recently removed from New Zealand's substantive criminal law, it is included in my cultural audit to demonstrate the attitudes towards religious nuances that have endured as a consequence of insistence by the dominant culture that its cultural perspective be maintained.

The origins of the offence of blasphemous libel can be traced to the common law offences of blasphemy and libel, and therefore represents a perpetuation of English law within New Zealand's criminal law. The offence of blasphemous libel was introduced into New Zealand's criminal law through the passing of the Criminal Code Act 1893. Section 133 of the Criminal Code Act 1893 criminalised blasphemous libel and this offence was retained as s 150 of the Crimes Act 1908.

[47] *Reference Re Section 293 of the Criminal Code of Canada* 2011 BCSC 1588 (Can.).
[48] *Lawrence v Texas* 539 US 558 (2003).

Although s 9 of the Crimes Act 1961 required that offences could only be punished under New Zealand Acts (thereby abolishing English common law offences such as blasphemy and blasphemous libel), s 123 of the Crimes Act 1961 specifically retained the offence of blasphemous libel. Although s 123 has been repealed, there remains considerable merit in continuing the discussion regarding blasphemous libel because a prosecution for reviling a religion can still, I suggest, be actioned under s 4 of the Summary Offences Act 1981.

Section 4 of the Summary Offences Act 1981 still allows for the prosecution of "offensive … threatening or insulting" language that causes "offence … alarm or insult". Section 4 of the Summary Offences Act covers a wide range of offensive statements and although there is no specific reference to profanity against a particular religion, the offensive, threatening or insulting words could, I suggest, include profane or blasphemous statements reviling a religion, God or sacred thing that causes offence or insult. Accordingly, the discussion to follow will continue to refer to past approaches to blasphemous libel under s 123 of the Crimes Act, however, such discussion may still have relevance in the context of any future prosecutions of words or statements that are "blasphemous" that cause offence or insult under s 4 of the Summary Offences Act 1981. Unlike s 123 of the Crimes Act, s 4 of the Summary Offences Act 1981 has no qualification that the offensive language be directed at reviling a religion but covers any offensive, threatening or insulting language. The wording of s 123 of the Crimes Act 1961 suggests that the protection provided is able to be applied to the vilification of any religion or an object that is sacred to any religion. The case-law on the interpretation and application of s 123, however, makes it clear that the protection offered by s 123 has only been applied by the courts towards preventing the reviling of the Christian religion.[49]

Despite the existence of blasphemous libel as an offence within New Zealand law since 1893, there has only been one prosecution in 1922 in the case of *R v Glover*.[50] In *R v Glover*, the publisher of a newspaper was prosecuted for including within his publication, two poems by a British poet (Siegfried Sassoon) that was readily available in other publications. The jury in *Glover* returned a verdict of not guilty but included a rider in their verdict that "similar publications of such literature should be discouraged". The only other incident which prompted the consideration of a prosecution for blasphemous libel related to the display of contemporary photographs in the Museum of New Zealand Te Papa Tongarewa entitled "Virgin in a Condom", "Wrecked" and "The Last Supper". It was claimed by various complainants that the inclusion of a topless woman at the centre of the Last

[49] Refer *R v Glover* [1922] GLR 185 per Hoskins J. Also see the UK rulings in *R v Cathercole* (1838) 2 Lew CC 237 per Alderson B; *Taylor's case* (1675) 8 ER 189; *R v Waddington* (1822) 107 ER 11; *R v Hetherington* (1841) St. Tr. (NS) 563.

[50] Refer *Glover* (n 49). Also refer commentary by Rex Tauati Ahdar *The Right to Protection of Religious Feelings* (2008) Otago Law Review, vol. 11, no. 4, 629-656 at 641.

Supper table in the place of Christ was blasphemous.[51] Although there were considerable protests against the exhibition of these photographs and applications made by National Party MP, John Banks and Father Denzil Meuli to commence a prosecution of Te Papa for blasphemous libel under s 123, the Solicitor General, John McGrath QC, rejected a prosecution on the grounds that a prosecution would be inconsistent with the New Zealand Bill of Rights Act's protection of freedom of expression.[52]

The Crimes Act 1961 provided no definition of what amounted to a "blasphemous libel" but referred to blasphemous libel under the generic heading of "crimes against religion". Although the Concise Oxford English Dictionary defines blasphemy as "profane or sacrilegious talk about God or sacred things",[53] and the Court in *Armstrong v Moon,*[54] has ruled that the term "profane" was to be interpreted as a reference to being blasphemous, a reasonable interpretation of s 123 would be that blasphemous libel therefore implies the reviling of any "religion", "God" or "sacred thing".

Section 123 referred generally to the 'publishing' of a blasphemous libel which has been interpreted by the courts as including publications in written form or through oral statements. The Supreme Court of Victoria in *Pell v National Gallery*,[55] has suggested that there was a need for a blasphemous libel to be published in written form, however, in New Zealand, s 4 of the Summary Offences Act 1981 criminalises the use of threatening, alarming, insulting or offensive behaviour or language in a public place. The former s 48 of the Police Offences Act 1927 (repealed) provided that the use of "any profane, indecent, or obscene language" in a public place was an offence punishable by way of a fine. The tenor of s 4 of the Summary Offences Act 1981 and s 48 of the Police Offences Act 1927 suggest that s 123 of the Crimes Act 1961 must also be interpreted to include both oral and written libel.[56]

Despite the absence of any reference to a specific "religion", "God" or "sacred thing" within s 123, the courts interpreted s 123 as only available in protecting the reviling of Christian religions.[57] The only criminal prosecution to consider the provisions of s 123 (or its former articulation under s 150 of the Crimes Act 1908) was *R v Glover* in 1922 where the subject-matter was disparaging remarks made about the Christian faith.[58] In *Glover,* Hosking J noted the object of s 150 was "to prevent disorder in the community … reverence and respect for certain religious and sacred subjects"

[51] Ahdar (n 50) at 641-642.
[52] Ahdar (n 50) at 642-643.
[53] Catherine Soanes, Angus Stevenson *Concise Oxford English Dictionary* (Eleventh revised edition, Oxford University Press 2006) at 143.
[54] *Armstrong v Moon* (1894) 13 NZLR 517.
[55] *Pell v The National Gallery of Victoria* [1998] 2 VR 391 per Harper J.
[56] Refer Gerald Orchard *Blasphemy and mens rea* (1979) 16 New Zealand Law Journal 347. Also refer NSW Law Reform Commission *Blasphemy* (1994) Report 74.
[57] See for example *Glover* (n 49) per Hoskins J at 185-187. Also, *Cathercole* (n 49) per Alderson B (UK).
[58] *Glover* (n 49) at 185-187.

therefore it was desirable "that provocation of and any outrage of those feelings should be prevented".[59] Because the disparaging remarks in *Glover* were directed at the Christian faith, the Court did not consider the consequences of an attack on articles or concepts held religious or sacred to non-Christians under the criminal law.

A New Zealand court, almost a century after the ruling in *R v Glover*, may well view the requirements of a prosecution for blasphemous libel under s 4 of the Summary Offences Act 1981 in a different light, however, in the United Kingdom, the approach adopted in *Glover* endured well into the 1990s. The earlier references in English criminal law to blasphemous libel used similar wording to s 123 of the Crimes Act 1961. In the earlier English cases of *Taylor*,[60] *R v Waddington*,[61] and *R v Hetherington*,[62] the respective Courts ruled that the purpose of the blasphemous libel provision was solely to discourage disparaging comments or the reviling of the Christian faith. In the 19th century English case of *R v Cathercole*, the Court held that it was not blasphemous to attack the Jewish or any non-Christian religion, or any Christian faith other than the established English religion.[63]

This approach has endured and was adopted more recently in the United Kingdom by Sir Mathew Hale in the 1991 case of *R v Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*,[64] where it was noted that the common-law offence of blasphemy was confined only to protecting the Christian religion. The common-law offence of blasphemous libel was abolished in England and Wales in 2008. Prior to its repeal, there had been no acknowledgement by the courts that the protection against blasphemy provided by s 123 would be extended to beliefs or artefacts that are sacred to religions other than Christianity. The existence of ss 13, 14, and 15 of the NZBORA regarding freedom of expression and freedom of religion, I suggest, further dilutes the already limited effect of s 123 of the Crimes Act 1961.

The mere existence of the blasphemous libel provision for almost the entire history of New Zealand's criminal law illustrates the willingness of the law to address the cultural concerns of the dominant Western cultural paradigm. In addressing the reviling of the Christian religion, the provision could be said to do one of two things. First, the provision seeks to protect the dignity of the Christian religion – a protection based partly or wholly on the immoral nature of ridiculing God. Second, the provision may in fact, be aimed at merely ensuring societal safety. Recognising the place of Christianity in Western societies, the provision may reflect the real danger of societal retaliation and conflict if such

[59] *Glover* (n 49) at 187.
[60] *Taylor's case* (n 49).
[61] *Waddington* (n 49).
[62] *Hetherington* (n 49).
[63] *Cathercole* (n 49).
[64] *R v Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429.

actions were legally permitted. The fact that no prosecution under this provision has been pursued since the 1920s suggests the later may well have been the driving force behind the provision. This said, the imperative for the inclusion of cultural nuances into the criminal law may not be accompanied by a form of cultural superiority or cultural endorsement as many aspects may merely act to reflect the protection of society itself. This goes to the fundamental pressure for the criminalisation of human conduct as will be discussed in Chapter Six. Whilst some references to culture in the criminal law may well be moral, others, perhaps like this provision of the Crimes Act, may be more firmly justified on the basis of protecting societal norms or utilitarian principles. Yet others, such as homosexual law reform and making same-sex marriage lawful may be based on a paternalistic approach of progressive development within the norms of society.

5.2.4 Māori-Specific Offences

Sections 30-36 of the Māori Community Development Act 1962 (MCDA) outlines various minor offences which are applicable only to Māori and designed to regulate the conduct of Māori within Māori communities. The offences under ss 30-36 of the MCDA dealt with (I paraphrase), disturbing "any congregation assembled for public worship" or public meeting or interfering with the conduct of any religious service, church, burial ground or other public building; behaving in a riotous, offensive, threatening, insulting or disorderly manner; using threatening, abusive and insulting words; supplying liquor to an intoxicated, violent or quarrelsome "Māori'; and behaving in a disorderly manner at "Māori" gatherings. The MCDA empowered Māori wardens (or the Police) to retain the car keys or take charge of a motor vehicle, where there is reasonable cause to believe that a "Māori" person is incapable of exercising control over a vehicle.[65] Further, a Māori warden (or on request, the Police) are authorised to order an "intoxicated or partially intoxicated" Māori, who was quarrelsome, violent or disorderly, to leave licenced premises.[66] There is however no reference or requirement in ss 30-36 of the MCDA that Māori culture or cultural factors be a consideration in the determination of the elements of the offending or in dealing with the ethnically or culturally Māori defendant. The MCDA does not provide a framework for the prosecution of offending or provides a structure whereby sanctions and punishments for offending under the MCDA can be determined. The implication is that Māori Committees are therefore to apply their respective tikanga processes to criminal offending, but this is unclear.

In passing the MCDA, New Zealand's Parliament had sought to consolidate and revise the Maori Social and Economic Advancement Act 1945.[67] In particular, the explanatory notes to the Maori

[65] MCDA, s 35.
[66] MCDA, s 32.
[67] Refer the explanatory notes to the Maori Welfare Bill 1962.

Welfare Bill of 1962 indicates that the purposes of the MCDA was to empower Māori Committees and Māori wardens to assume responsibility for the "unruly behaviour of Maoris" as well as the "exercise of certain powers in respect of the prevention of Maoris from driving vehicles when they are not capable of exercising control over vehicles".[68] The New Zealand Māori Council and Māori committees have not used the provisions of the MCDA to prosecute any Māori.

The offences under the MCDA, I suggest, are superfluous as similar offences were already able to be prosecuted under the Police Offences Act 1927 (which was subsequently incorporated into the Summary Offences Act 1981). Some of the offences under the MCDA are also able to be prosecuted under various provisions of the Crimes Act 1961.[69] Unlike the MCDA, all prosecutions under the Summary Offences Act 1981 and the Crimes Act 1961 are applicable to any offending committed within New Zealand's territorial borders and apply equally to any offender regardless of their cultural or ethnic orientation.

What these provisions illustrate is the creation of specific law and enforcement frameworks for Māori people. Rather than the criminalisation of cultural practices per se, this is an example of an attempt to establish parallel processes in which issues of culture can be more adequately addressed. The establishment of alternative, parallel systems of criminal justice, as may be advanced in pursuit of partnership obligations under the Treaty of Waitangi for example, are beyond the scope of my thesis. Whilst the offences under the MCDA can be said to be cultural in their focus, they are not cultural in their application.

[68] Refer the explanatory notes to the Maori Welfare Bill 1962.
[69] See for example, Crimes Act 1961, s 87 (rioting); s 145 (criminal nuisance); s 269 (intentional damage).

5.3 Culture and Criminal Defences

The avenues by which New Zealand's criminal law acknowledges culture or cultural factors in the context of recognised defences is available through the application of fundamental principles of the criminal law and the interpretation of the requirements of elements of the substantive criminal law. Of particular relevance to the discussion here are the avenues whereby culture and cultural factors impact assessments of *mens rea* or the motivation for the behaviour of defendants.[70] The case-law in New Zealand suggests that the use of culture and cultural factors in determining intent or motivation is limited and since the removal of the partial defence of provocation to murder in 2009, a defensive strategy based on a cultural contention has not, I argue, been adequately acknowledged by the New Zealand courts. I examine here various defences available to a defendant where cultural considerations are relevant to assessments of criminal liability.

5.3.1 Section 59 of the Crimes Act 1961

Section 59 of the Crimes Act 1961 provides justification for a parent to use force to correct a child's behaviour where the force used is:

> reasonable in the circumstances and is for the purposes of … minimising harm to the child or another person … preventing the child from engaging or continuing to engage in offensive and disruptive behaviour … or in performing the normal daily tasks that are incidental to good care and parenting.

It is not apparent in the language of s 59 that cultural factors will be relevant to this defence, however, it is implicit that the "good care and parenting" of children and what is to be regarded as "reasonable in the circumstances" will be culturally loaded and therefore require the consideration of cultural factors. Research by Pereira,[71] Fairbairn-Dunlop,[72] Schoeffel and Meleisea,[73] firmly suggest that the moral justifications regarding "parental smacking" and perceptions of parental autonomy to discipline children is deeply cultural. These cultural considerations may be based on religious understandings, or dictated by a variety of cultural factors.

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[70] For example, the colour of right defence (*Saxton v R* [2009] NZCA 498, [2012] 1 NZLR 331); reasonable excuse defence (*Hamilton v Police* (2010) HC, Auckland, CRI 2010-404-233 per Keane J); Necessity or compulsion (*Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA) and Compulsion/Necessity (*Akulue v R* [2014] 1 NZLR 17 (SC)); the US case of *People v Kimura* (1985) No. A-091133 (Los Angeles Superior Court) regarding murderous intent. See also Andrew Ashworth *The Principles of the Criminal Law* (6th ed. Oxford University Press 2009) at 74-82 and 154-159 regarding the concept of mens rea.

[71] Janet Pereira *Spare the rod and spoil the child: Samoan perspectives on responsible parenting* (2010) Kōtuitui New Zealand Journal of Social Sciences Online, vol. 5, no. 2, 98-109.

[72] Peggy Fairbairn-Dunlop *Tetee atu. To hit or not to hit: is there room for a third space?* (2001) Journal of Pacific Studies, vol. 25, no. 2, 203-230.

[73] Penelope Schoeffel, Malama Meleisea *Pacific Island Polynesian attitudes to child training and discipline in New Zealand: some policy implications for social welfare and education* (1996) Social Policy Journal of New Zealand, vol. 6, 134-147.

The cultural arguments in this context were highlighted by Ahdar and Allan in a 2001 commentary regarding a Bill before Parliament which sought to criminalise "parental smacking".[74] In support of their contention that parental autonomy to discipline their child as they saw fit should be retained, Ahdar and Allan argue that the call by various groups for the abolition of "capital punishment to correct their child's behaviour" under s 59 of the Crimes Act 1961 (as it was then constructed before 2007) "was misguided", as the arguments for banning physical punishment for the purpose of correction are "philosophically suspect, linguistically strained and not supported by … the limited research evidence".[75] The focus of s 59 prior to the 2007 amendment was that parents were justified in physically disciplining their child where the force used was reasonable in the circumstances. In essence, one side of the debate focused on the autonomy of parents to discipline their child while the opposing viewpoint emphasised the prevention of abuse of children. When s 59 was amended in 2007, a compromise position appears to have been adopted by Parliament where the use of force required an intent of "preventing or minimising harm" to a child,[76] but the defence of "force used [being] reasonable in the circumstances" was retained. After the amendment to s 59, parents were not entitled to use force for the purpose of correctional punishment.[77]

As can be seen in the case of *Ausage v Ausage*,[78] the retention of the "reasonableness" requirement in s 59 provides avenues whereby religious or cultural considerations can be relevant to this defence. Although no case after the 2007 amendment has directly discussed cultural issues in the context of s 59, the most influential decision regarding the recognition of cultural and religious factors within an assessment of the requirements of s 59 remains the decision in *Ausage*. The significance of *Ausage* is that Judge Somerville, in the Family Court, meticulously went through an assessment of the Respondent father's religious and cultural reasons for physically disciplining his teen-aged daughter in opposition to an application that a final protection order be made against him. Judge Somerville accepted that there were cultural and religious justifications for the discipline,[79] but found that, overall, the actions of the Respondent were not for the purpose of "correction" but instead were "motivated by feelings of shame and anger…and had little to do with the proper exercise of disciplinary powers".[80] Judge Somerville found that the physical force used was subjectively and objectively applied for an improper purpose aimed at imposing control over his daughter rather than to correct her behaviour. [81]

[74] Rex Ahdar, James Allan *Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand* (2001) NZ Law Review, 1.
[75] Ahdar, Allan (n 74).
[76] *R v Rika* [2011] NZCA 347 (CA) at [5] and [12] per Ronald Young J.
[77] *R v P (CA532/2015)* [2016] NZCA 50 (CA) at [6] per Ellis J.
[78] *Ausage v Ausage* [1998] NZFLR 72, (1997) 17 FRNZ 13.
[79] *Ausage* (n 78) at 20 - 22.
[80] *Ausage* (n 78) at 23.
[81] *Ausage* (n 78) at 22.

Ausage provides a further illustration of the divide between legitimate cultural practice and illegitimate harm to an individual as also illustrated with the FGM example above. In this case, the motivation for the use of force was pivotal in that it provided the basis upon which the legitimacy of the use of force was assessed. As a rare example of where motivation for an action will be a defining feature of the *actus reus* in the criminal law, here the cultural backdrop to the offending was of crucial importance in order for the court to determine the subjective and objective motivation. Having failed at the first hurdle of the test, the court did not go on to outline the relevance of culture to the level of force used in this particular case. In this instance, Judge Somerville applied a culturally nuanced approach to the question of the proportionality of harm used in light of the cultural circumstances and traditions of those involved.

5.3.2 Claim (or Colour) of Right

Property ownership law in New Zealand is implicitly framed around Western cultural notions of entitlement to or proprietorship of property. As such, alternative cultural paradigms are not reflected in the application of the defence of claim (or colour) of right. The term "claim of right" is defined in s 2 of the Crimes Act 1961 and is a concept that is relevant to numerous offences but is framed in negative terms by reference to the defendant acting "without claim of right" in theft offences (ss 219, 226, 228, 230, 239 and 240), intentional damage offences (s 269) and defending the removal of property (s 54). In the context of an arson charge, the offences under s 267 (1)(a) and (1)(c) can be committed whether or not the property is owned by the defendant. An offence under s 267 (1)(b) can only be committed where the defendant had no "interest" in the property concerned, therefore a claim of right would provide a defence under s 267(1)(b).

The "claim of right" concept referred to in these sections are based around situations where there are noticeably clear understandings of the concept of "property ownership" that are well-understood within European and other "Westernised" societies where the focus is on individualised values and norms. In other cultures, for example New Zealand Māori and various Pacific cultures, property ownership is centred on communal ownership and dictated by customary practices that promote the collective or shared use of property.[82] The cultural complexities regarding property ownership has rarely been tested in the New Zealand courts but are regularly disputed within legal jurisdictions (for example in the Pacific region) where "customary land" is abundant.[83]

[82] Refer for example, Miranda Forsyth *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (Australian National University E Press 2009).
[83] See Forsyth (n 82).

Under New Zealand's criminal law, a complete defence to a charge of conversion or theft is made out if there is evidence before the court of the existence of a specific set of circumstances (for example, consent from the owner of property or the establishment of a communal property right) that confers a right to take possession of a specific item of property. The basis of a cultural contention will be that the defendant believed that his or her conduct in removing or interfering with the subject property was justified according to the norms of the claimed culture.[84] If a claim of right defence based on cultural factors is advanced, then the defendant bears the evidential burden for establishing the existence of the custom claimed.[85] For example, in response to a charge of theft, the defendants in *Saxton v R* advanced a defence based on a colour of right claim that was founded on a cultural belief that they were allowed to remove pounamu (greenstone) from riverbeds in the West Coast of New Zealand's South Island which was owned by Te Runanga o Ngai Tahu.[86] Although the Courts, at various stages of these proceedings, accepted that there was basis for the cultural assertions, the contentions were unsuccessful as the defendants could not provide sufficient evidential basis for their cultural claim.[87] Although the defendants in *Saxton* claimed their removal of pounamu was a cultural right, ultimately, the Court held that their intentions were motivated by self-interest as the pounamu was eventually to be sold for their own benefit rather than advancing a community interest.

Adams Commentary on the claim of right defence suggests that it would be rare that a defence strategy based on a cultural belief will be successful in New Zealand.[88] The basis for this view rests on the test for the existence of the claim of right being entirely subjective. The standard to be applied by the Court in these circumstances is whether the belief was honestly held. The authors of Adams argue that where the defendant's belief would only have been justified under customary indigenous law then this cannot form the basis of a "claim of right" as such a concept also required that the customary indigenous law existed and must be recognised by the substantive criminal law.[89] As matters presently stand in New Zealand, Māori customary law is not formally recognised in substantive criminal law by virtue of the effect of ss 5 and 9 of the Crimes Act 1961, but, as the ensuing discussion will show, there is considerable scope within the criminal law where the courts are implicitly required to have regard to cultural considerations.[90]

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[84] *Saxton* (CA) (n 70).
[85] Refer *Brown and Edney v Police* (1984) 1 CRNZ 576 per Henry J. Also see *Police v Minhinnick* MC Rotorua, 3 March 1978 (per Trapski SM); *R v Knowles* CA146/98, 12 October 1998 (CA).
[86] *Saxton* (CA) (n 70).
[87] *Saxton* (CA) (n 70) at [77] to [94] regarding the inadmissibility of the cultural evidence.
[88] Simon France, Jeremy Finn *Adams on Criminal Law – 2020 Student Edition* – s 2 Interpretation, CA 2.04.01 Claim of Right generally.
[89] *Walden v Hensler* (1987) 75 ALR 173 (HCA); *Minhinnick* (n 85); *DPP Reference (No. 1 of 1999)* (2000) 134 NTR 1
[90] See for example *Saxton* (CA) (n 70); *Knowles* (CA) (n 85).

The relevance of cultural considerations from both a prosecution perspective and in support of a defence strategy can be seen in the case of *Cowlishaw v Police*.[91] In *Cowlishaw*, the defendants were charged with intentional damage under s 269 of the Crimes Act 1961 because they had cleared vegetation and constructed pathways on a nature reserve that was public property. The defendants sought to justify their actions on the basis of a claim of right (available under s 269 (2)(a)) where their interest in the land was legally and morally justified as they were "motivated by a desire to care for the Reserve" and to implement the objectives of the relevant legislation which, they claim, the local council had neglected to do.[92] The High Court ruled that there was no evidential basis for the appellant's belief that they had a right to undertake work within the reserve, therefore the appeal against their convictions and sentence for damaging Crown-owned land was dismissed. The District Court Judge considered the defendant's intentions to be well motivated and entered a conviction but discharged the defendants subject to the payment of a nominal sum to the council by way of reparation. Although the defendants in *Cowlishaw* were well intentioned, their motivation proved to be counter to what the experts considered to be in the best interests of the nature reserve. Although *Cowlishaw* was decided on the basis of a finding by the judge that the defendant's claim or colour of right could not be established, *Cowlishaw* also illustrates that despite the defendants and the council adopting contrasting approaches to the preservation of the heritage of the subject land (a tangible cultural factor), it was accepted that the motivations of both parties was to preserve the cultural heritage of the area.

As the discussion in Chapter Three demonstrated (parts 3.5 and 3.6), a belief arising from a claim of right must be genuinely held and although it need not be reasonable, reasonableness may be relevant in determining whether the assertion of belief is credible.[93] Because a claim of right is entirely subjective, an essential inquiry is therefore whether the belief was honestly held. Common to *Cowlishaw* and *Saxton* was that the defendants claimed their actions were motivated by their belief in the existence of a cultural right. While the defendants in *Cowlishaw* were able to establish that the motivations for their actions were "to maintain the heritage of the area" and therefore had genuinely believed that they were enhancing the heritage nature of the reserve, the court found that the defendants' methodology in achieving their cultural purpose was counter to what was culturally appropriate for the reserve. The contrast with *Saxton* is that the cultural evidence demonstrated that the defendants' claimed connections with Ngai Tahu were tenuous and their motivations for the removal of commercial quantities of pounamu were purely self-serving; therefore their colour of right claim based on a cultural belief was unreasonably and dishonestly held. The cultural evidence

[91] *Cowlishaw v Police* [2012] NZHC 1244 per Allan J at [49] – [59].
[92] *Cowlishaw* (n 91) at [13] – [17].
[93] See for example *Brown and Edney* (HC) (n 85) at 578. Also *Crockenberg and others v Police* [2017] NZHC 2704 (HC) at [2] and [4] per Muir J.

presented in both *Cowlishaw* and *Saxton*, I suggest, was relevant and significant to the final determinations by the respective courts in that it allowed the courts to assess the credibility and significance of the cultural contentions to the elements of the offence and the defence that was advanced.

5.3.3 Compulsion, Duress of Circumstances, Necessity

Another avenue for the recognition of culture in the criminal law can be found in the defence of compulsion (under s 24 of the Crimes Act 1961) and the defence of necessity (a common law defence available by virtue of s 20 of the Crimes Act 1961).[94]

Section 24 requires that emphasis be placed on the immediacy of the threat of harm and the presence of someone or something that has generated the threat.[95] In *Kapi v Ministry of Transport*, the Court of Appeal stated that the defence of compulsion pursuant to s 24 requires an assessment of "the belief that has been formed on reasonable grounds of imminent peril of death or serious injury".[96] The Court of Appeal in *R v Teichelmann* stated that an essential element of compulsion is that the defendant invoking the defence must have believed the threat would be carried out. The belief need not be entirely reasonable, but the reasonableness of the belief will be relevant to whether the belief was genuinely held. The Court of Appeal in *Teichelmann* referred to this as "a mixed subjective-objective test".[97]

The defence of necessity is now more established as a common law defence where duress of circumstances has necessitated the actions of the accused. In *Kapi*, the Court of Appeal stated that if the defence of necessity was available in New Zealand then:[98]

> breach of the law is … excused where there was no realistic choice but to act in that way. Even then the response can be excused only where it is proportionate to the peril.

The requirement of reasonableness under a defence of compulsion will accommodate a consideration of the defendant's understanding of the circumstances he or she faces in taking the course of action that has led to the criminal charges. This understanding of the circumstances, I suggest, can arise from

[94] See for example, *Tifaga v Department of Labour* [1980] 2 NZLR 235 (CA) per Richardson J at 243. Also see *Kapi* (CA) (n 41). It must be acknowledged again that the discussion here is for the purposes of a cultural audit of New Zealand criminal law. In Chapter Five (part 5.3) I analyse the cases discussed here in more detail with the aim of clarifying whether the cultural arguments raised by defence counsel could be regarded as "cultural" for the purposes of the criminal law.
[95] On this point see *R v Teichelmann* [1981] 2 NZLR 64 (CA) at 66-67.
[96] *Kapi* (CA) (n 70) at [57].
[97] *Teichelmann* (n 95) at 66.
[98] *Kapi* (CA) (n 70) at [57].

factors that are intrinsic to the defendant and may be influenced or inspired by his or her cultural, spiritual or religious beliefs. This can be demonstrated with reference to the circumstances surrounding the defendant's involvement with a prison riot in *R v Taiaroa*.[99] The defendant in *Taiaroa* claimed that the "prison culture" and the "culture of intimidation" that pervaded the prison raised serious concerns for his personal safety if he did not participate in the riot. He argued that he was therefore compelled to be involved in the riot. Heath J adopted a combination of objective and subjective tests in assessing the circumstances and responses of Mr Taiaroa to his situation and took into account the culture of intimidation within a prison and the associated "belief of harm" felt by the defendant,[100] the level of compulsion felt by the defendant to be involved with the riotous behaviour and the defendant's own psychological frailties (anxieties) in concluding that there was a reasonable possibility that Mr Taiaroa had participated in the riot under compulsion and therefore was not guilty of the charge of riotous behaviour.[101] Although the Court accepted there was a sound basis for Mr Taiaroa's defence of compulsion, there was insufficient evidence before the Court to substantiate his cultural contention.

The s 24 defence of compulsion has seen some recent developments where the defence of duress of circumstances or necessity have received some limited recognition by the New Zealand courts and has been subject to significant academic criticism.[102] The essence of these developments is that the previous insistence by the courts on a strictly objective assessment of the reasonableness of the defendant's actions is evolving towards the acceptance of subjective assessments of the reasonableness of the defendant's response to the threats of immediate death or grievous bodily harm. As discussed above, cultural considerations may impact the beliefs and understandings of a situation encountered by a defendant. I also suggest here that the present requirements of immediacy and presence of the threat fails to recognise that, in a modern world, a threat to (say) family in another part of the world can equally be regarded as "immediate", as a failure to comply with an activity in (say) New Zealand could just as likely engender an immediate carrying-out of the threat in another country, such as Nigeria. This extension of the compulsion defence can be demonstrated with a consideration of the rulings in *Akulue v R*[103] and *Kapi v Ministry of Transport*.[104]

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[99] *R v Taiaroa* [2015] NZHC 2401.
[100] *Taiaroa* (n 99) at [54], [56], [57].
[101] *Taiaroa* (n 99) at [50] to [61].
[102] New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC Report 75, 2001) at 72. Also see, Elisabeth McDonald *The common law defence of necessity: Revisiting the impact of Kapi v Ministry of Transport (1991) 8 CRNZ 49* (CA) [2015] NZLJ 238.
[103] *Akulue* (SC) (n 70). The Supreme Court of Canada considered a similar fact scenario in *R v Ruzic* [2001] 1 SCR 687, where a different approach was adopted by the SC, Canada. The Supreme Court in *Akulue* (SC)(n 70) at [17] to [21] rejected the *Ruzic* approach because it was not applicable in the New Zealand context as the provisions of the NZBORA do not directly correspond with the Canadian Charter (refer *Akulue* (SC)(n 70) at [17] to [21].
[104] *Kapi* (CA) (n 70).

In *Akulue*, the District Court did not allow the admission of evidence in support of a defence of coercion to a Nigerian man accused of being a "drug mule" to protect his family. Although Mr Akulue had been assured that the threats of harm to members of his family in Nigeria would be carried-out, the defence based on Mr Akulue's real and immediate fears for the safety of his family failed because of the requirements in s 24 that the threat of death or grievous bodily harm be immediate and the person who has threatened the harm is present at the time of the offending. I argue that the failure of the New Zealand Courts to appreciate the seriousness of the threat of harm from a Nigerian perspective reflects a "cultural divide" with how a threat of harm is perceived in the New Zealand context. The defence of necessity claimed in *Akulue* was not accepted by the lower courts due to an assessment of the proportionality between the harm caused by the offending and the harm which was threatened. In upholding the rulings of the lower courts, the Supreme Court noted that there must also be an accounting of the level of coerciveness, including the absence of practical alternatives to compliance. Although the Court of Appeal accepted that there could be some "inherent flexibility" in the immediacy and presence requirements, these could not be extended to threats of future retribution from a person who was well removed from the scene of the offending.

In *Kapi v Ministry of Transport*, a man involved in a traffic accident late at night after he drove into a parked car in the suburb of Porirua, Wellington, claimed that he did not remain at the scene of the accident (in contravention of a requirement to do so under s 65(1) and (5) of the Transport Act 1962) due to a genuine fear for his safety from being "given a beating" by local Samoans.[105] Although the defence of necessity was ruled to be available to the appellant, he could not be excused from the offence as there was no evidence of other persons at the scene of the accident and the Court's finding that there were no reasonable grounds for his belief.

It was asserted by the defence that the threat of being "beaten" by Sāmoans in these circumstances was genuinely held Mr Kapi, as a person of Māori ethnicity, on reasonable grounds. The contention was that Mr Kapi feared he had damaged a vehicle belonging to a local resident. Because of the nature and extent of violence inherent in a place like Porirua, Mr Kapi had honestly believed that immediately leaving the scene of the accident was the only option available in addressing the perceived threat. These fears, for Mr Kapi, I suggest, are cultural in nature and would still be open for acceptance by the court if relevant and probative evidence was introduced for the court's consideration. Other than a reference by defence counsel to a recent newspaper article regarding the prevalence of violence in Porirua, no expert evidence was advanced in support of Mr Kapi's claims. I suggest that the judge's lack of familiarity with the "culture of violence" in a place like Porirua will not have assisted Mr Kapi. I suggest that a judge can take judicial notice of the culture of a specific

[105] *Kapi* (CA) (n 70) at 50 per Gault J.

area (for example, Khandalla in Wellington or Fendalton in Christchurch) if the judge was familiar with its environs and general behaviour of the people who live in that area. However, the "culture" attached to a specific area in which the judge will have no familiarity will require clear and unequivocal evidence of the nature of such culture. It could also have been contended (or speculated) by the defence that Mr Kapi may well have remained at the scene of a similar vehicle accident in Fendalton or Khandalla as he will have appreciated that the prospects of being "beaten by Samoans" was far less likely in such areas. In the end, the inability of Mr Kapi and his defence counsel to present appropriate supporting cultural evidence has meant that the Court could not reasonably take account of the cultural claim.

In *Akulue* and *Kapi*, the circumstances of both cases would have provided opportunities for the defence to introduce cultural evidence in support of the cultural contentions made. The courts indicated a willingness to entertain evidence in support of the cultural contentions but ultimately there was insufficient evidential support for the cultural claims. In *Akulue* and *Kapi*, the respective courts adopted an objective test of the requirements for the "reasonableness" of the defendant's belief. A clearer appreciation by defence counsel of the relevance of the cultural factors to the rationale for the defendant's actions will, I suggest, have promoted a more robust approach to the introduction of relevant and probative cultural evidence.

Because of the issues raised by the Court of Appeal in *Kapi*, McDonald takes the view that legislative reform is necessary to extend the effect of the s 24 defence of compulsion (or duress) to include the common law defence of necessity.[106] Each of these defences allow for the introduction and application of cultural evidence where cultural factors impact a defendant's perception of the nature of the threat that they face. Similar arguments may be advanced in the circumstances of *Akulue*, where the Supreme Court recognised an extension of the common law defence of duress of circumstances where the threat of harm was directed at the defendant's family overseas. McDonald argues that there remain many examples of conduct by persons which are subjectively reasonable in the circumstances but not recognised by the defence of compulsion.[107] The significance of the extension to the s 24 defence of compulsion suggested by McDonald is that the perception of a threat to personal safety should not require the presence of the threatening person but may be based on a subjective belief. The existing requirements of s 24 of the Crimes Act 1961 fails to recognise that individuals from minority cultures may perceive the threat to family in their home countries to be of such significance that to refuse to comply with a requirement to act in an illegal manner, as was the case in *Akulue*, would be reasonable from a cultural perspective. I suggest that the significance of cultural factors in circumstances similar to *Akulue* is that s 24 presently requires presence and proximity of the threat yet the reality in a

[106] Refer McDonald (n 102).
[107] McDonald (n 102) at 239.

modern world is that a threat is equally real whether the persons in danger is the defendant or a member of the defendant's family in another place or country. I suggest that modern advances in communication would allow perpetrators to give immediate effect to threats even if the persons under threat or the perpetrator of the threat are in different locations. The development of an approach by the Courts towards a requirement of imminence rather than immediacy may well see more significant recognition of the "cultural" factors relied upon in cases such as *Kapi* or *Akulue*.

There is also a developing acceptance by the Courts that the defence of necessity will, depending on the circumstances, be extended to include situations where the threat of death or serious harm is "imminent" rather than the immediacy required by s 24. For example, in *Police v Kawiti*,[108] the High Court accepted that the defence of necessity was available to a defendant, a disqualified driver, who was forced to drive while intoxicated to hospital after being seriously assaulted and under threat of further assaults. When the matter was referred back to the District Court, it was accepted that the defendant had taken the only reasonably available way of avoiding a serious risk of further harm from her injuries and therefore the defence of necessity was successful.[109] The defence of necessity was also successful in *Police v Anthoni*,[110] where the defendant assaulted a child while swimming in the reasonable belief that this was necessary to prevent injury to the child who was drifting perilously close to rocks. By comparison, in *Cooke v Police*,[111] (where the dangerous driving was prompted by "distressing" conduct by five youths from outside of the defendant's vehicle) and in *Friend v Police*,[112] (where the errant driving arose from a "driving duel") the defence of necessity was unsuccessful because the defendant in both of these cases had adequate opportunity to disengage from the illegal activity.

5.3.4 Consent

The Crimes Act 1961 makes reference to the availability of consent as a defence in various sections. Most of these provisions focus on sexual offending in Part 7 of the Act,[113] and serious assaults within Part 8 of the Act.[114] Substantiation of a claim of consent in response to a sexual violation charge,[115] or an assault, has been accepted by the courts as negating the required intent.[116] Chiu argues that cultural

[108] *Police v Kawiti* [2000] 1 NZLR 117 (HC).
[109] *Police v Kawiti* DC, Kaikohe CRN802703705, 4 November 1999.
[110] *Police v Anthoni* [1997] DCR 1034 (DC).
[111] *Cooke v Police* HC, Christchurch AP118/02, 7 November 2002.
[112] *Friend v Police* (2006) 23 CRNZ 319 (HC).
[113] Crimes Act 1961, ss 128, 128A, 129A, 131, 132, 134A.
[114] Crimes Act 1961, ss 219 (3) (theft).
[115] *People v Moua* No.328106-0, Fresno Superior Court (1985). Refer further discussion of this case in Chapter Five (part 5.5.1(c)) regarding the issue of consent.
[116] For example, see *R v Lee* (2006) 22 CRNZ 568 (CA) and *R v Rawiri* (14 August 2009) Wellington HC (CRI 2007-032-5294).

considerations can impact how a defendant may reasonably view "consent" by the other party or alternatively how a situation involving an apparently sexual act will be regarded by the parties as culturally acceptable.[117]

Sections 128A and 129A of the Crimes Act 1961 specifically address the issue of how "consent" is to be construed in the context of the various offences involving sexual assault and lists various instances where consent is negated.[118] Although the consent must be "true, real or genuine"[119] and be "full, voluntary, free and informed",[120] subsection (8) of s 128A however recognises that not every misunderstanding of the situation or every limitation on the complainant's freedom to make an informed decision will negate consent. This, I suggest, therefore obliges the court to make assessments concerning the surrounding circumstances which may also involve a consideration of relevant community values and expectations. There are no New Zealand cases that directly deal with cultural approaches to consent, however, examples of how criminal courts in other jurisdictions have addressed these issues will, I suggest, provide guidance for the New Zealand courts.

Renteln[121] provides the examples of cultural approaches to marriage and sexual assault where consent, based on cultural beliefs, have been instrumental in negating the required intent.[122] In *State v Kargar*, a male Afghani was acquitted on a charge of kissing the penis of his nine-month old son.[123] While the case of *Kargar* did not specifically deal with the issue of consent, its significance to the present discussion is that it highlights the reality that the true nature of a particular cultural practice cannot always be taken at face value. Mr Kargar was convicted in the lower court of two counts of gross sexual assault. On appeal, the Maine Supreme Court accepted that the defendant's conduct was cultural in nature and because the father's actions were an extenuation which was not envisaged by the Maine legislature in defining the crime, the convictions were vacated. The cultural evidence presented by various people familiar with the custom and by cultural experts affirmed that the practice, which is common in Afghanistan, was a demonstration of love for the child rather than having any sexual connotations whatsoever and therefore was a major factor in the Supreme Court's decision to quash the convictions. The significance of this case to the present discussion is that cultural factors can operate to explain an alternative culturally derived justification for conduct that may appear criminal in nature.

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[117] See Elaine Chiu *Culture as Justification, Not Excuse* (Faculty Publications, Paper 52, 2006) at 1317- 1374. Also see James Donovan, John Stuart Garth *Delimiting the Culture Defence* (2007) QLR at 109-146.
[118] *R v Barker* (2009) 24 CRNZ 308 (CA). Also refer *State v Kargar*, 679 A.2d 81, 82 (Me. 1996).
[119] *R v S (T233/91)* (1992) 9 CRNZ 490 (HC) at 495.
[120] *R v Cox* CA213/96, 7 November 1996; *R v Herbert* CA81/98, 12 August 1998.
[121] Alison Dundes Renteln *The Cultural Defense* (Oxford University Press 2004).
[122] Refer Renteln (n 121) and the author's discussion of *Kargar* (n 118) at 59-60.
[123] *Kargar* (n 118).

The significance of the *Kargar* decision was that it provided a starting point for analysing the viability of culture as a defence because, on appeal, it was held that the lower court had erroneously ruled that the defendant's cultural background was relevant in absolving him of guilt and the conviction should be vacated.

Renteln also refers to the case in the United States of *People v Moua*, where the defendant faced a charge of kidnapping and rape.[124] It was contended for the defendant that the activity that took place was part of a Hmong marriage practice, where the female was required to demonstrate reluctance to sexual conduct as part of a courtship ritual, therefore the defendant's actions were ceremonial in nature rather than sexually motivated.[125] The prosecutor was reluctant to pursue the rape charges because there was uncertainty as to whether a jury could adequately comprehend the complex nature of evidence about Hmong marriage rituals. There was also concern that previous inconsistent statements by the complainant will have tainted any efforts to counter a defence assertion that there had been consent to the sexual activity. In the end, the Judge withdrew the kidnapping and rape charges and Mr Moua pleaded guilty to a charge of false imprisonment.

If the circumstances of the offending detailed in *Moua* was to be prosecuted in New Zealand, it is most likely the defendant will be charged under s 208 of the Crimes Act 1961 where the focus is on an abduction for the purposes of marriage or sexual connection. Section 208 recognises that the intention could be for the "purposes of marriage or sexual connection" as was the case in *Moua*, but s 208 also envisages that where there was consent to the abduction for such purpose then there is a valid defence to the charge. In *R v Mohi*,[126] Quilliam J held that the offence was complete at the time of the detention or taking away, as long as the abduction was accompanied at the time by the necessary intent. Accordingly, the offence will be made out once the necessary intent has been established but the fact of consent will operate to negate such intent.

The acceptance of the cultural factors by the United States courts in *Moua* and *Kargar* could equally be adopted by the courts within the New Zealand context as the wording of, for example s 128, recognises a defence of consent or reasonable belief as to consent. If the case of *Moua* was to be considered under s 208 of the Act, a New Zealand Court will require that the cultural evidence establish the nature of the cultural practice relied upon, the connections that the complainant and the defendant have with the claimed culture, clarify the parties' understandings of the claimed cultural

[124] *Moua* (n 115). Commentary on the case of *Moua* is also provided by Carolyn Choi *Application of a Cultural Defense in Criminal Proceedings* (1990) Pacific Law Journal, Issue 8, no. 1, 80-90 at 84-85. Also see Nancy S Kim *The Cultural Defense and the Problem of Cultural Pre-emption: A Framework for Analysis* (1997) New Mexico law Review, vol. 27, issue 1, 101-139 at 123-125.
[125] Renteln (n 121) at 127.
[126] *R v Mohi* [1982] 1 NZLR 240 (HC).

practice and whether the parties had acted in accordance with such cultural practices. Because the Court in *Kargar* found that the actions of Mr Kargar were cultural rather than sexual, it is likely that a prosecution under one of the sections in Part 7 of the Crimes Act 1961 will also result in an acquittal.

In the context of consent to an assault under Part 8 of the Crimes Act 1961, the physical injuries or degree of intended harm referred to in the various sections require proof of various levels of intention, namely wounding with intent, intent to injure, intent to cause grievous bodily harm, reckless disregard for the safety of others and common assault. The Court of Appeal in *R v Barker*,[127] reviewed the law on consent in the context of ss 189(2) (injuring with intent) and 188(2) (wounding with intent) of the Crimes Act 1961 with particular regard to the decision by the trial judge to remove the defence of consent because of concerns about the ages of the complainants, the need to protect "young members of society" and that the wounding involved scarification.[128] In a majority ruling, the Court of Appeal in *Barker* held that the denial of the defence of consent to the appellant on public policy grounds was erroneous in these circumstances and ruled that the appellant's convictions should be quashed and ordered a retrial. The Court of Appeal in *Barker* also acknowledged that the question of whether the consent was reasonable and whether it should be made available to the defence required a consideration of all of the surrounding circumstances, including policy reasons.[129] The surrounding circumstances that the court in *Barker* refers to would, I suggest, envisage the consideration of cultural factors where such factors impact the reasonableness of the defendant's belief as to consent.

The irregularities in the criminal law's approach to the issue of consent can be further demonstrated by reference to the non-therapeutic circumcision of children with the consent of their parents. Proxy consent is usually given by a parent because the child involved will be too young to provide personal consent and the law accepts that parents are in the position to make well informed decisions, providing such procedures are in the best interests of the child. If the authorisation of a circumcision process by a child's parent is sufficient to allow for the circumcision of a male child, then why is the consent of a parent to the circumcision of a female child not acceptable? This discrimination on the basis of gender, I suggest, provides a substantial counter to the justification for criminalising female circumcision on the basis of utilitarian principles.

The inconsistency that exists regarding the consent of parents to their child's circumcision procedure rests on an assessment of whether the procedure will be in the "best interests of the child". The consent of a parent to the circumcision of their male child is not disputed yet the consent of a parent to an FGM procedure is invalidated as a defence. Section 204A (4) of the Crimes Act prevents reliance

[127] *Barker* (CA) (n 118).
[128] *Barker* (n 118) at [130] per Hammond J and [134] – [139] per O'Regan J.
[129] *Barker* (n 118) at [134] – [139] per O'Regan J.

on a "cultural, religious or other custom or practice" as a defence to FGM, and ss 204A (6) and 204B (4) specifically removes the defence of consent to an FGM procedure. Despite this clear denial of a defence based on consent under ss 204A and 204B, I suggest that there is still scope whereby the consent of a parent or the inherent jurisdiction of the High Court to a medical procedure that is in the "best interests of the child" will provide avenues for medical procedures (such as a circumcision) to be undertaken legally.

Section 36 of the Care of Children Act 2004 (regarding consent to procedures involving children generally) in conjunction with ss 61 and 61A of the Crimes Act (regarding surgical operations), I suggest, requires a consideration of whether a medical procedure will be in the child's best interests and therefore will in turn have a bearing on whether a parent can lawfully consent to that procedure. The anomaly is that a parent's consent for a male child's circumcision could be validated under s 61A whereas reliance on s 61A as a defence for an FGM procedure will not be validated. It has been argued by commentators and medical professionals that a circumcision procedure could be regarded as in the best interests of a child in the observance of religious beliefs,[130] or promote health benefits such as a reduced risk of contracting HIV, reduced risk of genital cancer and urinary infection. [131]

Further, the High Courts' inherent parens juriae jurisdiction enables the court to give consent to a medical procedure provided such procedure is in the best interests of the child.[132] The parens juriae jurisdiction of the High Court has not been tested in New Zealand in the context of giving consent to a circumcision, however, an example is provided within the German Courts in 2012 where the court considered the contrasting arguments regarding maintaining a "child's bodily integrity" and "his parents' rights to inaugurate him into their religious traditions".[133] The Landgericht Cologne (District Court Cologne) ruled that the parents could not authorise the circumcision of the child and that this was a procedure that the child could consent to himself once he had reached sufficient maturity to understand the proposed treatment.[134] Similar arguments could be advanced before the High Court in New Zealand where the court will be invited to exercise its inherent parens juriae jurisdiction to address disputes regarding circumcision procedures for minors.

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[130] Refer Kirsten Bell *Genital Cutting and Western Discourses on Sexuality* (2005) Medical Anthropology Quarterly, vol. 19, issue 2, 125-148.
[131] Chris F Heyns, John N Kreiger *Andrology for the Clinician* (Springer 2006) at 203-212.
[132] Refer the discussion of parens juriae by the High Court in *X v Y [Mental Health: Sterilisation]* [2004] 23 FRNZ 475 and *Carrington v Carrington* [2014] NZHC 869.
[133] Landgericht Koln, 151 Ns 169/11, 07.05.2012 (Cologne, Germany).
[134] Refer commentary by Phoebe Harrop *Balancing rights on a knife edge: the legality of non-therapeutic male circumcision* [2013] New Zealand Public and International Law Journal, vol. 13, issue 1, 199-212 at 200-201. Also see Debra Wilson, Aileen Odgers, Robert Wagner *Reconsidering Circumcision* [2014] NZLJ 357 at 357-358.

The indication from cases such as *Barker v Barker* is that the New Zealand courts will step in and prevent an "invasive and irreversible surgery" (such as the circumcision of a child) unless it can be demonstrated that such surgery will be in the best interests of the child.[135] However, no prosecution has come before the New Zealand courts where such a course of action has been deemed necessary. In the context of a circumcision procedure, it is most likely that the New Zealand courts would not sanction the circumcision of a female child on the basis that such a procedure was in her best interests because the harm considerations will inevitably outweigh the cultural or health and wellbeing considerations advanced in support of such a procedure.[136]

Another example is provided by s 63 of the Crimes Act 1961 which states that there can be no consent to the infliction of death on oneself. However, consent to conduct which involves a physical assault that ultimately leads to a death requires a consideration of the nature of the consent and the precise parameters of what was consented to. In this regard, *R v Lee*,[137] and *R v Rawiri & others*,[138] demonstrate a willingness by the New Zealand Courts to entertain defence contentions regarding the infliction of physical harm based on cultural and religious beliefs.

The position taken by the Court of Appeal in *R v Lee*,[139] was that the availability of the defence of consent will require a consideration of public policy reasons and the circumstances of each case.[140] In *Lee*, the victim consented to an "exorcism" procedure to rid her of a perceived illness. The exorcism involved praying and chanting over the victim and the sustained application of pressure to her upper body. The exorcism process restricted her ability to breathe freely and ultimately led to her death. The Court of Appeal acknowledged that the consent given by the victim to the procedure and the defendant's understanding of the nature of the consent must have been based, in the circumstances of this case, on cultural and religious beliefs. However, the defence of consent to an assault was not accepted by the Court, as the acts performed after the consent had been given, were held to have exceeded the scope of the consent.[141] Because the person giving consent to the "exorcism" has died, determination of the victim's subjective (or cultural) understandings of the nature and extent of the consent will be extremely difficult evidentially and therefore the application of an objective process by the court will be required.

In *R v Rawiri*, the victim's family formed a belief from Ms Moses' irrational behaviour and after consulting a tohunga (Māori tikanga expert, priest or healer), that her "illness" had been a result of a

[135] *Barker v Barker* DC Wellington, FP 085-612-02, 25 August 2003 (Family Court).
[136] See for example Wilson et al (n 134).
[137] *Lee* (CA) (n 116) at [47].
[138] *Rawiri* (HC) (n 116).
[139] *Lee* (CA) (n 116) at [298].
[140] *Lee* (CA) (n 116) at [298] to [310].
[141] *Lee* (CA) (n 116) at [154] and [318].

"makutu" (a Māori curse) and further that she could only be cured by way of an exorcism process. Ms Moses' family undertook a cultural procedure involving extensive use of water in a frenzied effort to ward off the evil spirits they thought were afflicting Ms Moses. It is not disputed that Ms Moses had initially consented to the "exorcism" process. Ultimately, Ms Moses died and was later found to have drowned. Simon France J, in sentencing the five defendants convicted of manslaughter, accepted that the cultural beliefs behind the exorcism amounted to a significant mitigating factor in sentencing because the cultural factors operated to diminish the culpability of the offenders.[142]

The significance of *Lee* and *Rawiri* is that the Court, in both cases, accepted that the actions of the perpetrators were based on and motivated by firmly held cultural and religious beliefs that they were exorcising "demons" from the victim. In *Lee*, the main offender (Mr Lee) was sentenced to imprisonment whereas the offenders in *Rawiri* received a range of community-based sentences.

5.3.5 Insanity

Although insanity is generally regarded as a defence to a criminal offence, it is not available to the defendant until the prohibited act or omission is proven and the required mens rea could have been inferred from the defendant's conduct. The defence of insanity will only then be successful if the requirements of s 23(2) of the Crimes Act 1961 are satisfied. In *R v Chand*, Winkelmann J characterised insanity:[143]

> not as a defence in the sense that it is some sort of legal construct that permits the guilty to go free. Rather it is a recognition by the law that a person may, because of mental illness, be so disordered in their thinking that at the time they act, they lack the capacity to be held responsible for the crime they commit.

Section 23(2) of the Act requires that no person shall be convicted of an offence where he or she was "labouring under a natural imbecility or disease of the mind" to such an extent that he or she is incapable of understanding the nature and quality of their conduct or under s 23(2)(b) "of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong".

The terms "natural imbecility" and "disease of the mind" are imprecise and vague. The case-law suggests that the courts will recognise an extremely wide range of mental impairments in the context of an insanity defence. "Mentally impaired" is not defined by the Crimes Act 1961 or the related Mental Health (Compulsory Assessments and Treatment) Act 1992 and Intellectual Disability

[142] *Rawiri* (HC) (n 116) at [97] to [99].
[143] *R v Chand* [2012] NZHC 2745 at [19] per Winkelmann J.

(Compulsory Care and Rehabilitation) Act 2003, however, it is generally understood to be "designed to capture both intellectual disability and mental disorder".[144] The consequences of this understanding of insanity, I suggest, is that the cognitive processes behind the behaviour, inclusive of cultural influences, become relevant considerations in establishing a defendant's state of mental impairment. Although only a small number of cases in New Zealand have considered these issues in a nominal way, I suggest that cultural assertions of this nature may become more common because of New Zealand's developing superdiversity and therefore, will be considered more regularly in the future by New Zealand's criminal courts.

To illustrate the relevance of cultural considerations in the context of an "insanity" claim, decisions from other jurisdictions suggest that a "mental impairment" may be temporary in nature and arise from circumstances where cultural factors have directly impacted or influenced the commission of a criminal act leading to a full discharge or the entry of a conviction on a less serious offence. For example, in the United States case of *People v Kimura*, the prosecution agreed to a reduction of the charge of murder to one of involuntary manslaughter based on a temporary mental incapacity arising from a Japanese cultural factor (oyako shinju). Mrs Kimura, an ethnic Japanese, walked into the Pacific Ocean with her two children on discovering her husband's acts of infidelity.[145] Mrs Kimura was saved by bystanders, but her two children died, and she was charged with their murder. Considerable expert cultural evidence was adduced for consideration by the court (including a petition by several hundred members of the Japanese community) to confirm that Mrs Kimura had acted because of the Japanese concept of oyako shinju. Renteln records that six psychiatrists testified that Mrs Kimura was suffering from temporary insanity based on her inability to differentiate her life from that of her children.[146] This was accepted by the court as displacing the intent to murder and, as there was consequently a favourable plea bargain, Mrs Kimura was convicted of involuntary manslaughter.

Similarly, in the United States case of *People v Chen*, Chinese cultural factors were accepted by the Court as the primary reasons for the reduction of a murder charge to a conviction for involuntary manslaughter and the imposition of a lengthy term of probation in sentencing.[147] Because the *Chen* case arose from a "plea bargain" situation, it is unclear whether the cultural arguments went to the defence of temporary insanity or provocation. The value in analysing the *Chen* case is how the cultural factors were applied by the respective counsel and the plea arrangement which was ultimately accepted by the court. As with *Kimura* the focus of the defence in *Chen* was on the relevance of

[144] See Warren Brookbanks *Competencies of Trial: Fitness to Plead in New Zealand* (Lexis Nexis New Zealand 2011) at 237. See also *R v T* [2013] NZHC 2299 at [21] per Kós J; *S v Police* HC Hamilton CRI 2005-454-47, 8 December 2005 at [12].
[145] *Kimura* (n 70).
[146] Renteln (n 121) at 25.
[147] *People v Chen* No. 87-7774, Sup. Ct. NY County, Dec. 2, 1988.

cultural factors to both the defence of provocation and, in the alternative, mental impairment. On discovering his wife's infidelity, Mr Chen struck her several blows with a hammer, ultimately causing her death. The cultural evidence adduced before the Court contended that the excessively violent response by Mr Chen to his wife's infidelity was culturally appropriate because of the significant shame he will undoubtedly have suffered within the context of his Chinese community.

The approaches adopted by the courts in both *Kimura* and *Chen* engendered considerable public and academic criticism, not only because of the reasoning applied by the courts in reaching their decisions, but also because of the inordinately lenient sentences imposed. Sikora observed that the *Chen* case received considerable criticism and protests from women's groups but some protests were revoked as it became apparent that the protests could result in a total rejection of a cultural defence.[148] Donovan and Garth suggest that the difficulty which arises with cultural contentions in these circumstances is that, in *Chen's* case for example, they involve "new immigrants seeking to identify with their former culture in the context of an unfamiliar social construct"[149] and Mrs Kimura may have benefited from the cultural argument despite the fact she had resided in the United States for some time prior to the offending.[150] A critical issue in both of these cases is that the courts accepted that although Mrs Kimura and Mr Chen had spent some time living in the United States, this did not interfere with their close connections with their traditional cultures and therefore they were both likely to be heavily influenced by the claimed cultural factors.

It is conceivable that cultural contentions similar to those advanced in *Kimura* and *Chen* could be entertained under s 23 of the Crimes Act 1961, especially as subsection (2)(b) could arguably incorporate a set of facts in support of a defendant's honest belief that his (or her) actions were "morally justified". In the context of s 23, New Zealand's superdiversity also demands a re-assessment of what is to be regarded as "the commonly accepted standards of right and wrong". I suggest that this re-assessment of common moral standards of right and wrong will require the recognition of both dominant and minority cultural influences.

5.3.6 Provocation

Although the partial defence of provocation to murder has been removed from New Zealand's substantive criminal defences,[151] I include provocation in this audit of the criminal law as it remains a

[148] Damian Sikora *Differing Cultures, Differing Culpabilities? A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing* (2001) Ohio State Law Journal, vol. 62, 1695.
[149] Donovan, Garth (n 117) at 121.
[150] Renteln (n 121) at 25.
[151] s 169 of the Crimes Act 1961 was repealed on 8 December 2009, by s 4 of the Crimes (Provocation Repeal) Amendment Act 2009.

relevant consideration in proceedings concerning activity that occurred prior to its removal.[152] There also remains a call for re-establishing the provocation partial defence to murder because of claimed inadequacies in the sentencing process.[153] Norton argues that it is unfair to label someone who was provoked into a violent response as a murderer because of the stigma involved in being labelled a murderer.[154] Borissenko advances a further reason for the re-establishment of the partial defence of provocation that there are presently no alternatives to a conviction for murder to account for degrees of culpability.[155] It is also of some concern that the removal of the provocation defence means that there is now inadequate recognition of factors such as loss of self-control,[156] special characteristics,[157] uncontrolled anger[158] and suddenness of provocation.[159] I contend that these are all factors which, in certain circumstances, are impacted by or arise from cultural factors.

A successful contention of provocation requires the satisfaction of both objective and subjective tests of criminal liability. Power suggests that increasing cultural diversity in society demands a revisiting of the standard of the reasonable person to reflect an "increasingly fragmented social and cultural space with a corresponding fragmentation of standards that are expected of people and regarded as proper".[160] Power argues that the objective standard (that the provocation may have been enough to make a reasonable person act as the defendant had acted) is:[161]

> starkly culturally saturated, as it overtly invites a jury assessment of the excusability of the defendant's actions in anger …" [from the perspective of the values and norms of the dominant culture which are] "… infused with the particularities of … white, male, heterosexual, middle class and largely Christian.

The application of the subjective tests within a claim of provocation can be illustrated with assessments of "special characteristics" possessed by a defendant under the former s 169(2)(a). These "special characteristics" will in most instances be culturally or religiously based. I refer, for example, to the line of cases that have relied on cultural contentions based around the "feagaiga" concept which is deeply rooted within Pacific cultures.

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[152] In the April 2016 trial of Leonard Nattrass-Berquist and Beauen Wallace-Loretz for the murder of Ihaia Gillman-Harris, defence counsel claimed that the defendants were acting in self-defence and as a result of provocation.
[153] See for example Hannah Norton *Time to bring back the provocation defence* (1 July 2015) NZ Lawyer and Sasha Borissenko *Issues paper may awaken provocation debate* (12 November 2015).
[154] For example Norton (n 153).
[155] For example see Borissenko (n 153).
[156] Refer *R v Ahluwalia* [1992] 4 All ER 889 (CA). Also refer discussion in Chapter Five (part 5.5.2(a) and (b)).
[157] Refer the discussion in Chapter Seven (parts 7.3.4 and 7.5.2(b)) regarding the significance of a defendant's "special characteristics" in assessing culpability.
[158] See for example, *R v Turaki* CA47/06, 23 November 2006 (CA).
[159] Refer for example, *R v Timoti* [2005] 1 NZLR 466 (CA) where the "heat of passion", although no longer a test for provocation, remains a factor to be considered in assessing whether there was provocation. Refer discussion in Chapter Five, part 5.5.2(a).
[160] This is a quote used by Power (refer n 161 below) taken from Timothy Macklem, John Gardner *Compassion without respect? Nine Fallacies in R v Smith* [2001] Criminal Law Review 623 at 635.
[161] Helen Power *Provocation and Culture* [2006] Criminal Law Review 871-888 at 878.

In *R v Lafaele,* the defendant claimed he felt deeply affronted by some particularly hurtful words (spoken in Sāmoan) used by his girlfriend immediately prior to his grabbing a knife and stabbing her.[162] The wounds caused injuries which led to the death of his girlfriend. The evidence referred to by the Court of Appeal (at 679) suggest that the words used by the victim were particularly rude, "very dangerous", engendered a deep sense of anger to the point of provoking a fight and should not be uttered by Sāmoan women. The case for the appellant was that these words (there was no suggestion that the victim's actions or conduct were operative) had been sufficient to deprive the appellant of the power of self-control. The cultural evidence was adduced through the testimony of the accused, but no other evidence of culture was provided at trial to support the clear suggestions that a cultural factor was relevant to the mens rea element of the offence. The appeal focused on an application for leave to adduce further cultural evidence by a lecturer in sociology and another person regarding the meaning and significance of the language used by the victim. The Court of Appeal ruled that the further evidence would add little to establishing the Sāmoan characteristics of the applicant and his response to the language used by the victim. The approach by counsel for the Appellant in *Lafaele,* I suggest, was defective in that there was little to be gained from clarifying the meaning of the victim's language, but rather, expert evidence should have been adduced to clarify the impacts of the victim's language and behaviour within a cultural context given the appellant's special characteristics. Such special characteristics, I contend, will have required a focus on the appellant's affiliations with his Sāmoan culture and whether the language used by the victim, from a cultural perspective, could have provoked the appellant's violent response.

The approach in *Lafaele* can be contrasted with that adopted by the High Court in *R v Sagatea,*[163] where it was accepted that the single punch which caused the death of the victim had been provoked by a particularly offensive insult from a Sāmoan perspective. Although a death had eventuated in *Sagatea*, the High Court nevertheless considered that, in light of the cultural and character information made available to the Court, a sentence of home detention was appropriate to reflect the level of culpability involved in the offending. In *Lafaele,* the cultural evidence was not challenged by the prosecution and the cultural information before the Court in *Sagatea* was provided through the probation officer's pre-sentence report and character references. In *Sagatea*, it was not apparent what guidelines were applied by the court in recognising the cultural factors. However, it was evident that the cultural information was accepted as relevant to the rationale or motivations for the accused's actions and therefore pertinent to issues of culpability. While the Court of Appeal's dismissal of the appeal in *Lafaele* was expected given the erroneous basis for the appeal, the absence of a framework

[162] *R v Lafaele* (1987) 2 CRNZ 677.
[163] *R v Sagatea* 20 May 2010, HC Auckland, CRI 2009-092-17953.

for the recognition of culture in these circumstances have ultimately led to inconsistencies of approach and, in certain situations, unfairness and inequality of treatment.

The difficulty for the defendants in *Lafaele* and *Sagatea* is that the claimed provocation arose from the use of language which the defendants contended were culturally offensive and so odious as to engender loss of self-control leading to a violent response. The hurdles to be overcome in the context of such cultural claims, I suggest, are significant in that they focus on the question of proportionality of the response to the provocation[164] and the connection between the provocation and the defendant's claimed special characteristic. The Court of Appeal in *R v McGregor* noted that there must be a real connection between the provocation and the defendant's particular characteristics where "the words or conduct must have been exclusively or particularly provocative to the individual because, and only because of, the characteristic".[165] The inconsistency highlighted by *Lafaele* and *Sagatea*, I suggest, is that although the respective courts recognised that the provocative words were culturally offensive, the assessment of the proportionality of response in the context of the defendant's special characteristics (which were apparently cultural in nature) were not fully explored by the court and therefore different conclusions were reached as to the relevance and significance of the cultural factors to the specific individual.

Where the claimed provocation involves more than words and includes a sustained and prolonged course of conduct, then, I suggest, there is greater scope for the recognition of cultural factors. Some rulings suggest that a measure of uniformity in approach to culture could be sustained within the criminal law where the courts recognise that cultural factors are relevant to and have influenced the actions of defendants.[166] In recognising that cultural factors impact the motivations for a defendant's actions and the relevance of culture to the heightened feelings of shame and hurt that have provoked a violent response, the rulings in *R v Fate*,[167] and *R v Suluape*,[168] suggest that uniformity of approach could engender rulings that are consistent and promote equality of treatment.

In *Fate*, it was contended that the defendant was provoked into a state of uncontrollable anger in stabbing her husband (eventually causing his death) after discovering he had been having a clandestine affair with her elder sister. On being convicted of the manslaughter of her husband, the sentencing judge took particular note of the cultural factors relevant to the offending such as the isolation of the accused within her Tuvalu community, the heightened shame she felt within a small

[164] Refer *Timoti v R* [2006] 1 NZLR 323 (SC). Also see *R v Rongonui* [2000] 2 NZLR 385 (CA).
[165] *R v McGregor* [1962] NZLR 1069 (CA). Also note the discussion in *R v Tai* [1976] 1 NZLR 102 (CA) re the slow-burning and quick-burning anger or passion of Sāmoan people as a special characteristic. Also see *Uluakiola v R* [2007] NZSC 46.
[166] Refer n 165.
[167] *R v Fate* (1998) 16 CRNZ 88.
[168] *R v Suluape* (2002) 19 CRNZ 492 (CA).

community and the accused's inability to speak English; as factors that were relevant to the provocation that prompted the violent response to her husband's infidelity. The Court accepted that the offender's isolation within her small Tuvaluan community had contributed to her heightened feelings of shame and anger (referred to in the Court of Appeal judgment as "faka vale vale").[169] On appeal against sentence by the Solicitor-General, the Court of Appeal in *Fate* affirmed the "merciful approach" of the sentencing judge in imposing a sentence of two years' imprisonment. Although the defendant was a Tuvaluan (from the island of Nanumea),[170] the sense of shame she felt and the motivations for her actions were remarkably similar to the Sāmoan concept of feagaiga. I discuss the nature, significance and implications of the feagaiga concept in Chapter Five.

The facts of *R v Suluape* are analogous with many aspects of the cultural contentions in *Fate*. In *Suluape* the victim's wife struck him several times to the back of his head with an axe, instantly killing him. The defendant was tried for murder but was convicted of manslaughter and sentenced to imprisonment. Mrs Suluape appealed the sentence of seven and a half years imprisonment that was imposed on the ground that the sentence did not reflect the cumulative effect upon her of a long process of abuse and degradation to which she was especially vulnerable by reason of her ethnic and cultural background to which her offending was ultimately a response.[171] The Court of Appeal accepted that certain cultural factors contributed to the mental state of the offender when she killed her husband. In reducing the term of imprisonment to five years, the Court of Appeal acknowledged the sustained pattern of abusive and insulting conduct by the victim towards the appellant, the gross humiliation of the appellant and her family by the deceased and the appellant's perception of her situation from the perspective of her Sāmoan culture. Another factor which influenced the Court of Appeal in *Suluape* was that the defence experts focused on the contentions in support of battered women's syndrome but did not address the vital element that the appellant "was a woman of a traditional culture, to whom much of the analysis … is relevant".[172] The Court referenced the earlier case of *R v Fate* in support of the position it took on the relevance of cultural factors in the appellant's response to the prolonged abuse by her husband.

The most recent decision to highlight the difficulties faced by the courts in addressing the use of cultural contentions in support of a provocation defence is *Uluakiola v R*.[173] At trial (and later appeal) the appellant claimed that his Tongan background, his health issues and the abusive conduct of his wife towards him, in combination, amounted to a sufficient degree of provocation for his actions in

[169] *Fate* (n 167) at 91 (line 20-22).
[170] Refer www.everyculture.com/To-Z/Tuvalu.html (accessed 1 March 2017) which notes that Tuvaluans (especially Nanumeans) have close historical, linguistic and religious affiliations with Sāmoa and share many traditional customs and practices similar to those of the Sāmoans.
[171] *Suluape* (n 168) at [2].
[172] *Suluape* (n 168) at [16].
[173] *Uluakiola v R* (2006) CA 123/06 (CA); (SC) (n 165).

responding by way of a violent assault on his wife. On appeal, it was contended that the trial judge had erred in ruling the expert evidence as to a "qualifying characteristic" (based on the appellant's Tongan ethnicity) in support of a provocation defence, inadmissible. In dismissing the appeal, the Court of Appeal relied on an earlier decision of *R v Tai*,[174] where a full bench of the Court of Appeal held that an "ordinary person" for the purposes of the objective tests for provocation was to be considered in terms of someone from New Zealand's mixed society rather than someone of British blood or background. The Court of Appeal also affirmed the trial judge's view that although the cultural expert had authoritative understanding of Tongan language and culture he was not sufficiently qualified to provide an "authoritative opinion" as to whether Tongan men might be more vulnerable to "insults going to their lack of education or the loss of their role as fathers than men of other ethnicities in New Zealand."[175] Accordingly the cultural factors claimed as distinguishing Mr Uluakiola from the ordinary New Zealander could not be sustained and the cultural evidence was therefore inadmissible.

The defence strategy applied in each of these cases focused on the partial defence of provocation and relied on the responses to provocation being culturally induced. As illustrated above, the approach by the Courts to these cultural contentions have been inconsistent and ad hoc. The repeal of s 169 does not prevent these cultural contentions being advanced in the future. Causing a death in these circumstances can only be classified as murder as there are no alternative offences to reflect degrees of culpability, but issues of provocation may still be a relevant consideration in sentencing, for example, by virtue of s 9(2)(c) of the Sentencing Act 2002. It is unclear, based on the present construction of the criminal law, how cultural contentions surrounding provocation can be fairly addressed when it is apparent that cultural considerations are often relevant to the determination of culpability and criminality. In this regard, I contend that addressing the issue of provocation at the sentencing stage provides inadequate recognition of reduced culpability in these circumstances.

5.3.7 Reasonable Excuse

Section 20 of the Crimes Act 1961 retains the common-law rules that allows a defendant to advance any circumstance or evidence relevant to the offending which may amount to a justification or excuse. In *Tifaga v Department of Labour*, Richardson J commented that the s 20 common law defences will be preserved where "they are not inconsistent with the enactment creating the particular offence".[176] Although s 20 suggests the preservation of common law defences are to have general application to

[174] *Tai* (n 165) at 106. See also *Timoti* (SC) (n 164) at [33].
[175] *Uluakiola* (CA) (n 173) at [32] to [34]. Also note the court's approach to the tikanga concept of loss of mana in *Fane v R* [2015] NZCA 561.
[176] *Tifaga* (CA) (n 94) at 242-243.

all offences (unless specifically excluded), various sections of the Crimes Act 1961[177] and other enactments such as the Summary Offences Act 1981 make available the concept of "reasonable excuse" by way of a defence.

As noted by Robertson et al the test to be applied to a claim of reasonable excuse is the objective assessment that a reasonable person would consider that, in the particular circumstances, the conduct concerned was acceptable.[178] I suggest that the reasonableness of a belief can be based on cultural or religious factors and the introduction of relevant and probative cultural evidence will be critical in satisfying the requirement of a reasonable excuse. An example of this is provided by s 202A of the Crimes Act 1961 and s 13A of the Summary Offences Act 1981 which prohibit the possession of a knife (or weapon) in a public place but recognises the defence of "reasonable excuse".

Although few New Zealand cases have considered the relevance of cultural issues to "reasonableness" arguments, the case of *R v Hyde* places the focus for the interpretation to be adopted by the court on the available evidence.[179] In *Hyde*, the Prosecution contended that the knife that was found in the defendant's vehicle was paraphernalia for the application of illicit drugs. The defendant argued that the knife was used for fishing purposes but was nevertheless convicted in the lower court. On appeal to the High Court, Williamson J took the view that the reasonableness of the excuse must be judged in the light of the particular circumstances and because no other evidence was produced by the Prosecution to counter the appellant's claim that the knife was used for fishing purposes, the conviction must be quashed. As highlighted in earlier discussion, where cultural contentions are to be made in support of specific defence strategies, it is imperative that the assertions pertaining to culture can be evidentially supported.

The relevance of cultural considerations in the context of carrying a weapon in a public place can be seen in the example of an adherent of the Sikh faith carrying a ceremonial knife (kirpan). The cultural conflict that arises in this regard is that a Sikh male is required to carry certain items on his person at all times when in public. A kirpan would fall within the definition of a knife or weapon and if carried in public would therefore fall within the requirements of s 202A of the Crimes Act or s 13A of the Summary Offences Act. No New Zealand case has directly dealt with a prosecution for carrying a kirpan in a public place but the obligations of an adherent of the Sikh faith to carry a kirpan in a

[177] For example, see ss 76 (failing to inform police or reasonably prevent commission of treason), 202A (possession of weapons without reasonable excuse), 216I (possession of intimate recordings), 228 (theft), 240 (obtaining by deception), 256 (forgery), 258 (altering documents), 298A (administering disease to animals), 298B (contaminating food), 307A (threats of harm to people or property).
[178] Bruce Robertson, Jeremy Finn *Adams on Criminal Law – Student Edition* (2015) CA202A.08 at 348.
[179] *R v Hyde* (1990) 7 CRNZ 366.

public place has been accepted by courts in other jurisdictions as establishing a "reasonable excuse" defence.

In the United States, the case of *People v Singh* suggests a willingness by the courts to recognise the significance of cultural or religious obligations.[180] In *Singh* it was held that the New York law prohibiting, with some exceptions, the wearing or carrying of a kirpan did not violate a Sikh's freedom to practice his religion (in carrying a kirpan) but the charges were still dismissed as the Court noted that "a continuance of this prosecution would not be in the furtherance of justice and that dismissal is required as a matter of judicial discretion". In the Canadian case of *Multani v Commission Scolaire Marguerite-Bourgeoys*, the Supreme Court recognised the significance of cultural rights and freedoms preserved under the Canadian Charter and overturned a prohibition by a school board that banned the wearing of a kirpan to school.[181] The Court held that the school board's policy infringed the student's freedom of religion under the provisions of the Canadian Charter. Section 15 of the NZBORA preserves the right to manifestation of religion and belief (using language similar to that within the Canadian Charter), therefore, I suggest that the position adopted by the court in *Multani* could similarly be adopted by the New Zealand courts in assessments of the reasonableness of a defendant's conduct.

An example of the relevance of cultural factors to a contention of reasonable excuse within the New Zealand context is provided by the case of *Hamilton v Police*, where, on appeal, the appellant contended that her driving while under the influence of alcohol was prompted by cultural pressure to comply with the request by a relative to drive him to church.[182] Counsel for the appellant contended that the sentencing judge had erred in not recognising that the pressure to drive was based on the appellant's Sāmoan cultural norms and that she was "coerced by those norms and by family pressure". The inconsistency highlighted by the *Hamilton* case is that it is apparent that the sentencing judge had discounted the cultural contention and ruled that the pressure from the relative to drive did not amount to "special reasons" but on appeal, Keane J took a less circumscribe view of the cultural reasons advanced and held that in the context of the circumstances of this case, the reasons why Mrs Hamilton drove, nevertheless constituted a "special reason" to reduce the mandatory driving disqualification from six months to three months.

The scope whereby cultural factors will be relevant to a "special reasons" or "reasonable excuses" assertion within the criminal law will be extremely wide given the developing acceptance by the criminal courts of the significance of cultural factors to the rationale for why defendants act or

[180] *People v Singh* 516 NYS 2d 412 (New York Civ. Ct. 1987).
[181] *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] SCC 6 (Canadian Supreme Court).
[182] *Hamilton* (HC) (n 70).

respond within specific circumstances. I explore in greater depth the relevance of cultural factors to the concept of "reasonableness" within the context of criminality and culpability in Chapter Seven.

5.3.8 Self-defence

A claim of self-defence under s 48 of the Crimes Act 1961 involves the posing of three questions. In *R v Auckram*,[183] the Court of Appeal noted the enquiries to be made in the context of s 48 as:[184]

> (a) What were the circumstances as the accused believed them to be?
> (b) Did the accused use force for the purposes of defending himself?
> (c) Was the force used, reasonable in the circumstances as he believed them to be?

The inquiries in (c) is objective in nature and imposes a strict standard requiring that the force applied was reasonable in the circumstances as the defendant believed existed at the time he acted. As noted by the Court of Appeal in *R v Wang*,[185] reasonableness will require consideration of the perceived imminence and seriousness of the attack or threatened attack, whether the defensive reaction was reasonably proportionate to the perceived danger and whether there was any alternative course of action.[186] Similarly, the test to be applied to question (b) requires an objective examination of the facts. Although it is acknowledged that cultural factors may be relevant to the issue of reasonableness in (c), it is the subjective inquiry required by the first element in (a) above which will most likely necessitate a consideration of culture and cultural factors.

The essence of the inquiry in (a) is that the defendant's actual beliefs are a vital consideration. The Court of Appeal in *R v Thomas* held that it is irrelevant if the defendant's beliefs were unreasonable or wholly misguided, but it is critical that the beliefs were honestly held.[187] In *Thomas*, the defendant honestly believed that what he was witnessing was an overzealous use of force by police and he intervened to assist the person who was the focus of the perceived assault by police. The Court of Appeal held that the application of force by the appellant was reasonable in defence of another as he had honestly believed the use of force by police was excessive. Because the appellant honestly believed the police were using excessive force, it was also accepted that he therefore believed that the police were no longer acting in the execution of their duty. I suggest that this requirement of a belief that is "honestly held" will, in certain circumstances, include beliefs that are culturally based.

[183] *Auckram v R* [2007] NZCA 570.
[184] *Auckram* (n 183) at [24].
[185] *R v Wang* [1990] 2 NZLR 529.
[186] *Wang* (n 185) at 535-536.
[187] *R v Thomas* (1991) 7 CRNZ 123 at 127 per Casey J.

Although no New Zealand case has specifically considered cultural factors in the context of s 48, the United States case of *People v Croy* demonstrates the relevance of cultural factors to a claim of self-defence.[188] The issue for the jury was whether the defendant's cultural orientation and the surrounding circumstances were the primary cause of his heightened feelings of fear and perception of an immediate threat to his personal safety.[189] The Court in *Croy* found that the accused genuinely believed that he would be killed by pursuing police if he was apprehended and therefore the shooting at a pursuing police officer was a defensive act. His response in shooting at police was therefore accepted by the jury as subjectively reasonable in the circumstances as he believed them to be.

Renteln also provides the example of *People v Romero,*[190] where the accused advanced a culture-based self-defence argument concerning the role of street fighters defending family honour within Hispanic culture.[191] Mr Romero contended that he was obliged by his cultural norms to defend his brother from an attack when he stabbed the victim. The defence intended to introduce expert cultural evidence from a sociologist who was to avow that the Hispanic culture was based on honour where there was to be no retreat therefore the accused was culturally bound to defend his brother from an assault. The trial judge ruled this evidence inadmissible. The California Appellate Court affirmed the ruling of the trial judge and held that the evidence was irrelevant because it would not enlighten the court regarding whether the defendant actually believed that he and his brother were in imminent danger or whether that belief was objectively reasonable. *Romero* highlights the need to align the cultural contention with the requirements of the relevant defence strategy. In the context of New Zealand's criminal law, I suggest that the subjective inquiry under s 48 cannot discount a consideration of a defendant's cultural beliefs and understandings as to his or her situation (as was the case in *Croy*) when confronted with a sudden attack or threat of imminent danger.

[188] *People v Croy* (1985) 42 Cal3d 1 California Supreme Court.
[189] *Croy* (n 188).
[190] *People v Romero* 69 Cal App 4th 846 ((1999).
[191] Renteln (n 121) at 38-39.

5.4 Cultural Evidence

Because there are no clear guidelines for how culture is to be introduced and applied in criminal justice processes, there is potential for inconsistencies as to how cultural evidence is utilised in the criminal law. Chetwin et al expressed concern about the inconsistencies in the application of "culture evidence" under s 16 of the Criminal Justice Act 1985 and considered that, in extreme circumstances, this may lead to claims of unfairness or a miscarriage of justice.[192] Examples of the inconsistencies referred to by Chetwin et al is demonstrated by the appeal decisions in *Mika v R* (where the Court considered tikanga Māori to be an irrelevant consideration regarding a serious assault),[193] *R v Mason* (where the Court took the view that tikanga Māori was not a relevant consideration regarding sentencing for murder),[194]and *Knowles v Police* (where cultural considerations were held to not be relevant to the application of the provisions of the Misuse of Drugs Act 1975 due to the seriousness of the charges involved).[195] In each of these cases, claims of unfairness arising from the failure of the Court to consider cultural factors (tikanga Māori) were advanced by the appellants but in each case the appeal court affirmed the position taken by the lower court in rejecting tikanga Māori as a factor to be considered in sentencing or as an aspect of the defence because of a deficiency in supporting cultural evidence.

These cases also illustrate the difficulties faced by defendants in substantiating their cultural contentions. Although the criminal courts have shown a willingness to consider cultural contentions, the defence in each case was not able to produce for the court's consideration sufficiently probative and relevant evidence of culture to satisfy the courts that the cultural factor applies. I suggest that the lack of a definition of culture and a specific process whereby cultural evidence could be applied within the criminal law means that the admissibility of cultural evidence will largely rest on whether the judge is averse to or sympathetic towards the cultural evidence. The acceptability of cultural evidence will also be dependent on other factors such as the adequacy of the evidence adduced, the approach taken by the Prosecution and Defence Counsel on cultural evidence and whether the cultural evidence itself is supportive of the contentions made. For example, in *Mika*, the Court of Appeal accepted the basis for the cultural contention, however, because there was no cultural evidence produced to support the cultural assertions, the Court could not take into account the submissions

[192] Refer Alison Chetwin, Tony Waldegrave, Kiri Simonsen *Speaking about Cultural Background at Sentencing – Section 16 of the Criminal Justice Act* 1985 (2000) at 142-149.
[193] *Mika v R* [2013] NZCA 648.
[194] *Mason* (CA) (n 5).
[195] *Knowles* (CA) (n 85).

regarding tikanga Māori.[196] In *Mason*, the defendant's cultural contention that he be tried in accordance with tikanga Māori was not supported by relevant and probative cultural evidence.[197]

Although cultural contentions have been ineffective due to the irrelevance and remoteness of evidence, I suggest that a number of recent decisions indicate that the rejection of a cultural contention or the determination that cultural evidence is inadmissible have largely resulted from the application of a judge's cultural perspective to the assessment of a minority cultural factor or the insufficiency of supporting cultural evidence which then prevents the cultural contention from being fully assessed by the court.[198]

For example, in *Uluakiola v R*, the prosecution did not dispute the qualifications of the cultural expert or present evidence to counter the cultural assertions, yet the trial judge (Keane J) ruled that, although the witness was an expert on Tongan culture and linguistics, the cultural evidence was inadmissible as it was not authoritative enough to confirm that the defendant had a "special characteristic" that made him more susceptible to a violent response to a cultural provocation because he was Tongan.[199] I suggest that *Uluakiola* demonstrates inconsistencies in the Court's assessment of cultural evidence and the potential for unconscious judicial bias because assessments of culture are made from the cultural perspective of the judge rather than a balanced consideration of the cultural evidence and the overall merits of the cultural contention. Similarly, in *R v Mesui*, the trial judge ruled inadmissible the opinion evidence of two well-qualified psychologists regarding the defendant's emotional response to provocation from an ethnic and cultural perspective because the expert opinion "lay in ordinary experience and not medical expertise".[200] The inconsistency in approach to cultural evidence can be demonstrated when *Uluakiola* and *Mesui* are compared with the ruling in *R v Sagatea*, where the Court accepted a particularly offensive insult (which was culturally significant from a Sāmoan perspective) that provoked a single punch assault causing the death of the victim, was sufficient to displace the intention to murder. Mr Sagatea was convicted of manslaughter and consideration was given to the imposition of a sentence of home detention.[201] The contrast between *Mesui* and *Sagatea* is that the cultural information adduced for the Court's consideration in *Sagatea* could be regarded as less cogent than that in *Mesui* as it was introduced through a probation officer's pre-sentence report, yet the expert opinion evidence of two well-qualified psychologists (Dr D G Chaplow and Dr Siale Foliaki) in *Mesui* was ruled inadmissible.

[196] *Mika* (CA) (n 193) at [14].
[197] *Mason* (CA) (n 5).
[198] As was the case in, for example, *Mason* (CA) (n 5); *Knowles* (CA) (n 85); *Mika* (CA)(n 193).
[199] *Uluakiola* (SC) (n 165) and (CA) (n 173).
[200] *Mesui v R* (1 December 1999) CA485/99 (CA) at [8].
[201] *Sagatea* (n 163) at [7], [10] & [27]

As illustrated by the dismissal of cultural contentions in *Police v Knowles*, *Mika v R*, and *Saxton v R*, the challenges to the admissibility of cultural contentions focus on the sufficiency of supporting evidence rather than the qualifications and nature of the cultural expert opinion evidence. In *Knowles*, the defendant was not able to substantiate a claim that the use of marijuana was customary to Māori.[202] In *Mika*, the defendant (and his counsel) did not avail themselves of the opportunity to present evidence in confirmation of the disadvantages encountered by Māori from being raised within a tikanga Māori environment.[203] In *Saxton*, the defendants were not able to evidentially establish the existence of a customary right to take pounamu (greenstone) from a West-Coast (New Zealand) river.[204] In each of the cases discussed here, the Court was prepared to consider the cultural evidence provided in support of the cultural contentions, without setting clear parameters for the qualifications of the cultural witnesses and the scope of the cultural evidence to be presented. I suggest that the inconsistency of approaches to culture within New Zealand's substantive criminal law and the application or use of cultural factors within the substantive aspects of the criminal law can be attributed, in part, to the absence of a clear definition of culture and the inadequacies of the existing framework for the introduction, application and interpretation of cultural evidence.

Examples from foreign jurisdictions demonstrate the ad hoc use of cultural evidence in criminal proceedings to either partially[205] or totally exculpate alleged offenders. Because there is no formal "cultural defence" or clear guidelines for the use of culture in these jurisdictions, there are inconsistencies in the approaches taken by the Courts to the recognition of cultural factors. In the United States case of *People v Kimura*, a mother of Japanese ethnicity felt compelled by her cultural orientation to commit suicide with her two children on discovering her husband's infidelity.[206] While she survived, her two young children died. The Los Angeles Superior Court considered expert evidence which showed that Mrs Kimura's actions were motivated by the Japanese custom of "oyako-shinju" (parent-child suicide) and accepted that she therefore did not possess the required intention for murder.[207] The murder charges against Mrs Kimura were reduced to involuntary manslaughter and she was sentenced to five years' probation. Renteln suggests that a court would unquestionably have difficulty in grasping the cultural imperative for Mrs Kimura's actions without information about the meaning and significance of oyako-shinju. Renteln observed that six psychiatrists testified that Mrs Kimura was suffering from temporary insanity and a petition by thousands of signatories from the

[202] *Knowles* (CA) (n 85).
[203] *Mika* (CA) (n 193) at [14].
[204] *Saxton* (CA) (n 70)).
[205] *Kimura* (n 70) and *People v Wu* (1991) 286 Cal. Rptr. 868
[206] *Kimura* (n 70). Also, *Chen* (n 147).
[207] Renteln (n 121) at 25. Also see Alison Dundes Renteln *Making Room for Culture in the Court* (2010) Judges' Journal, vol. 49, no. 2.

Japanese community was tendered in support of the significance of oyako-shinju within Japanese culture.[208]

In the United States case of *People v Chen*, the Court accepted the cultural evidence provided by an anthropologist that the reaction by Chen in using a hammer to beat his wife to death, was culturally appropriate. Chen was convicted of second-degree murder and sentenced to five years' probation.[209] In *People v Croy* the defendant's 1979 conviction for murder was overturned by the Californian Supreme Court and a retrial ordered.[210] At his re-trial a self-defence argument based on a cultural contention that Mr Croy was so fearful of his life due to past discrimination and a deep distrust of "white" authorities that he felt compelled to shoot at pursuing police. Mr Croy's actions in these circumstances was accepted by the jury as a defensive act and therefore he did not possess the intention to commit murder. Mr Croy was accordingly acquitted of murder by the jury.

The contrast between the New Zealand cases and the United States cases is that the United States cases involved the introduction of extensive and well-qualified cultural expert evidence, while the approach adopted by defendants (and their counsel) in New Zealand suggest a less formal reliance on the use of expert cultural witnesses.[211] I argue in my thesis that a more formal structure and criteria for the introduction, application and interpretation of culture and cultural evidence will enhance the fairness of trials and equality of treatment for individuals from any culture.

[208] Refer Renteln (2010) (n 207).
[209] *Chen* (n 147).
[210] *Croy* (n 188). Also, see Renteln (2010) (n 207) at 37 and Donovan, Garth (n 117) at 140.
[211] See for example, *Knowles* (CA) (n 85), *Kapi* (CA) (n 70), *Saxton* (CA) (n 70) and *Mika* (CA) (n 193).

5.5 Culture and Cultural Information in Sentencing

My focus in this thesis is culture as it applies to and is recognised as relevant to issues of criminalisation and culpability. However, in conducting an audit of culture in the criminal law, it is important to highlight that the majority of cases in which culture is considered by the Courts occur in the context of sentencing. The opportunities for introduction of cultural evidence is available to all defendants, offenders and appellants regardless of their cultural or ethnic orientation in the context of sentencing. The culture and cultural background of an offender will be an important consideration within the sentencing stage for three main reasons. First, an offender's culture and cultural influences may operate to mitigate the culpability of an offender's conduct and therefore will impact the nature of the sentence to be imposed. This may occur in the context of provocation, for example, where as a result of the removal of s 169, issues of provocation, that logically relate to culpability, can now only be dealt with under sentencing. Second, the offender's cultural background, family or whanau support and community associations may present options for rehabilitation or avenues for meeting the principles and purposes of sentencing required by ss 8 and 9 of the Sentencing Act 2002.[212] Third, the restorative justice processes referred to in s 8(j) of the Sentencing Act 2002, I suggest, are deeply cultural and significant within many of the minority communities in New Zealand. I enlarge upon each of these avenues for recognition of culture in the context of sentencing below.

5.5.1 An Offender's Culture and the Use of Cultural Information in Sentencing

Section 8(i) of the Sentencing Act requires a sentencing Judge to "take into account the offender's personal, family, whanau, community and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose". The s 8 sentencing principles are mandatory considerations when sentencing offenders. Although information about the offender is usually provided by a probation officer's report at the request of the court, other specialist reports (for example, psychologist or psychiatric reports) may be requested by the court or introduced by counsel. Defence counsel may also obtain and place before the court a cultural report under s 27 of the Sentencing Act 2002 (formerly s 16 of the Criminal Justice Act 1985) or request the Court "hear any person or persons" regarding "the personal, family, whanau, community, and cultural background of the offender".

In *Wells v Police*,[213] Smellie J stated that the intention of s 16 of the Criminal Justice Act 1985 was that the cultural information is to be given to the Court informally. The High Court in *Wells* held that there was no obligation for the person who speaks pursuant to a request under s 16 of the Criminal

[212] *Nishikata v Police* HC Wellington, AP 126/99 per Gendall J at 7.
[213] *Wells v Police* [1987] 2 NZLR 560, per Smellie J (HC, Auckland).

Justice Act 1985 to take the oath or be subject to the rules of evidence for that purpose. This approach was endorsed regarding s 27 of the Sentencing Act when Gendall J commented in *Nishikata*, that the:[214]

> intent [of s 16 and therefore also s 27 of the Sentencing Act 2002] was that the Court should receive information to recognise Maori cultural patterns and alternative programmes for discipline and reformation of Maori offenders. However, it is equally clear that the provision does encompass all ethnic minorities and the section was deliberately framed to apply generally to persons of all races or ethnic origin so as to avoid any suggestion it favoured some racial groups at the expense of others.

If a request is made by a defendant or Defence Counsel under s 27 for the Court to hear from a witness regarding the offender's cultural background, then the Court is obliged to hear from that person unless the Court is satisfied that there is some special reason that makes this unnecessary or inappropriate. In one of the earliest decisions to consider the use of s 27, the sentencing judge in *R v Bhaskaran*,[215] declined a request by the defendant's Counsel for a member from a Māori Trust Board to be heard on social and health services offered to the offender through the Trust as well as a "culturally appropriate" personalised program that was available for the offender and his whanau. On appeal, the Court of Appeal held that the appellant had a presumptive right under s 27 to have representations on relevant matters placed before the Court.[216] The Court of Appeal also noted that where the Court declines a request under s 27, then special reasons as to why it is unnecessary or inappropriate to hear the "person or persons" must be provided under s 27(4). The Court of Appeal noted further that no special reasons were provided but this did not affect the outcome of the appeal preferring only to condemn "the overlooking of the section and its requirements" by the District Court Judge as "unfortunate".[217] Although the Court of Appeal's ruling on s 27 did not affect the outcome of the appeal, the appeal against sentence was upheld on other grounds.

In their research into s 16 of the Criminal Justice Act 1985,[218] Chetwin et al observed that the s 16 reporting framework for introducing information regarding the offender's cultural background had been utilised on relatively few occasions by defendants and counsel in New Zealand.[219] Since the passing of the Sentencing Act 2002, the use of the s 27 procedure for introducing cultural information continues to be limited and the approaches adopted by different Judges to a request under s 27 have been inconstant. Although Davidson J recently commented in *R v Alexander*, that cultural reports under s 27 are seldom obtained, under-utilised and was one of the least known provisions of the

[214] *Nishikata* (HC) (n 212) at 6-7.
[215] *R v Bhaskaran* CA333/02, 22 November 2002 (CA).
[216] *Bhaskaran* (n 215) at [13].
[217] *Bhaskaran* (n 215) at [15].
[218] s 16 of the Criminal Justice Act 1985 was repealed on 30 June 2002 by s 166(a) of the Sentencing Act 2002.
[219] Chetwin et al (n 192) at 142-147.

Sentencing Act,[220] there are indications that s 27 reports are now being sought more regularly by defence counsel.[221] As illustrated in the discussion below, there remains an inconsistency in approach by the courts to the use of s 27 reports and the absence of clear guidelines for seeking cultural reports means that allowances for cultural factors in sentencing is ad hoc resulting in inconsistencies in sentencing and inequality of treatment.

The significance of the procedure provided by s 27 is highlighted by the Court of Appeal decision in *R v Mika*.[222] The Court of Appeal in *Mika* rejected the Appellant's cultural contention because defence counsel did not make a request under s 27 to introduce supporting cultural information. Defence counsel in *Mika* had contended that the Appellant was entitled to a 10 per cent discount in sentence because of his "social deprivation" as a Māori. Because there was no evidence or cultural information to establish the nature of the claimed "deprivation", the Court of Appeal was left with no option but to dismiss the appeal and affirm the sentencing approach adopted by Gendall J in the High Court.[223] In contrast with the approach by the Court of Appeal in *Mika* where no discount was provided by the court to account for Mr Mika's social deprivation as a Māori, Whata J in *Solicitor-General v Heta* affirmed a 30 per cent discount for cultural factors addressed in the s 27 report.[224] Whata J distinguished the approach he took in *Heta* to that taken by the Court of Appeal in *Mika* by adopting the rationale that the normative basis for the recognition of systemic Māori deprivation as a mitigating factor is not dependent on racial or ethnic classification but rather whether the systemic deprivation for Māori triggers "the potential for a differential sentencing response". Because the presence of deprivation in the lives of Māori cannot be assumed, Whata J suggests that the focus must therefore be on the cogency of the cultural information in establishing the likely presence of systemic deprivation, the strength of the linkages between the deprivation and the offender and the availability of rehabilitative measures to specifically address the effects of the deprivation.[225] This approach by Whata J to the recognition of culture and cultural factors in sentencing accords with the contentions of my thesis but is not an approach which is applied to the issue of criminalisation or culpability.

Although recent decisions in the New Zealand courts indicate there is a willingness to recognise the significance of cultural information within the sentencing process, such cases also illustrate the inconsistent application of cultural information in sentencing. In *Keil v R*, the Court of Appeal recognised (at [56] and [57]) the importance of accounting for a particular offender's personal, family, whanau, community and cultural background during sentencing and acknowledged that this is why s

[220] *R v Alexander* [2018] NZHC 1584 at [77].
[221] See for example, *Keil v R* [2017] NZCA 563; *R v Heta* [2018] NZDC 11085 (DC); *Solicitor-General v Heta* [2018] NZHC 2453 (HC) per Whata J; *Alexander* (HC) (n 220); *R v Hurrell* [2018] NZHC 2505 (HC).
[222] *Mika* (CA) (n 193) at [10] per Harrison J.
[223] *R v Mika* [2013] NZHC 2357 (HC), per David Gendall J.
[224] *Heta* (HC) (n 221) at [40] to [50] and [67].
[225] *Heta* (HC) (n 221) at [49].

27 reports were prepared and considered.[226] However, the Court of Appeal in *Keil* also affirmed its earlier position in cases such as *Mika* in commenting at [58] that:[227]

> Our sentencing regime cannot be seen to condone a particular group's use of violent force to exact physical retribution. Similarly, cultural norms cannot excuse that conduct for some groups but not for others. While those norms may help to explain, they can never justify offending of such severity as occurred here.

While the Court of Appeal in *Mika* was not in a position to quantify the level of discount than can be attributed to cultural factors in sentencing due to the inadequacy of cultural information, the High Court in *Alexander* did not allow a discrete discount for the cultural "deprivation" highlighted in the s 27 report. In *Keil* the Court of Appeal affirmed the 20 percent discount allowed by the sentencing judge for cultural factors as appropriate within the context of the offending but expressed the reservation that cultural norms cannot be used to excuse some conduct but not others. In regard to the offender's (Mr Paul's) actions, the cultural norms may explain but never justify the severity of the offending.[228] The most recent development regarding the setting of a sentencing discount to allow for cultural factors was provided by the High Court in *Solicitor-General v Heta* where Whata J accepted that a 30 per cent discount allowed by a sentencing judge for cultural factors detailed in a s 27 report "was not sufficiently excessive to require adjustment".[229] The cases therefore demonstrate that the level of discount available in an accounting for cultural factors on sentencing will vary depending on the seriousness of the offending, the relevance of cultural factors to the offending, and the nature and extent of the offender's affiliation with the claimed culture.

The significance of the processes available under s 27 of the Sentencing Act for the Court to make enquiries about the "offender's personal, family, whanau, community and cultural background" were comprehensively applied by the Kaikohe District (Matariki) Court in *R v Rewiri*.[230] In *Rewiri*, the 16-year old offender was convicted on a charge of aggravated robbery. In sentencing Mr Rewiri, Judge Davis recognised the utility of the process under s 27 that enabled the Court to hear from whanau and other persons as to the offender's background and personal circumstances, especially because the offender was a youth. Judge Davis undertook extensive in-court discussion with members of the local community, representatives from the local marae and sports organisations as well as "persons" involved with various rehabilitative programs where Mr Rewiri was a participant.[231] Although the conviction was for a serious offence, the sentencing Judge was influenced by the cultural information

[226] *Keil* (CA) (n 221).
[227] *Keil* (CA) (n 221).
[228] *Keil* (CA) (n 221) at [58].
[229] *Heta* (HC) (n 221) at [67].
[230] *R v Rewiri* (2012) District Court, Kaikohe, CRI 2011-027-1264, per Judge Davis at [7].
[231] *Rewiri* (n 230) at [8] – [12].

which confirmed Mr Rewiri's "personal features", his potential for rehabilitation and community support in sentencing Mr Rewiri to one year home detention.[232]

In other jurisdictions defence counsel have utilised the opportunity to substantiate cultural contentions through the introduction of evidence by cultural experts and from members of a specific cultural grouping. For example, in *People v Kimura*,[233] evidence from several cultural experts and a petition signed by several hundred members of the Japanese community was advanced by the defence to substantiate the cultural factor "oyako shinju".[234] This cultural factor was accepted by the Court as negating the intention to murder and that a conviction for involuntary manslaughter be entered against Mrs Kimura. The cultural evidence produced in *Kimura* was also influential on the sentencing Judge in imposing a sentence of 5 years' probation. A sentence of 5 years' probation was also imposed in *People v Chen*,[235] where the offender killed his wife using a hammer after discovering her infidelity. Considerable cultural evidence was introduced in *Chen* to satisfy the Court that the violent response of the defendant was culturally understandable from a Chinese perspective. The sentences imposed in both *Kimura* and *Chen* were extensively criticised as inappropriately lenient.[236]

Although a defendant may ultimately be found to be guilty of an offence, the degree of culpability may still be a relevant consideration in sentencing. For example, in *Nishikata v Police*, [237] Gendall J accepted that the appellants' actions had initially been motivated by aspects of their Japanese culture and although the appellants' conduct "went too far", the "cultural influences involved in the offending should properly be taken into account in mitigation".[238] The Court of Appeal in *Mika v R*,[239] has made it clear that ethnicity or cultural background can never be a ground in itself for a discount on sentence. The difficulty for the appellant in *Mika* was that he and his Counsel had sought a 10 per cent discount to his sentence on the basis of disadvantages arising from his Māori heritage, but then did not avail themselves of the opportunity under ss 27 or 8(i) of the Sentencing Act 2002 to introduce evidence in support of their cultural contentions. As illustrated by the approaches taken in cases such as *Hamidzadeh v R*,[240] and *R v Talataina*,[241] the introduction of reports and evidence of culture allows the Courts to properly take into consideration any cultural factors relevant to the sentencing of offenders. In *Hamidzadeh*, Randerson J (in giving the reasons for the Court of Appeal) recognised the relevance of the claimed provocation on the violent response by Mr Hamidzadeh; however, the Court

[232] *Rewiri* (n 230) at [26] – [30].
[233] *Kimura* (n 70).
[234] Renteln (n 121) at 25.
[235] *Chen* (n 206).
[236] Refer Sikora (n 148).
[237] *Nishikata* (n 212).
[238] *Nishikata* (n 212) at 9.
[239] *Mika* (CA) (n 193).
[240] *Hamidzadeh v R* [2012] NZCA 550 (CA) per Randerson J at [60] – [68].
[241] *R v Talataina* (1991) 7 CRNZ 33 (CA).

noted the ordinary expectation of the community is that an angry and emotional response, especially where there are fatal consequences, cannot justify the use of violence.[242]

In contrast with the position taken by the New Zealand Courts, the Australian Courts have sought to limit the extent to which cultural factors can be applied in sentencing. In *Munda v Western Australia*, the High Court of Australia noted at [53] that:[243]

> Mitigating factors must be given appropriate weight, but they must not be allowed to 'lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. It would be quite inconsistent with the statement of principle … to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour.

This approach was also adopted by the Queensland Court of Appeal in *R v Ku*,[244] where the sentences for several juvenile offenders were overturned because the sentencing judge had given too much credit for factors which amounted to an undue stereotyping of the offenders and the community they came from.

As illustrated by the approach adopted by the courts in cases such as *Knowles*, *Mika* and *Mason*, the position in New Zealand is that there will be very limited specific situations where the seriousness of the offending and relevance of the cultural claims will prompt the Courts to have regard to cultural factors in sentencing.

5.5.2 Cultural Information in Pre-Sentence Reports

Section 26(2)(a) of the Sentencing Act 2002 provides for the introduction of cultural information "regarding the personal, whanau, community and cultural background, and social circumstances of the offender" into the sentencing process. Pre-sentence reports are ordinarily prepared by a Probation Officer. However, the parameters for the preparation of these probation reports are set by the Court for sentencing purposes only and therefore do not, I argue, fall within the scope of the substantive considerations which are the focus of my research. Cultural reports are often sought (from professionals such as psychologists, psychiatrists or other specialist report-writers) in the Youth Court for youth offenders (under s 336 of the Children Young Persons and Their Families Act 1989) and under s 16 of the Parole Act 2002 when assessments are made regarding work programmes for prisoners. Because there are no set rules nor uniform requirements for the preparation of these various

[242] *Hamizadeh* (n 240) at [68].
[243] *Munda v State of Western Australia* [2013] HCA 38 (HC of Australia). Also see *Neal v The Queen* [1982] 149 CLR 305.
[244] *R v Ku* [2008] QCA 154.

reports, and the cultural expertise of the respective report writers will vary, there are no standardised requirements for the experts or Probation officers who prepare the pre-sentence reports.

5.5.3 Restorative Justice

Another avenue by which cultural information (or the application of cultural practices) can be introduced into the sentencing process is through the use of the restorative justice processes mandated by s 8(j) of the Sentencing Act 2002. The concept of restorative justice is embraced as one of the Act's mandatory sentencing principles. Although the Sentencing Act does not specifically refer to the restorative justice process as cultural in nature, I suggest that the restorative justice process is deeply ingrained in the culture of minority communities within New Zealand and therefore has significant cultural value. Support for this proposition can be found in the developing acceptance by the New Zealand Courts of the Māori tikanga principles of "muru" (compensation, restoration, ritualised confiscation of property, redress for wrong-doing),[245] "utu" (the concept of compensation, balance and reciprocity)[246] and "tika" (fairness and what is regarded as just) or the Sāmoan concept of "ifoga" ("to bow down" or to "submit" but encompasses principles of apology, restoration, rehabilitation). Despite the court's recognition of these cultural concepts there remains an element of inconsistency in application. This can be seen in *Takamore v Clarke*,[247] where utu was viewed by the court as "a restoring of the balance" between parties, but in the context of sentencing, the Court of Appeal in *R v Rikys* at [5], Anderson J rejected the appellant's claim that his actions were by way of "equalising the balance".[248]

In *R v Eruera*,[249] Whata J acknowledged the contents of a cultural report prepared for the purposes of sentencing and noted the significance of the cultural factors that provided background to the offender's connections with the Mongrel Mob and his "tikanga Tuhoe". Whata J recognised the social and cultural background that contributed to Mr Eruera's past and present offending but found that such cultural considerations were of little significance as the Court was obliged to impose on Mr Eruera, the "standard" life sentence for murder, of seventeen years imprisonment.[250]

In *Knowles v Police*, Hammond J, in considering an appeal against conviction and sentence on a charge of possession of cannabis for supply, acknowledged that in some circumstances cultural

[245] Refer *Mason No. 1* (HC) (n 5) per Heath J at [40]. Also refer *R v Saxton* 25/10/2007 DC Christchurch CRI-2004-002-00741 at [63] per Judge MacAskill. Also see Robert Joseph *Maori Customary Laws and Institutions: Crimes Against the Person, Marriage, Interment, Theft* (Te Matahauariki Research Institute, August 1999) at 5.
[246] See *Mason No. 1* (HC) (n 5) at [40] per Heath J.
[247] *Takamore v Clarke* [2013] NZSC 116 at [78] and [130].
[248] *R v Rikys* CA428/01, 3/7/2002 (CA).
[249] *R v Eruera* [2016] NZHC 532 at [20] – [24].
[250] Refer *Eruera* (n 249) at [23].

concerns may play a part in the sentencing process.[251] Hammond J, however ruled that the claim by the appellant that her use of cannabis was cultural to Māori was a "case of outright defiance of the law" as there was no legal source or supporting evidence for the appellant's claims of a cultural practice or custom.

The recognition of and significance to be attached to cultural processes or practices as mitigating factors in sentencing can be most effectively demonstrated in the application of restorative justice processes from a cultural perspective. I refer here, by way of example, to the concept of "ifoga" which is practiced widely among many cultures. For the sake of brevity, I refer to these as the "ifoga cases". In *R v Talataina*, Hardie Boys J noted that the essence of the custom of ifoga:[252]

> operates in place of a formal criminal justice system and spans all manner of offences from minor dishonesty to serious sexual offences. Where, as here, the wrong is done to the family of a Matai, the amends must be offered by a Matai, who proffers gifts of value, including fine mats which are many years in the making and are regarded as of the highest value. The offer is almost always accepted, and reconciliation thus affected.

In *Talataina*, Hardie Boys J recognised that the Samoan practice of ifoga can be "accepted in a very forgiving way" by the victim and "was potentially valuable in remedying the harm caused and reconciling the victim and offender and their respective families". It is also possible that a cultural apology by way of an "ifoga" can take place in the absence of the victim.[253] However, the Court of Appeal in *Talataina* ruled, in the circumstances of this case, that the ifoga was of limited value as the victim and the offender were not directly involved in the "ifoga".[254] The Court noted that the victim, although present, was not sufficiently conversant with the Sāmoan language to fully understand the nature of the discussion that took place during the "ifoga" and the offender was in custody at the time awaiting sentencing so, was not involved at all in the ifoga process.

The inconsistencies in how the courts regard ifoga can be seen by contrasting the *Talataina* approach and how ifoga is used by the courts in other cases. In *R v Chankau*, Miller J noted that the Samoan apology can be "accepted in a very forgiving way" by the victim,[255] however in *R v Aiolupo*, the Court of Appeal was circumspect about the value of the ifoga because it had taken place but in the absence of the victim.[256] In *R v Gatoloai & Eteuati*,[257] the Court of Appeal allowed the appeal against sentence based on an acknowledgement of the significance of the ifoga process together with other factors such

[251] *Knowles* (CA) (n 85) per Hammond J.
[252] *R v Talataina* (CA) (n 241) at 35.
[253] See *R v Aiolupo* CA58/01, 21/6/2001 (CA)
[254] *Talataina* (n 241) at 37.
[255] *R v Chankau* [2007] NZCA 587 per Miller J at [21].
[256] *Aiolupo* (n 253).
[257] *R v Gatoloai & Eteuati* [2007] NZCA 319.

as the appellant's remorse, his early guilty plea and prospects of rehabilitation. In *R v Maposua*,[258] the Solicitor-General appealed on the ground that the sentence of two years imprisonment imposed on a conviction for manslaughter was manifestly inadequate. The Court of Appeal accepted that the ifoga process involved the contribution of a significant amount of money by way of restoration and demonstrated "genuine and heartfelt" remorse on the part of the offender, however, the Court also noted that the concept of ifoga must not be given undue weight in sentencing. Although the Solicitor-General's appeal here was allowed, it can be inferred from the Court of Appeal's reasoning that considerable weight is to be given by the Courts to cultural processes such as the Sāmoan ifoga.[259] In *R v Fanolua*,[260] the Court of Appeal (per Ellis J) acknowledged the ceremonies of 'fa'aleleiga' (restoration)[261] and 'ifoga' called for "significant and palpable discounts" and allowed an appeal against sentence by reducing the sentence of imprisonment from two years to one year.

Traditionally, ifogas can take place in the absence of the perpetrator and victim but requires the involvement of representatives of each family or whanau grouping and as discussed later, can promote genuine remorse, aid rehabilitative processes and engender considerable family and community support in addressing the issues arising from the offending. These issues in the ifoga process could have been addressed if the parties were cognisant of the Court's requirement that there be direct and meaningful involvement of the offender and the complainant (victim) in the ifoga process.

I suggest that the difficulties in obtaining acceptance of the "ifoga" process by the Courts may well be resolved through the setting of clear guidelines for such restorative justice meetings. This may involve a direction from the Court that the process must involve both the victim (complainant) and the offender, subject to the mutual consent of the parties. As the cases discussed here demonstrate, the significance of the ifoga or restorative justice meetings will also require a reconciliation of the competing cultural perspectives.

[258] *R v Maposua* (2004) CA 131/04 at [10], [11].
[259] Refer *Maposua* (n 258).
[260] *R v Fanolua* CA239/00, 25/10/2000 (CA) at [7].
[261] "fa'aleleiga" (in the Sāmoan language) refers to restoration or reconciliation.

Summary

Although there are few express references to culture, the criminal law is nevertheless steeped in culture. The reality is that culture is relevant to all areas of the criminal law. As illustrated, culture is particularly relevant to assessments of criminality and culpability. I have also highlighted that the present ad hoc approach to culture results in inconsistency, unfairness, inequality of treatment, discrimination, and bias. The cases discussed above not only illustrate the difficulties encountered by defendants and their counsel in substantiating their cultural contentions, they also face the invisible hurdles of unconscious bias, indirect discrimination and the uncertainties of advancing cultural assertions as part of their defence strategies. The common nexus of the cases highlighted in the audit is that they are all cases that fall within the concepts of honour, shame, spirituality or the preservation of a cultural norm. I suggest that the approach to be adopted in New Zealand towards the recognition of cultural contentions will require clearer guidelines rather than leaving the issue to be resolved through a judge's personal cultural perspective and inherent jurisdiction.

Accordingly, a definition of culture is necessary because of the reality of the changing population demographics in New Zealand which points to an unprecedented level of superdiversity (Chapter Two), but also through the adoption of tikanga Māori (Chapter Three) and as illustrated by my audit. Such a definition needs to be developed in the substantive criminal law in which cultural perspectives have been considered. Ultimately, this will not only include a definition of culture, but also express recognition of culture in the framing of offences and defences. Unfortunately, as illustrated in this audit, notions of culture are being applied by judges in the courts inconsistently and without guidance from a definition. As outlined earlier in Chapter Four, academic approaches to culture are varied and there is no single definition that is easily discernible and can be called in aid by judges in their application of culture where it is deemed relevant to particular offences and defences. With no definition of culture, judges in particular are left prone to accusations of bias as recourse to cultural evidence can only be ad hoc. In the next chapter, I demonstrate the deficiencies, irregularities and inconsistencies in approach to culture and cultural considerations in the criminalisation of culturally-loaded behaviour.

Chapter Six:
Culture Criminalised

Building on the significance and relevance of culture within criminal law, I focus in this part on the rationale and justifications advanced in relevant literature for criminalising behaviour that is traditional or cultural within New Zealand's ethnic populations. I do so by way of an analysis of the various principles and ideologies of the criminal law which are used as validation or justification for the criminalisation of behaviour that is culturally-specific to minority populations. The purpose for undertaking this analysis is to demonstrate the deficiencies, irregularities and inconsistencies in approach to culture and cultural considerations in the criminalisation of culturally-derived behaviour.

For the purposes of this discussion, I refer to "criminalisation" as the process whereby an act is deemed harmful or dangerous to society, is designated by the substantive criminal law as a crime and is therefore criminally punishable.[1] Criminalisation processes are complex and is an essential aspect of the substantive criminal law. Because the substantive criminal law is immense in scope it is illogical to examine every aspect of the substantive criminal law that impacts the criminalisation of behaviour. In keeping with the cultural focus, I confine the discussion in this chapter to the application of the principles advanced as rationale or justification in determining that culturally-loaded conduct ought to be declared criminal.

In this discussion, I do not argue or assume that some objective standard exists to determine whether specific conduct ought to be criminalised because the vast range of actual or conceivable criminal offences makes such an undertaking impractical. I argue that the rationale for New Zealand's enduring mono-cultural approach to criminalisation of behaviour arises from reliance on various justification principles. The principles of the criminal law generally refer to the concepts and doctrines that provide guidance for application of the criminal law. These principles cover a wide area of the criminal law.[2] Here, I focus my analysis on examining the utilitarian justifications, the harm prevention principles, individual autonomy principles, and the principles of enforcing morality and paternalism for the criminalisation of culture-specific behaviour. In undertaking this analysis, I emphasise the inequalities and irregularities that arise from a reliance on these approaches to criminalisation in the absence of an express acknowledgement of culture.

[1] See Wayne LaFave, Austin Scott *Substantive Criminal Law, Volume 1* (West Publishing 1986) at 8. Also see Stanley Cohen *Against Criminology* (Transaction Books 1998) at 42-43.
[2] Andrew Ashworth, Jeremy Horder *Principles of the Criminal Law* (Oxford University Press 2013), Chapter 2, at 22-43.

As illustrated in my cultural audit of the criminal law, notions of crime may vary through time and cultures,[3] and things which may not have been criminal in the past are now criminal because of the vicissitudes of societal expectations and evolution of values and norms.[4] My cultural audit in Chapter Five (Part 5.2) highlighted various examples where behaviours which were cultural or traditional to minority populations, and often regarded as acceptable behaviour in other jurisdictions, were nevertheless criminalised under New Zealand law. As demonstrated, the approach by the criminal courts to these culturally-loaded offences have been ad hoc and inconsistent resulting in claims of inequality of treatment, unfairness and injustice. These offences were rarely prosecuted (if at all) or have been the subject of attempts at removal from the substantive criminal law therefore raising concerns as to whether these practices should continue to be criminalised. In this part, I enlarge upon the origins of these offences and their development and application by the courts. Undertaking this exercise will in turn provide foundation for my contention that there must be express recognition of culture in criminal law.

[3] See discussion in Chapter Five (5.2.2) regarding the legalising of same-sex marriage.
[4] Refer for example the discussion in Chapter Five (part 5.2.1 re FGM and part 5.2.3 re blasphemous libel).

6.1 Utilitarianism and the Criminalisation of Culture-Specific Behaviour

In earlier discussion (Chapter Three, part 3.1), I contended that past and present criminalisation processes in New Zealand are inspired by mono-cultural policies because the methodologies applied by Parliaments and successive governments predominantly reflect and promote the values, norms and expectations of New Zealand's dominant Euro-Christian culture. Because utilitarian policies favour the perpetuation of values aligned with the dominant culture and operates to disadvantage individuals from minority cultures, utilitarian principles therefore, I argue, run counter to the objectives of fairness and equality of treatment that are hallmarks of the criminal law. I contend that a reliance on utilitarian principles in criminalising culture-specific behaviour is out of step with the reality that New Zealand's population is multicultural and isolating a majority viewpoint may no longer be a viable marker by which culturally-loaded behaviour should be criminalised. This reliance on utilitarian justifications has meant that the recognition of minority culture and associated cultural factors within the criminal law has been sporadic, ad hoc and inconsistent.

An essential aspect of utilitarianism, as it relates to the criminalisation of behaviour, is that it provides a moral justification for legislators (the State) in prescribing what behaviour is inappropriate and therefore ought to be outlawed. I suggest that two issues of concern arise from relying on utilitarian principles for the criminalisation of culture-specific behaviour. First, what standards, values and norms must be applied in assessing whether the behaviour ought to be categorised as "right" or "wrong"? The literature suggests that utilitarian methodologies require the application of a process that tests the utility of action taken against "meeting the greatest happiness for the greatest number" therefore promoting the viewpoint of the majority over the minority. Second, if culture-specific behaviour has been deemed to be "wrong" or amoral, is criminalisation the appropriate course for addressing the perceived "wrong"? In this regard, I allude to the criminalisation of behaviour that is traditional to minority cultures in New Zealand and examine whether the justifications or rationale advanced for criminalising such behaviour have been vindicated.

6.1.1 The Preponderant Standpoint versus the Significance of the Minority Perspective

My focus here will be on the counter-argument to utilitarianism that is advanced by those who ascribe to the view that values change and evolve over time and further that the variability of human experiences will accordingly foster variability of values regarding concepts or institutions that are common between cultures. It must be acknowledged in this regard that despite the variability of

differences between people there is also considerable commonality in values between different cultures.[5]

To illustrate my contention, I examine the example of the acceptability of the wide variability of marital relationships while polygamy (multi-partner or plural marriages) continues to be an unacceptable practice in Euro-centric jurisdictions, such as New Zealand. The utilitarian justifications for criminalising polygamy, I suggest, have been overshadowed by an innate compulsion by Euro-Christian cultures to maintain its traditional values in the face of the reality that such values may no longer be in accordance with the dominant social paradigm. In the context of New Zealand's developing superdiversity, utilitarian justifications for the criminalisation of multi-partner marriage will therefore be challenged by cultural imperatives which are aligned with the various minority populations that are forecast to dominate New Zealand society in the future.

Addressing the issue of the dominant viewpoint in criminalising culturally-loaded behaviour, I suggest, necessitates a brief reference to the early development of utilitarian theory to provide context. In developing his theories on what is to be regarded as right or wrong, Bentham posited that action which provided "the greatest happiness to the greatest number is the measure of right and wrong".[6] Bentham contended that the criminalisation of morally wrong acts is right if to do so will be useful or for the benefit of the majority. In analysing Mill's interpretations of Bentham's theory of utilitarianism, Brown suggests that the guiding principle is that conduct will be regarded as appropriate if it achieves the greatest happiness for the greatest number.[7] The application of utilitarian approaches in criminalising behaviour therefore requires an assessment of the overall benefits of an action and whether the "utility" of the action outweighs the costs.[8] Sandel suggests that the moral dilemma that ensues will also require the consideration of "certain moral duties and fundamental human rights" which may rise above the cost versus benefit calculations that is so commonly applied by commentators.[9] The utilitarian approach accordingly presupposes that the viewpoint of the greatest number (the majority) must prevail or alternatively, if a moral position must be relied upon, then the morals of the majority must again be preferred over competing values. The consequence for the minority viewpoint must therefore be that it is disregarded or considered subordinate to the majority perspective.

[5] See for example Sissela Bok *Common Values* (University of Missouri Press 1995).
[6] Jeremy Bentham *Introduction to the Principles of Morals and Legislation* (1780). Also see Krister Bykvist *Utilitarianism: A Guide for the Perplexed* (Continuum International Publishing 2010) at 16-32.
[7] D G Brown *What is Mill's Principle of Utility?* at 9-24 in David Lyons (ed.) *Mill's Utilitarianism* (Rowman & Littlefield 1997).
[8] See Michael J Sandel *Justice: What's the Right Thing to do?* (First edition, Farrar, Straus and Giroux 2009) at 31-57.
[9] Sandel (n 8) at 33.

Moore advances the argument that the primary task when ascertaining the scope of criminalisation is to identify when conduct is morally wrongful.[10] A contradiction to be found in the moral argument is highlighted by an interpretation of Bentham's approach to utilitarianism by theorists such as Urmson, who argue that a particular action "is justified as being right … if it accords with some moral rule."[11] Although this analysis of utilitarianism invites an incursion into the discourse regarding moral relativism (the view that moral judgments are true or false is relative to a particular standpoint)[12] or the debate regarding moral subjectivism (the argument for subjectivity of moral values),[13] such analysis will not be undertaken here as it overlaps with my reference to the significance of the moral discourse to the justifications for criminalising behaviour in part 6.4 below. It will suffice at this point to acknowledge that the moral discourse presents another counter to the utilitarian perspective and I enlarge upon this contention below.

(a) Evolving Values and the Need to Reassess the Utility-Costs Dichotomy

While the concept of utilitarianism presupposes that the values and norms of the majority culture provides the primary influences for the creation and development of substantive law, it cannot be presumed that the values and norms of the majority culture will not be in accordance with the values of other cultures because many values and norms are shared between cultures.[14] Bok defines many areas where divergent cultures share similar fundamental frameworks whereby every viable society is able to maintain its survival.[15] Bok contends that all human groups and all religious, moral and legal traditions prioritise; first, some form of positive obligations regarding mutual support, loyalty and reciprocity; second, negative duties to refrain from harmful actions; and third, basic values that form norms for (at least) rudimentary fairness and procedural justice.[16] Despite the reality that values may be shared between cultures, behaviour that is criminalised within one jurisdiction may not be criminalised in another.[17] In its various forms, the institution of marriage is common to all cultures. I examine the concept of marriage to illustrate the irregularities in criminalising culturally-specific behaviour under the guise of utilitarianism.

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[10] Michael S Moore *Placing Blame: A General Theory of the Criminal Law* (Oxford University Press 1997) at 18.
[11] J O Urmson *The Interpretation of the Moral Philosophy of J S Mill* at 1-8 in David Lyons (ed.) *Mill's Utilitarianism* (Rowman & Littlefield 1997). Also see Roger Crisp *Mill on Utilitarianism* (Routledge 1997) at 95-126.
[12] Refer for example Seungbae Park *In Defence of Cultural Relativism* (2011) Cultura, International Journal of Philosophy of Culture and Axiology, vol. 8, no. 1, 159-170. Also Louis Pojman *Who's to judge what's right or wrong?* at 13-21 in Stephen Satris (ed.) *Taking Sides: Clashing Views on Moral issues* (Dubuque: McGraw Hill Book Company 2008).
[13] Refer Park (2011) (n 12). Also Seungbae Park *Against Moral Truths* (2012) Cultura, International Journal of Philosophy of Culture and Axiology, vol. 9, no. 1, 179-194. Also see Pojman (n 12).
[14] Bok (n 5). Also see Park (2011) (n 12).
[15] Bok (n 5) at 10-41.
[16] Refer Bok (n 5) at 13-18.
[17] For example refer the earlier discussion in Chapter Three (3.2.1) regarding FGM.

Within the New Zealand context, the primary utilitarian rationale for the criminalisation of polygamy is that plural marriages are contrary to the values of the dominant Eurocentric-Christian population.[18] I argue here that the Euro-Christian perspective transplanted into the culture of New Zealand's criminal law that plural marriages should be condemned is no longer as unequivocal as it was in the late 1800s because the change in perspective to polygamous practices within a cosmopolitan society demands a reassessment of whether such practices should continue to be criminalised. Accordingly the reliance on utilitarian justifications for the criminalisation of polygamy is flawed because a majority viewpoint may be difficult to discern in the future and assessments of the "utility" in criminalising culture-specific behaviour may no longer be justified.

As illustrated in earlier discussion (Chapter Five, part 5.2.2), significant changes to societal perspectives on the "institution of marriage" has seen the acceptance of same-sex marriages and other forms of marital or civil union relationships.[19] Achieving absolute freedom of marital choice would require the de-criminalisation of plural marriages. I contend that the constitutional, human rights and freedom of choice arguments advanced in support of de-criminalising same-sex marriages can equally be advanced in support of de-criminalising plural marriages in New Zealand.[20] Although the discourse regarding the right to a polygamous marriage also raises issues regarding the rights of authorised organisations (religious or in the context of a public service) to refuse to perform a polygamous marriage,[21] this inquiry is beyond the scope of my thesis.

Den Otter argues that the rationale used to deny or support a constitutional right to same-sex marriage may equally apply in support of decriminalising plural marriages.[22] In promoting the importance of preserving marital choice, Den Otter argues that this not only encompasses the right to plural marriage but also embraces marital diversity where "the recognition of any form of intimate relationship that competent, consenting adults want to form, regardless of its number, gender, composition or interpersonal dynamics" should be countenanced by law provided the behaviour does not violate other valid law.[23] Although Stein counters this argument by suggesting that same-sex marriages are not the same as plural marriages because the former recognises that some people are "constitutively attracted

[18] See for example John Witte *The Western Case for Monogamy over Polygamy* (Cambridge University Press 2015) at 65-97.
[19] See for example, Elizabeth Somerfield *For Better or Worse: The Changing Legal and Social Purpose of Marriage* [2014] New Zealand Student Journal 9; (2014) 3 NZLSJ 331.
[20] Ronald Den Otter *Three May Not be a Crowd: The case for a Constitutional Right to Plural Marriage* (2015) Emory Law Journal, vol. 64, 1977-2046. Also see Natali Exposito *The Negative Impact of Polygamy on Women and Children in Mormon and Islamic Cultures* (2017) Law Student Scholarship, Paper 888, 1-33 at 11-30.
[21] See for example, Thomas Berg *What Same-Sex Marriage and Religious-Liberty Claims Have in Common* (2010) Northwestern Journal of Law and Social Policy, vol. 5, issue 2, 206-236.
[22] Ronald Den Otter *In Defense of Plural Marriage* (Cambridge University Press 2015) at 31-64.
[23] Den Otter (n 20) at 2044. Also see Den Otter (n 22) at 31-64; Berg (n 21) at 206-223.

only to members of the same sex" while it cannot be argued that anyone would be "constitutively attracted to groups rather than individuals",[24] the conclusions reached by Stein after undertaking his analyses of the competing arguments suggest that the United States case law provides inadequate grounds for distinguishing between same-sex marriage and polygamy.[25] Stein's argument is flawed because he overlooks the reality that in many parts of the world, multi-partner marriages form the basis for communities that are economically sound, socially acceptable and are not criminalised.[26] I suggest that, within the New Zealand context, there is ample scope whereby a push for the decriminalisation of plural marriage could be advanced on the basis of substantive law, constitutional grounds and individual rights similar to the arguments proffered in favour of same-sex marriage. As illustrated in the discussion above, the continued criminalisation of plural marriage is an anomaly within the context of the extremely liberal perspectives attached to the institution of marriage.

A further concern in justifying the criminalisation of polygamy on the basis of utilitarian principles is that the "happiness" or "utility" that arises from outlawing polygamy is extremely difficult to quantify. Statistics New Zealand does not collect data relating to the prevalence of multi-partner marriages in New Zealand and no statistical data is available to specifically quantify the "utility" in outlawing polygamous relationships.

(b) The Contradictions of Relying on Dominant Religious Morals

As illustrated, a reliance on utilitarian justifications to preserve Eurocentric-Christian values by criminalising culturally-loaded behaviour is not warranted because the rationale for criminalisation is contradictory and evidentially unsound. If, as observed by Robertson, that the utilitarian justification for criminalising multi-partner marriages arises from the threat it poses to public morality and that polygamy compromises the institution of marriage,[27] then I suggest that the rationale for criminalising multi-partner relationships is ambiguous and inconclusive. Although Robertson does not expand on the source of the "public morals" he refers to, it can be reasonably inferred that he is implicitly alluding to the institution of marriage aligned with New Zealand's dominant Euro-Christian culture.[28] As illustrated earlier (Chapter Two), a superdiverse and multi-ethnic New Zealand presents

[24] Edward Stein *Plural Marriage, Group Marriage and the Immutability in Obergefell v Hodges and Beyond* (2016) University of Missouri-Kansas City Law Review, vol. 84, no. 3, 872-895 at 887-893.
[25] *Obergefell v Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556-Question-1) per Justice Alito at 17-18 and Chief Justice Roberts (dissenting) polygamy challenge.
[26] Refer Den Otter (n 20). Also see Exposito (n 20) and Salman Elbedour, Anthony Onwuegbuzie, Corin Caridine, Hasan Abu-Saad *The Effects of Polygamous Marital Status on Behavioural, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature* (2002) Clinical Child and Family Psychology Review, vol. 5, no. 4, 255-271.
[27] Bruce Robertson *Adams on Criminal Law* (Brookers 1992) loose-leaf version, vol. 1 at CA205.02 (16/6/98).
[28] Robertson (n 27).

considerable challenges to the maintenance of Ethno-centric values, especially because the dominance of the Euro-Christian population is diminishing within New Zealand society.[29]

It is my contention that the perceived condemnation of polygamous relationships by the various Christian religions has always been inconsistent and therefore renders the reliance on religious grounds as contradictory. For example, polygamy is condemned outright by a religion, but the same religion will be ambiguous as to whether polygamy is acceptable, therefore the condemnation of polygamous practices by Christianity, I suggest, is not absolute. The approach to polygamy by the various Christian religions is that it is a practice that should be condemned because the Bible expressly refers to the promotion of monogamous relationships,[30] but biblical texts do not expressly forbid polygamy or characterise polygamy as improper.[31] For example, the Roman Catholic Church condemns polygamy on the basis that "polygamy is not in accord with the moral law" and "contrary to conjugal love which is undivided and exclusive".[32] However, the unacceptability of polygamy within Christianity is not unqualified because contradictions within the Bible itself can be found in the Old Testament where polygamy is not forbidden and the Bible also contains many references to important Biblical figures that practiced polygamy.[33] This would suggest that the practice of having "many wives" was acceptable within Biblical scripture. Other inconsistencies in approach to polygamy can be found, for example, during the Protestant Reformation where Martin Luther's writings indicated that he not only condemned polygamy,[34] but also wrote in support of "a man wishing to marry more than one wife".[35] Luther also specifically sanctioned the polygamous relationship of one of his supporters.[36] Another example is seen in the Anglican Church where the Church resolved to promote monogamy,[37] however in passing Resolution 26 of the Twelfth Lambeth Conference of the Anglican Communion in 1988, the Anglican Church also allows a polygamist and

[29] Refer discussion in Chapter Two (parts 2.1 and 2.3).
[30] For example, Matthew 19:3-9; Genesis 2:24.
[31] See for example, John Witte, Martin Marty *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (1st ed. Cambridge University Press 2002) at 57-60. Also Lisa Fishbayn Joffe *Whats the Harm in Polygamy? Multicultural Toleration and Women's Experience of Plural Marriage* (2016) Journal of Law and Religion, vol. 31, no. 3, 336-353 at 345.
[32] Catholic Church *Catechism of the Catholic Church* paras 2387 and 1645
[33] For example, Esau (Gen 26:34; 28:6-9); Jacob (Gen 29:15-28); Elkanah (1 Samuel 1:1-8), David (1 Samuel 25:39-44; 2 Samuel 3:2-5; 5:13-16) and Solomon (1 Kings 11:1-3).
[34] Hartmann Grisar *Martin Luther: His Life and Work* (B Herder Book Company 1930).
[35] Refer Wilhelm Martin Leberecht de Wette *Collection of Martin Luther's letters* (De Wette II, 459) at 329-330. Martin Luther's writings on polygamy are frequently referred to by proponents and opponents of polygamy. The interpretation of Luther's writings on polygamy by de Wette have been the subject of considerable debate by later commentators.
[36] Refer Witte (n 31) at 141, 205, 224-226. Also Michelet (ed.) *The Life of Luther written by himself* (Bohn's Standard Library, 1904) Chapter III, 1536-1545, translated by William Hazlitt, at 251 (regarding the approval of a second wife for Langrave Philip of Hesse by Martin Luther). Also see John Alfred Faulkner *Luther and the Bigamous Marriage of Philip of Hesse* (Apr. 1913) The American Journal of Theology, vol. 17, No.2, 206-231.
[37] Anglican Church, Resolution 120 *The Family in Contemporary Society - Polygamy* (Ninth Lambeth Conference of the Anglican Communion 1958) Lambeth Palace, London.

"his believing wives" to join the church subject to a number of requirements.[38] Witte also observes that within Jewish communities, polygamy was widely practiced and although later banned by the "cherem of Rabbenu Gershom in 1030 for the Ashkenazic world",[39] it remains possible to secure a dispensation under Jewish law to take a second wife.[40]

Although the doctrines that form the foundations of the Latter Day Saints faith (Mormonism) are based on various documents (such as the Book of Mormons and the Lectures of Faith), it also considers the Bible as scripture and therefore has close associations with Christianity. The Mormon Church has also vacillated between previously condoning polygamy when many of its prominent members practiced polygamy (for example the founder, Joseph Smith and later Brigham Young) and, although the banning of polygamy by the Mormon Church in the 1890s was enforced through the passing of various anti-polygamy law by the United States Federal government,[41] some factions who claim association with the Mormon Church continue to maintain polygamist relationships. For example, members of the Fundamentalist Mormon movement (who have clear historical connections and share many of the fundamentals of the Mormon Church) continue to practice polygamy; yet the Mormon Church claim no affiliation with these groups. In recent decades, the Mormon Church has firmly declared that it will excommunicate polygamists from the church.[42]

As illustrated here, the variability of approaches to the condemnation or acceptability of polygamous relationships are contradictory and fundamentally based on cultural justifications. As demonstrated in the following discussion, the criminal law principles advanced as rationale for criminalising multi-partner marriage in New Zealand mask the reality that ss 205 and 206 of the Crimes Act 1961 perpetuate Euro-Christian cultural norms.

The reality of a superdiverse New Zealand is that the variability of human experiences, the inconsistencies within any given utilitarian justification, the inability to discern what the consequences are in criminalising behaviour that are fundamental to "other" cultures and the difficulties in clarifying the values that are being preserved, presents considerable challenges to a reliance on utilitarian reasons for criminalising behaviour. Further, the reliance on utilitarian principles as justification for the criminalisation of culture-specific behaviour within the context of New Zealand's developing superdiversity and diminishing dominance of the Euro-Christian population, not only makes it increasingly difficult to discern a clear dominant viewpoint but, more

[38] Anglican Church, Resolution 26 *Church and Polygamy* (Twelfth Lambeth Conference of the Anglican Communion 1988) Canterbury Campus, University of Kent.
[39] Witte (n 31) at 58. Also see Joffe (n 31) at 339.
[40] Joffe (n 31) at 340.
[41] For example, the Morill Anti-Bigamy Act 1862; the Edmunds Act 1882 and the Edmunds-Tucker Act 1887.
[42] Refer the Proclamation by President Gordon B Hinckley at the General Relief Society Meeting, 23 September 1995 at Salt Lake City, Utah.

significantly, challenges the continued criminalisation of cultural practices that run counter to the norms of the dominant social paradigm.

The continued criminalisation of plural marriages to the present date, I suggest, is a perpetuation of the values espoused by Lord Penzance in the 1866 decision of *Hyde v Hyde*, where marriage was to be the "voluntary union for life of one man and one woman to the exclusion of all others."[43] While all other forms of marital relationships have been legitimated by New Zealand's substantive law (both civil and criminal) and although marriage is a more diverse institution (as illustrated earlier at Chapter Five, part 5.2.2), plural marriages are still regarded as culturally unlawful under the Crimes Act 1961. Multi-partner marriages have been criminalised in New Zealand law since 1893 but has resulted in a limited number of prosecutions. As contended in earlier discussion (Chapter Two, part 2.2.3 (c) and Chapter Five, part 5.2.2) the moral justifications espoused by Lord Penzance and Robertson may now be outdated and there may well be a need for future legislation to reflect the changing attitudes towards plural marriage.[44]

6.1.2 The Criminalisation of Culture-Specific Behaviour: Utilitarian but Ineffectual

In this part, my objective is to examine the utilitarian reasons advanced for the criminalisation of culturally-loaded offences and consider whether the objectives in criminalising these cultural practices have been justified. I analyse the criminalisation of FGM and blasphemous libel to illustrate that utilitarian justifications have been ineffectual in addressing the cultural concerns advanced for criminalising culturally-loaded behaviour. In doing so, I also examine the viability of the arguments and counter-arguments regarding whether criminalisation was the most appropriate methodology for addressing concerns about these culturally-loaded behaviours.

Although I have restricted my analysis to the criminalisation of FGM and blasphemous libel, my contention is that there is limited basis for the contention that the criminalisation of behaviour that is traditional to minority populations in New Zealand can be justified on the basis of utilitarian principles. The utilitarian rationale for the criminalisation of culture-specific offences have been tenuous, these offences are rarely prosecuted (if at all), other provisions of the criminal law already provide scope where these offences can be prosecuted and changing attitudes to these offences have resulted in calls for the removal of these provisions from the substantive criminal law.

[43] *Hyde v Hyde* (1866) LR 1 P&D 130.
[44] Robertson (n 27).

(a) Female Circumcision

The practice of female circumcision is deeply cultural and has been practiced by numerous communities worldwide over several centuries. Despite endeavours by the United Nations to discourage the practice of FGM,[45] female circumcision continues to be widely practiced in various parts of the world today.[46] In the discussion to follow, I argue first, that the rationale advanced in relevant literature for criminalising female circumcision has been ineffectual in addressing the cultural concerns attached to such practices; and second, that criminalising female circumcision in contrast to the acceptability of male circumcision implies that outlawing FGM is, in reality, founded on a contradictory and antithetical cultural distinction. Although the emphasis of this part will be on the utilitarian justifications for criminalising FGM, discussions below regarding the harm and paternalistic principles will provide further affirmation of this second contention.

The primary impetus for criminalising female circumcision in New Zealand emanates from United Nations Resolutions [47] and New Zealand's obligations as a signatory to various international conventions such as the Universal Declaration of Human Rights,[48] the Convention for the Elimination of all Forms of Discrimination Against Women,[49] and the Convention on the Rights of the Child,[50] that encourage the criminalisation of FGM. In affirming New Zealand's international law obligations, the Minister of Justice argued that the proposed 1995 amendment to the Crimes Act 1961 to criminalise FGM was necessary because it was a practice that was widely condemned by the World Health Organisation and various organs of the United Nations.[51]

The focus of the debates into criminalising FGM was on speculation that increasing numbers of immigrants from countries where female circumcision was a common cultural practice might result in the increased possibility that female circumcision would also be practiced in New Zealand.[52] It is unclear how the concerns raised in the parliamentary debates about female circumcision being practiced in New Zealand can be adequately assessed as no statistical data as to the prevalence of these practices in New Zealand (or by immigrants entering New Zealand) was provided in support of the FGM amendment. Although there was some cursory inquiry in the debates, first, into whether

[45] For example, the creation of the International Day of Zero Tolerance for Female Genital Mutilation (6 February) by the United Nations.
[46] UNICEF *Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change* (UNICEF July 2013). Also see UNICEF *Legislative Reform to Support the Abandonment of Female Genital Mutilation/Cutting* (August 2010).
[47] For example, the United Nations Resolution dated 20 December 2012 banning female genital mutilation. .
[48] Universal Declaration of Human Rights, art 25.
[49] Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); arts 2f, 5a, 12.
[50] Convention on the Rights of the Child, arts 2, 19.2, 24.1, 37a, 24.3.
[51] Refer New Zealand Parliamentary Debates (Hansard) vol. 545 (29 Nov – 8 Dec 1994), 5231-5239 at 5232.
[52] New Zealand Parliamentary Debates (Hansard) (27 July 1995), Third Reading, Phil Goff, Ruth Dyson.

FGM was practiced in New Zealand; second, whether there was sufficient awareness of FGM; and third, whether medical professionals were adequately informed about this practice;[53] the debates provided no assistance in this regard and the explanatory notes to the Crimes Amendment Bill (No. 2) 1995 provided no guidance as to how these concerns regarding the practice of FGM in New Zealand could be addressed.[54]

I suggest that it would be counter-intuitive to reason that because there has been no prosecution for FGM in New Zealand, ss 204A and 204B are therefore warranted in achieving the aim of preventing such practices. The reality is that there is insufficient evidence to indicate that female circumcision is practiced within New Zealand.[55] It must also be acknowledged that the intrinsically cultural, deeply personal and hidden nature of FGM procedures operate to render the criminalisation of FGM an ineffectual methodology for discouraging the practice of female circumcision. Berer suggests that, instead of criminalisation, the concerns regarding FGM could be addressed through "community-led educational information and more support for dialogue within FGM-practicing communities".[56] Williams-Breault also refers to the lack of impact that criminalisation of FGM has had in reducing the incidence of FGM practices and advocates educational interventions using "rights-based" approaches, involving key religious leaders and the spread of information programmes about FGM that are tailored to the needs of the targeted populations.[57] The fact there have been no prosecutions under ss 204A and 204B may well operate to challenge the efficacy of creating such offences and, as contended by Schonsheck, "the non-enforcement of criminal statutes fosters a generalised disrespect for the law".[58]

The debates in Parliament prior to the passing of the 1995 amendment to the Crimes Act criminalising FGM highlighted the need for targeted education programs to create greater awareness of the harms of female circumcision.[59] If the purpose of criminalisation is to create awareness then Schonsheck argues

[53] Refer New Zealand Parliamentary Debates (Hansard) (27 July 1995) Third Reading, D A Graham.
[54] New Zealand Government *Crimes Amendment Bill (No. 2) Explanatory Notes* (1994) No. 55-1.
[55] Refer for example, Ayan Said, Cath Conn, Shoba Nayar *New Zealand should intensify efforts to eliminate female genital mutilation by 2030: the views of women from communities that practice FGM/C* (2018) Pacific Health, vol. 1, issue 1, (ISSN: 2537-8864). Also see Ayan Said, Peter Simunovich *Female Genital Mutilation Challenges in Practice and Policy in New Zealand* (eCALD.com) Auckland University of Technology, Department of Public Health.
[56] Marge Berer *The History and Role of the Criminal Law in Anti-FGM Campaigns: Is the Criminal Law what is needed, at least in countries like Great Britain?* (2015) Reproductive Health Matters, vol. 23, no. 46, 145-157 at 154-155.
[57] Beth Williams-Breault *Eradicating Female Genital Mutilation/Cutting* (2018) Health Human Rights, vol. 20, issue 2, 223-233 at 228-230.
[58] Jonathan Schonsheck *On Criminalization: An Essay in the Philosophy of the Criminal Law* (Kluwer Academic Publishers 1994) at 74.
[59] Refer discussion in Chapter Five (part 5.2.1) above.

that "the criminal law is a clumsy educator" and provides an apt summation of the triviality of such rationales by parliaments to criminalise culture-specific behaviour, in stating that:[60]

> It sometimes happens that laws are passed with no expectation that police will arrest people for violating them, much less will prosecutors be prosecuting offenders, much less still will jail space be devoted to punishing offenders. The enactment is intended not so much as a serious addition to the calendar of crimes, but as a statement of disapproval. Sometimes the purported justification is that the law will serve to "educate" the citizenry.

I suggest that an analysis of the various utilitarian reasons advanced for the criminalisation of FGM are flawed as being contradictory, discriminative on the basis of gender, unwarranted because provisions already exist within the Crimes Act for prosecuting the "wounding" or "injuring" of a child and despite the existence of ss 204A and 204B within the Crimes Act 1961, there has been no prosecution for FGM in New Zealand. These factors, I suggest, calls into question whether criminalisation was the most appropriate utilitarian methodology for addressing concerns about female circumcision.

Although the criminalisation of FGM was intended to serve the utilitarian purpose of enhancing Euro-Christian values, I contend that the addition of ss 204A and 204B into the Crimes Act 1961 has instead resulted in the introduction of a criminal offence which promotes an unjustified cultural distinction between the acceptability of male circumcision as a Euro-Christian tradition in contrast with the "barbaric" practice of female circumcision by non-European immigrants. The criminalisation of FGM is therefore hypocritical when examined in light of the legality of male circumcision. I expand on this contention in further discussion below regarding the paternalist rationale (part 6.3.1) and harm justifications (part 6.2.2).

(b) Blasphemous Libel

The offence of blasphemous libel (or the use of insulting, offensive and threatening words that cause offence, alarm or insult) provides a further illustration of the ineffectiveness of reliance on utilitarian principles in the criminalisation of culture-specific behaviour. As illustrated, the retention of blasphemous libel as an offence under New Zealand's criminal law has not been warranted for four reasons. First, there has only been one prosecution for blasphemous libel in its 127 year history; second, there is ambiguity within the criminal law as to the purpose for such an offence; third, application of the law regarding blasphemous libel by the courts has been ad hoc and; fourth, as discussed earlier (in Chapter Five, part 5.2.3), s 4 of the Summary Offences Act 1981 adequately deals with the prosecution of "offensive … threatening or insulting" language that causes "offence …alarm or insult" which, I argue, can be used to prosecute the "reviling of a religion".

[60] Schonsheck (n 58) at 74.

As demonstrated earlier (in Chapter Five, part 5.2.3), religious beliefs and adherence to the doctrines of a particular religion is deeply cultural. If the criminalisation of blasphemous libel was to serve a utilitarian purpose whereby a potential harm to the Christian religion was to be protected, the perceived harm will be difficult to establish because s 123 also allowed the expression of an opinion or commentary that has been articulated in "good faith" and conveyed using "decent language". A further counter to the reliance on utilitarian principles as justification for s 123 is that it is no longer possible to discern a single dominant religious perspective and therefore the past approach by the courts in favouring the Christian perspective cannot be justified.

Recent New Zealand Census indicate that 57 per cent of New Zealand's population claim affiliation with a non-Christian religion or have no religious associations at all. The reality for New Zealand is that there is no longer a majority religion but a variety of minority religions where some beliefs are shared but clear divergences also exist where a particular religion will adopt a belief that is not shared with other religions. Donovan distinguishes between universal moral law and "independent culturally-borne religious beliefs and intentions" and argues that different religions share common moral ground where "their belief-systems are found to be sufficiently flexible of interpretation to permit believers to have inclusive moral intentions in situations involving common action".[61]

While the repeal of s 123 in March 2019 was undoubtedly an acknowledgement that this provision no longer served its utilitarian justifications in preventing the reviling of the previously dominant Christian religion, I suggest that the fact blasphemous libel was a criminal offence since the earliest stages of the introduction of criminal law into New Zealand is equally a reflection of, first, the difficulties in challenging the values aligned with the dominant social order; second, the insignificance of minority perspectives; and third, a recognition that societal values change and evolve (albeit gradually) over time.

[61] Peter Donovan *Do Different Religions Share Moral Common Ground?* (1986) Religious Studies, vol. 22, No. 3 and 4, 367-375 at 375.

6.2 Culture-Specific Offences: Are the Claims of Harm Justified?

Ashworth and Horder suggest that any discussion on criminalisation must inevitably involve a consideration of the principle that the State is justified in criminalising any conduct that causes harm to or creates unacceptable risks of harm to others.[62] Simester and von Hirsch suggest that four conditions must be met for conduct to be criminalised. First, the conduct must be morally wrong;[63] second, the conduct causes harm;[64] third, the harms the conduct causes can be properly attributed to the offender;[65] and fourth, criminalisation is the best legal device for dealing with the harm.[66] I focus here on the harm justifications alluded to by Simester and von Hirsch and argue that a reliance on "harm" as a justification for criminalising culture-specific behaviour can be problematic where the perceived harms are not able to be sufficiently quantified or where the claimed harms are found to also exist within comparable behaviour that is not criminalised.

The early development of the harm principle as a justification for the criminalisation of behaviour has been attributed to liberal thinkers such as Mill.[67] Wilson suggests that there are two perspectives on the harm principle, which he distinguishes by reference to the negative thrust and the positive thrust.[68] The negative thrust of the harm principle was first articulated by Mill when he argued that:[69]

> the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

Mill contended that the only purpose for which power can rightfully be exercised over any member of a civilized society, against his or her will, is to prevent harm to others.[70] Where the conduct concerned merely harms oneself or is thought to be immoral but otherwise harmless would therefore be ineligible for prohibition under Mill's conception of the harm principle. In the course of Mills' extensive written thoughts on the harm principle he provides no definition of what he considers to be the parameters of a "harm". Support, in recent times, for Mill's conception of the harm theory is

[62] Ashworth, Horder (n 2) at 28-31.
[63] Andrew Simester, Andreas von Hirsch *Crimes, Harms and Wrongs: On the Principles of Criminalisation* Hart Publishing 2011) at 23.
[64] Simester, von Hirsch (n 63) at 36.
[65] Simester, von Hirsch (n 63) at 59-61.
[66] Simester, von Hirsch (n 63) at 89.
[67] See for example Andrew P Simester, Warren J Brookbanks, Neil Boister *Principles of the Criminal Law* (4th ed. Thomson Reuters 2012) at 769. See also William Wilson *Criminal Law* (Longman Law Series 4th edition 2011).
[68] Wilson (n 67) at 33, 34. Also see Simester et al (n 67) at 769-774.
[69] John Stuart Mill *On Liberty* (Kitchener Books 2001, originally published 1859 by Parker & Son London).
[70] Mill (n 69) at 13.

provided by Simester and von Hirsch who contend that the state is justified in intervening coercively to regulate conduct only when that conduct causes or risks "harm to others".[71]

The alternative argument that the harm principle affords a positive rationale for legislative intervention was noted by Feinberg as effective:[72]

> in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.

Viewed from a positive perspective, the concept of harm is therefore an essential justification for state intervention in criminalising behaviour.[73] Feinberg extends Mill's conception of the harm principle to also include the prevention of harm to others and therefore aligns the harm principle with other justifications for the criminalisation of behaviour such as the offence principle, the social contract rationale and paternalism. Feinberg refers to a harm as "a thwarting, setting back, or defeating of an interest".[74] Simester and Brookbanks suggest that a person's "interests" will comprise the things that make his or her life go well and therefore "we are harmed when our lives are changed for the worse".[75] Simester and von Hirsch suggest that any reliance on the harm principle therefore also requires an identification of the harm addressed by each crime and a clarification that:[76]

> the harm is sufficiently important to outweigh countervailing considerations, including those of individual liberty, which militate against state intervention. Moreover, the account must not neglect to show why the defendant's conduct is wrongful.

In the context of the culture-specific offences highlighted here, the "harm" justifications for the criminalisation of such behaviour does not, I suggest, outweigh the countervailing considerations. I argue further that there are various anomalies regarding the "wrongfulness" or level of "harm" attached to the criminalisation of culturally specific behaviour. An essential aspect of my contentions in favour of the recognition of cultural factors is that the "harm" which is perceived to be done as a consequence of behaviour that is cultural or traditional to minority cultures is not necessarily supported by relevant research or literature.[77] This assertion is founded on the premise that harm should not be treated as the reason for criminalising behaviour but rather as a precondition to criminalisation. In the context of culture-specific behaviour, I suggest that a reliance on the harm principle as justification for these offences lacks validity to the extent that the "harm" to others is

[71] Simester, von Hirsch (n 63) at 35.
[72] Joel Feinberg *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press 1984) Vol. 1 at 26.
[73] See Simester, von Hirsch (n 63) at 35.
[74] Feinberg *Harm to Others* (n 72) at 33.
[75] Simester et al (n 67) at 770.
[76] Simester, von Hirsch (n 63) at 38.
[77] Refer for example, Hamish Stewart *The Limits of the Harm Principle* (2010) Criminal Law and Philosophy, vol. 4, 17-35. Also refer the discussion of remote harms by Simester, von Hirsch (n 63).

unclear, the criminalisation of culture-specific behaviour imposes unnecessary restrictions on the rights and freedoms of individuals from minority cultures; and, there is already adequate provision within the substantive criminal law to address societal concerns about the risk of harm to others. Accordingly, I argue that these culture-specific offences are superfluous and unnecessary.

6.2.1 The Obsolescence and Ineffectuality of Blasphemous Libel as an Offence

As discussed above (Chapter Five, part 5.2.3 and Chapter Six, part 6.1.2 (b)), s 123 of the Crimes Act 1961 (now repealed) previously criminalised blasphemous libel. A consideration of the "harm" that was intended to be protected by criminalising blasphemous libel, I suggest, highlights the limits of this offence and the ineffectuality of using criminalisation as a methodology for safeguarding against the perceived harm. A further complication in criminalising blasphemous libel is that the harm that is purported to have been done in committing such an offence is inherently difficult to reconcile against the right to express an opinion on a religious matter and more generally, the freedom of speech that is protected by ss 13 and 14 of the NZBORA.

The precise nature of the harm that was intended to be protected under s 123 is unclear as subsection (3) provides a defence which can be interpreted to cover a broad range of scenarios. Subsection (3) permitted the expression of "any opinion whatsoever on any religious subject" which can be established by good faith arguments and expressed in "good faith and conveyed in decent language". Subsection (3) of s 123 therefore allowed a wide range of commentary or opinion on any religion or "sacred thing". Subsection (3), I suggest, also represented an extension of the right to freedom of expression under s 14 of the NZBORA which includes the "freedom to seek, receive and impart information and opinion of any kind and any form". In this regard, I argue that these rights and freedoms restrict the reliance on harm principles to justify the offence of blasphemous libel that is purported to have wide application yet is interpreted narrowly by the courts.

The protection provided by criminalising blasphemous libel, I contend, was discriminatory because it was only applied by the criminal courts to prevent the reviling of Christian religions. To understand the nature of the harm that s 123 was intended to protect reference must be made to the development of this offence under English common law. In the 1675 decision of *Taylor's Case*, Sir Mathew Hale stated that "Christianity is parcel of the Laws of England" and in doing so inferred that a reproach of the Christian religion would be to speak in subversion of English law.[78] Although Coleridge J held in the 1822 case of *R v Carlile* that "there is nothing unlawful at common law in reverently doubting or

[78] *Taylor's Case* (1675) 8 ER 189.

denying doctrines parcel of Christianity, however fundamental",[79] later decisions of the English courts have clarified that what was required to establish the offence of blasphemous libel was more than a denial of the truth of Christianity but:[80]

> There must be in addition a wilful intent to pervert, insult, and mislead others by means of licentious or contumacious abuse of sacred subjects or by wilful misrepresentation or wilful sophistry calculated to lead the unwary and the ignorant.

In the more recent ruling of the English Administrative Court in *R (Green) v The City of Winchester Magistrate's Court*, the court went some way towards clarifying the nature of the harm in stating that what was required was not only a "contemptuous, reviling, scurrilous and/or ludicrous material relating to God, Christ, the Bible or the formularies of the Church of England …", but also an element of threat to society in general.[81] The language used in *R (Green)* was vague and imprecise but more significantly required that there be a general threat to society. This clarification of the boundaries and the nature of the harm that is to be protected by the offence of blasphemous libel in *R (Green)* also, I suggest, highlights the ineffectual nature of this offence. First, s 13 of the NZBORA protects freedom of thought, conscience and religion and s 14 of the NZBORA refers generally to the preservation of the freedom of expression. Second, it would be extremely difficult to prove that any expression of opinion would pose a threat to society in general if it was "made in good faith and in decent language … established by arguments used in good faith and conveyed in decent language" (as referred to in s 123 (3)).

A blasphemous comment about a particular religion that would amount to a general "threat to society", I suggest, would be exceedingly complex and impossible to evidentially substantiate because the "threat" or perceived harm will be excessively abstract and hypothetical. I suggest that proving the elements of s 123 was unworkable and therefore the repeal of s123 was perhaps inevitable given the highlighted difficulties with this offence.

6.2.2 The Irregularities and Inequalities in Criminalising Female Circumcision

As illustrated in part 6.1.2 (a) above, female circumcision is a cultural tradition that is practiced among many cultures world-wide and is a procedure that involves the wounding and physical alteration of the female genitalia.[82] Inherent within a female circumcision procedure is the fact that

[79] *R v Carlile* (1821) 1 St. Tr. (NS) 1033. Also refer *R v Hetherington* (1841) St. Tr. (NS) 563.
[80] See *R v Ramsay and Foote* (1883) 15 Cox 231; *R v Boulter* (1908) 72 JP 188; *Bowman v Secular Soc Ltd* [1917] AC 406 (HL).
[81] *R (Green) v The City of Westminster Magistrates' Court* [2007] All ER (D) 64 at [11].
[82] See for example, Linda Morison, Cornelia Scherf, G Ekpo, Katie Delahaye Paine, B West, Royce Coleman, Gijs Walraven *The long-term reproductive health consequences of female genital cutting in rural Gambia: A community-based survey* (2001) Tropical Medicine and International Health, vol. 6, no. 8, 643-653.

there will be specific physical consequences and psychological side-effects for young girls and women.[83] The health complications that arise for young girls and women will depend on the circumcision procedure that is applied.[84] Although various concerns were raised in Parliament regarding whether FGM was practiced in New Zealand and speculation was raised about whether the practice of FGM would become common among non-European immigrants, the indications from the parliamentary debates is that the primary reason for criminalising female circumcision was the physical and psychological consequences.[85]

While the physical and psychological harms to young women was acknowledged by Parliament, there was no acknowledgement in the debates that circumcision for young males engendered similar physical and psychological harms, yet male circumcision was a practice which was not deemed unlawful. As with female circumcision, male circumcision is widely practiced by various cultures and ethnicities around the world.[86] In New Zealand, male circumcision was a relatively common traditional procedure in the past, however, research by the Southern Cross organisation indicates that the prevalence of male circumcision has reduced significantly and is now performed on about 10 per cent of New Zealand's male population.[87] As with female circumcision, the circumcision of a young male child involves invasive and harmful medical procedures. The male circumcision procedure involves "wounding" of the male genitalia and inherently requires the surgical removal of the foreskin from the male genitalia resulting in a permanent and altered appearance. Because the foreskin contains a deep concentration of highly sensitive nerve-endings, its removal represents a significant wound to the male genitalia.[88] As with female circumcision, the effects of a male circumcision procedure will vary according to the nature of the operation, the skill of the person performing the procedure and the physical and psychological responses of the person concerned.

A further inconsistency arises with the language used to describe the harm involved for what is essentially the same procedure but distinguished only on the basis of culture. Despite the various similarities between female circumcision and male circumcision, an unwarranted distinction is drawn

[83] New Zealand Ministry of Health *Female Genital Mutilation Teaching Module* (2009) NZ FGM Education Programme at 11-15. Also see Ayan Mohamud Said *Stories and Strategies of Women Living with Female Genital Mutilation in Auckland Communities* (2015) Master of Public Health thesis at 54-56. Also Morison et al (n 80).
[84] Refer Said (2015) (n 83).
[85] Refer Hansards (n 51, n 52, n 53).
[86] See Alison Dundes Renteln *The Cultural Defense* (Oxford University Press 2004) at 51-57. Also see Brian D Earp *Female Genital Mutilation and Male Circumcision: Towards an Autonomy-Based Framework* (Dovepress 2015) 3 October 2015, 89-104.
[87] Southern Cross Medical Care Society *Southern Cross Medical Library – Circumcision* (website – last updated in 2017)
[88] Refer Brian Earp *Do the Benefits of Male Circumcision Outweigh the Risks: A Critique of the CDC Guidelines* (2015) Frontiers in Paediatrics Child Health and Human Development, vol. 3, article 18, 1-6. Also see Brian Earp *The Ethics of Infant Male Circumcision* (2013) Journal of Medical Ethics, vol. 39, Issue 7, 1-3.

by international human rights organisations,[89] and ultimately, New Zealand's Parliament, in referring to female circumcision as a "genital mutilation", whereas male circumcision is labelled in benign or neutral terms. The objective of using contrasting terms to describe what is, essentially the same type of medical procedure, I suggest, promotes the "harm" caused by FGM as severe and therefore distinguishable from the harm caused by male circumcision. If the nature of the harm which is sought to be prevented against females from specific minority cultures is sufficiently grave to warrant criminalisation under New Zealand law, then not criminalising a similar form of "wounding" by way of a comparable circumcision procedure to, largely young males, demonstrates inconsistency of approach by legislators and an unwarranted gender discrimination.

This anomaly can be further highlighted by reference to other provisions of the Crimes Act 1961 that make it unlawful to "wound" or "injure" a child under ss 188 and 189 of the Crimes Act 1961. The inconsistency lies in the reality that the wounding of a male child in the course of a circumcision procedure will not normally attract a prosecution however, a circumcision procedure involving the wounding of a female child will be unlawful. The inevitable conclusion to be drawn from this irregularity in approach by legislators is that the criminalisation of female circumcision does not necessarily arise from prioritising the prevention of harm to young children but rather a cultural distinction where male circumcision is regarded as an acceptable traditional practice while female circumcision is deemed an offensive cultural practice.

6.2.3 The Harm Caused by Polygamous Relationships: Isolated or Universal?

A commonly advanced argument for the continued criminalisation of polygamous marriage is that specific harms to women and children are perceived to arise within such relationships.[90] Various commentators, such as von Struensee,[91] and Berkowitz,[92] have argued for the prohibition of polygamy as it promotes the oppression, impoverishment and exploitation of women. The United Nation's CEDAW Committee has adopted a similar view regarding the harms caused by polygamy and has stated that:[93]

> polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her dependants, that such marriages ought to be discouraged

[89] Refer UNICEF report July 2013 (n 46). Also UNICEF report dated August 2010 (n 46).
[90] Refer *United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1981* (CEDAW) ratified by New Zealand in 1985.
[91] Vanessa von Struensee *The Contribution of Polygamy to Women's Oppression and Impoverishment: An argument for Prohibition* [2005] Murdoch University Electronic Journal of Law 2.
[92] Jason Berkowitz *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada* (2007) 38 University of Miami Inter-American Law Review, vol. 38, issue 3, 615-639.
[93] United Nations Committee on the Elimination of Discrimination Against Women *General recommendation on article 16 of the Convention on Elimination of All Forms of Discrimination against Women* (CEDAW/c/GC/29, 26 February 2013) at [27] and [28].

> and prohibited. The Committee notes with concern that some state parties, whose constitution guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.

Having ratified CEDAW, New Zealand is periodically "urged" by the CEDAW Committee to "promote measures to protect women harmed by polygamy".[94] The nature of the harm that is claimed by CEDAW to occur within polygamous relationships centres around the contention that it promotes gender inequality because the male holds a position of dominance while the women must share resources. Thobejane and Flora have noted that "there is potential for the unequal and discriminative treatment of wives by their husbands",[95] and, although acknowledging that some wives in polygamous marriages may have suffered harm, Thobejane and Flora accept that "it would be a mistake to believe that all polygamous marriages are abusive."[96] The claims of harm arising from polygamous relationships, I suggest are, first, difficult to quantify; second, are not supported by research data that compares such harms with comparable harms within other forms of marital relationships; and third, involve a significant degree of complexity when assessed against the concerns that arise with intimate partner violence arising within other forms of marital relationships.

In response to the claims that polygamous relationships cause harm to and promote inequality for women, various researchers have countered such arguments by referencing the numerous positive consequences of polygamous relationships. Thobejane and Flora note that there are various social, economic, environmental and cultural reasons why women would agree to enter into a polygamous marriage.[97] In taking a global view on the practice of polygamy, Berkowitz argues that eighty-three per cent of human societies permit polygamy and while the world-wide percentage of men with more than one wife is relatively small, as many as a third of the world's population belong to a community that allows it.[98] In research focused on countries where polygamy is commonly practiced, (for example by Lawson et al,[99] and Al-Sharfi et al)[100] the underlying conclusion reached by such research is that multiple-partner relationships are more likely to harbour positive associations and promote the health, welfare and socio-economic wellbeing of those involved in such relationships.

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[94] Refer United Nations *Concluding Observations of the Committee on the Elimination of Discrimination against Women* (CEDAW/C/NZL/CO/7, 27 July 2012) at 10 (clause 38 (b)).
[95] Tsoaledi Daniel Thobejane, Takayindisa Flora *An Exploration of Polygamous Marriages: A Worldview* (December 2014) Mediterranean Journal of Social Sciences, vol. 5, no. 27, at 1058.
[96] Thobejane, Flora (n 95).
[97] Thobejane, Flora (n 95).
[98] Berkowitz (n 92).
[99] David Lawson, Susan James, Esther Ngadaya, Bernard Ngowi, Sayoki Mfinanga, Monique Borgerhoff Mulder *No evidence that polygamous marriage is a harmful cultural practice in Tanzania* (November 2015) Proceedings of the National Academy of Sciences USA, vol. 112, no. 45, 13827-13832.
[100] Mohammad Al-Sharfi, Karen Pfeffer, Kristy Miller *The effects of polygamy on children and adolescents: A systematic review* (2015) Journal of Family Studies, vol. 22, issue 3, 272-286

Lawson et al challenge the claim that polygamy is harmful to children and promotes inequality for women. In relying on extensive statistical data and empirical research, Lawson et al conclude that polygamy is often positively associated with food security and child health and any concerns about these factors are more than sufficiently addressed by alternative socio-ecological factors. Lawson et al also argue that polygamy is largely based on female choice and "in some contexts, prohibiting polygamy could be costly for women and children by restricting marital options."[101] In research by Hayase and Liaw, the authors suggest, that:[102]

> polygamy has been a well-developed, coherent, and even preferred (or at least generationally acceptable) way of life for many sub-Saharan Africans since pre-colonial times… At a societal level, it has helped the survival of various tribes in a rather unproductive and hostile environment. At familial and individual levels, it remains appealing in many respects …

Freitas acknowledges that legalising multi-partner relationships would promote the freedom of women to choose their form of marital relationships and because the claims of harm caused within polygamous relationships are often overstated, there is some justification for legalising polygamy in the United States.[103] Despite such acknowledgements, Freitas, nevertheless, maintains that:[104]

> polygamy is a religious custom that endangers women, and multicultural justifications should only extend to practices that support the concepts of liberalism the United States was founded upon.

Having analysed the criminal justice statistical data on domestic violence in New Zealand, there are no reported incidences of physical harm arising from a polygamous relationship. However, in the only New Zealand case to make reference to a perceived harm arising from polygamy, Lang J in *R v Timbun*,[105] explained the offender's behaviour as resulting from having grown up in a "highly abnormal environment" where the offender's father practiced polygamy with three wives and the "dynamics within the society in which you lived were unusual".[106] This negative reference to polygamy was made in the course of sentencing an offender (of Papua New Guinean ethnicity) on various sexual offences. The extent to which Lang J in *Timbun* has attributed the fact that the offender was raised within a polygamous family as a causal factor for the offender's conduct was not sufficiently articulated in the judgment to clarify the nature of the harm that was inferred. This, I suggest, demonstrates the misunderstandings and confusion that exist regarding cultural practices that are not common in New Zealand.

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[101] Lawson et al (n 99) at 13827.
[102] Yasuko Hayase, Kao-Lee Liaw *Factors on Polygamy in Sub-Saharan Africa: Findings based on the Demographic and Health Surveys* (September 1997) The Developing Economies XXXV-3, 293-327 at 294.
[103] Jessica Freitas *Practicing Polygamy: Multicultural Right or Liberal Crime?* (2012) Global Tides, vol. 6, Article 10, 1-22. See also Joffe (n 31) at 342-344.
[104] Freitas (n 103) at 21.
[105] *R v Timbun* (2/3/2010) High Court, Auckland, CRI-2007-004-1896.
[106] *Timbun* (n 105) at [33] and [34].

In 2011, the Supreme Court of British Colombia in *Reference re: Section 293 of the Criminal Code of Canada* (*Canadian Polygamy Reference) case*[107] upheld the ban on polygamy on the basis of the harm that was perceived to have been caused to women and children in such relationships. Although Bauman CJ acknowledged at [228] that "it has never been seriously claimed that monogamous marriage is a uniformly positive experience for everyone", he nevertheless characterised the harm that was perceived to arise within polygamous relationships for women as:[108]

> at an elevated risk of physical and psychological harm. They face higher rates of domestic violence and abuse. Competition for material and emotional access to a shared husband can lead to fractious co-wife relationships. These factors contribute to the higher rates of depressive disorders and other mental health issues that women in polygamous relationships face … They tend to have less autonomy, and report higher rates of marital dissatisfaction and lower levels of self-esteem. They also fare worse economically, as resources may be inequitably divided or simply insufficient.

The difficulty with these comments and equally with regard to those made by Lang J in *Timbun* is that, it is reflective of a narrow perspective that focused on the harm that was found within polygamous relationships but ignored the fact that similar "harms" and the prevalence of intimate partner violence and domestic abuse is equally found in other forms of marital relationship which are not criminalised.[109] In the *Canadian Polygamous Reference case,* the evidence into the specific harms found in polygamous relationships was based on extensive research undertaken by Rose McDermott and various other researchers.[110] In her report to the court, McDermott acknowledged that the literature on polygamy was limited by the scope of the investigations which were typically confined to a particular country or particular group.[111] Accordingly, direct comparisons between the harms found in monogamous and polygamous marriages were not undertaken or adequately considered. While the statistical data referred to by various researchers such as Hayase and Liaw,[112] Lawson et al,[113] and Al Sharfi et al,[114] acknowledge the existence of certain inequalities and harms within polygamous relationships, such research also recognise that polygamous relationships positively impact the wellbeing of women and children as well as preserving social and community structures attached to the societies where polygamy is prevalent. Further, the declarations by the court in the *Canadian Polygamy Reference case* and in *Timbun* ignore the statistical information available world-wide that

[107] *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588 at [228]-[233] and [779]-[793].
[108] Refer *Canadian Polygamy Reference case* (n 107) per Bauman CJ at [8] and [782]. Compare with *Lawrence v Texas* 539 US 558 (2003). Also note *Brown v Buhman*, 947, F. Supp. 2d 1170 (D. Utah 2013).
[109] For example see Dannette Marie, David Fergusson, Joseph Boden *Ethnic Identity and Intimate Partner Violence in a New Zealand Birth Cohort* (March 2008) Social Policy Journal of New Zealand, issue 33, 126-145.
[110] *The Canadian Polygamy Reference case* (n 107) at [610] to [621]. Also refer the summary of the evidence of harms within polygamous relationships provided by B J Wray *The Canadian Polygamy Reference – Demonstrating the Harms to the Court* at 128-134 in Rose McDermott (edited by Kirsten Monroe) *The Evils of Polygamy* (Cornell University Press 2018).
[111] See B J Wray (n 110) at 133.
[112] Hayase, Liaw (n 102).
[113] Lawson et al (n 99).
[114] Al Sharfi et al (n 100).

there is a prevalence of harm from domestic abuse and intimate partner violence, regardless of the nature of the marital relationship.[115]

If it is accepted that polygamous marriages are extremely rare in New Zealand and all other forms of marriage predominate, then the concern for my research is that the harm caused within other forms of marriage in New Zealand are at a level significantly beyond the scope of any concerns raised regarding polygamous relationships. The criminal justice statistics in New Zealand demonstrate a particularly troubling concern that a considerable number of violent acts (at all levels from minor assaults to murder) are committed by a victim's intimate partner, former spouse or family member.[116] The Family Violence Report notes that 76 per cent of recorded assaults against females are committed by an offender that is identified as family.[117] Statistics New Zealand data also shows that in the four years from 2009 to 2012, 76 per cent of intimate partner violence-related deaths were perpetrated by men and 24 per cent were perpetrated by women.[118] Despite the prevalence of polygamous relationships worldwide, there are, by comparison, relatively few complaints of physical violence within polygamous relationships.[119]

If the conclusion to be taken from the domestic violence statistics noted above is that physical violence is far more prevalent within New Zealand's traditional family structures in comparison with polygamous relationships, then reliance on the principle of harm prevention as a reason for criminalising polygamous relationships is not justified. Similarly, if the justification for making polygamous relationships unlawful in New Zealand arises from the concern that polygamous relationships result in the oppression, impoverishment and unequal treatment of women, then there is inconclusive and disputed statistical information pertaining to such claims.

[115] See for example research by Heidi Stockl, Karen Devries, Alexandra Rotstein, Naeemah Abrahams, Jacquelyn Campbell, Charlotte Watts, Claudia Garcia Moreno *The Global Prevalence of Intimate Partner Homicide: A Systematic Review* (2013) Science Direct, vol. 382, issue 9895, 859-865.
[116] Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (June 2014) Health Quality & Safety Commission New Zealand ("Family Violence Report"). (Refer https://nzfvc.org.nz/data-summaries/violence-against-women).
[117] Family Violence Report (n 116) at 71-86.
[118] New Zealand Family Violence Clearinghouse *NZFVC Data Summaries 2017*
[119] Refer for example Joffe (n 31) and Freitas (n 103). Also refer Stokl et al (n 115).

6.3 Paternalism

As illustrated, the objective of the harm principle is to prevent the causing of harm to others. By contrast, the essence of the paternalistic justification is that criminalisation is warranted to prevent self-harm and the State is entrusted with the authority to enact rules, regulations and laws to ensure that individuals do not harm themselves. This rationale for the adoption of a paternalistic approach to the criminalisation of behaviour was acknowledged by the New Zealand Court of Appeal in *R v Lee*, at [231] when it noted that "paternalism … would prohibit conduct in order to prevent physical, psychological or economic harm to the actor."[120] In defining the "liberty-limiting principles", Feinberg provides a summary of the legal paternalistic approach as the ideology that is founded on the rationale that:[121]

> It is always a good reason in support of a prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself and there is probably no other means that is equally effective at no greater cost to other values.

6.3.1 Prevention of Harm to Self

Rachels recognises that the prevention of harm to oneself is a primary justification for the paternalistic approach and expands the rationale for a paternalistic approach to also provide rules that prevent immoral behaviour and law designed to prevent "offence" to others.[122] For the purposes of this discussion, I limit my analysis to a comparison of the paternalistic justification of preventing harm to oneself in contrast with the argument that individual autonomy ought to be preserved. I examine the impacts of adopting a moralistic or offence justification for the criminalisation of culture-specific offences in part 6.4 below.

Where the objective of a paternalistic approach is to prevent harm being done to oneself, the challenge for the legal paternalist is to demonstrate why it would be justified to interfere with an individual's autonomy by coercing a particular course of conduct in order to promote the individual's welfare. In clarifying this dilemma, Simester et al provide the analogy of the requirement that people must wear seat belts when in a car where the requirement to do so "is not destructive of his or her lifestyle" but the "disvalue attached to the infringement … of autonomy" is minor.[123] Accordingly, where the infringement to an individual's autonomy can be assessed as insubstantial, there will unlikely be an objection as the welfare considerations outweigh the infraction into the individual's autonomy. I

[120] *R v Lee* (2006) 22 CRNZ 568 at 623.
[121] Feinberg *Harm to Others* (n 70) at 26-27. Also refer Simester et al (n 65) at 780-784 and Joel Fienberg *The Moral Limits of the Criminal Law: Harm to Self* (Oxford University Press 1986), vol. 3 at 3-26.
[122] James Rachels, Stuart Rachels *The Elements of Moral Philosophy* (McGraw-Hill Education, Ninth Edition 2018) at 82-97.
[123] Simester et al (n 67) at 780-784.

suggest that difficulties with this argument arise where the harm that is perceived as requiring protection is unclear, difficult to quantify or is speculative in nature. Further, where the intrusion into individual autonomy is regarded as significant in comparison with the perceived harm, then the paternalistic approach must be seen as unwarranted. The criminalisation of plural marriages, I suggest, illustrates the irregularities of criminalising culturally-loaded behaviour because the cultural reasons for criminalisation will inexorably outweigh the paternalistic justifications for criminalisation.

This issue is astutely posed by Somerfield when she queries that, "if polygamy is a lifestyle [and individual] choice … and a polygamous group marriage is not going to harm society" then why should the range of acceptable forms of marriage not be extended to include polygamous relationships?[124]

As illustrated in earlier discussion (part 6.1.1), the criminalisation of plural marriage has been variously justified on the basis of pre-existing Euro-Christian attitudes towards polygamous relationships and the challenges that plural marriages present to the values that are fundamental to New Zealand's dominant social paradigm. While New Zealand caselaw does not specifically refer to whether polygamous relationships are harmful, the inference from comments made in cases such as *Rex v Kingi*,[125] and *R v Timbun*,[126] is that there are inherent negative consequences from being raised within or being a participant in plural marital relationships. Research by Thobejane et al,[127] and by United Nations organisations,[128] have highlighted that polygamous relationships may cause emotional, social and economic harm to women and children as well as fostering gender inequalities where women are placed in inferior and conflicting positions within such relationships. However, these claims of harm are countered by other researchers such as Lawson et al,[129] Al-Sharfi et al,[130] Hayase and Liaw,[131] Elbedour et al,[132] Den Otter,[133] and Exposito,[134] who argue that polygamous relationships are more likely to have been voluntarily entered into by women for various positive motives such as social cohesion, familial support, economic, health and welfare reasons.[135]

If the justification for criminalising polygamy in New Zealand is based on paternalistic reasons in preventing harm to women and children who voluntarily enter into such relationships then, I suggest,

[124] Somerfield (n 19) at 362.
[125] *Rex v Kingi* (1909) 29 NZLR371 (per Chapman J) High Court, Wellington.
[126] *Timbun* (HC) (n 105).
[127] Thobejane et al (n 95)
[128] United Nations Report 27 July 2012 (n 94).
[129] Lawson et al (99).
[130] Al-Sharfi et al (n 100).
[131] Hayase, Liaw (n 102).
[132] Elbedour et al (n 26).
[133] Den Otter (n 20).
[134] Exposito (n 20).
[135] See for example Hayase, Liaw (n 102); Den Otter (n 20); Al-Sharfi et al (n 100).

such rationale is contradictory because the claimed harms are not unique to polygamous relationships. If it is accepted that women and children are "harmed" regardless of the nature of the marital relationship involved, then the divergence in approach to criminalising multi-partner marriage (when all other forms of marital relationship are legal) must therefore inevitably point to cultural distinctions perpetuated by the dominant social paradigm.

6.3.2 Encroachment on Individual Autonomy

Another perspective on the paternalistic approach is provided from a philosophical viewpoint by Schonsheck in examining the conflict between paternalism and the encroachment on individual autonomy. [136] Schonsheck analyses the rules (which he argues are inspired by paternalistic justifications) that require individuals to wear helmets when riding a motorbike and law requiring the wearing of seatbelts in cars. Schonsheck acknowledges that wearing seat belts saves lives, prevents some injuries and reduces the seriousness of other injuries. The counter-argument, however, is that wearing seat belts could also take some lives and exacerbate some injuries if wearing seat belts prevents people from being able to eject themselves from vehicles in the event of the car being submerged or in the event of a fire.[137] Schonsheck reasons that because fires, submersions and safe ejections from cars are relatively rare, the safety evidence therefore overwhelmingly favours using seat belts. The converse position is that not wearing a seat belt increases the risk of harm, serious injury or death. The contrary argument by Liberals (those who advocate individual freedoms), according to Schonsheck, is that the seat belt law can only be justified as limiting harm to others rather than preserving the welfare of the actor because the harm caused, as a consequence of not wearing a seat belt, is an "interest set-back to others" in the form of increased insurance rates and increased taxes to meet the costs of the harm done.[138] In analysing the various issues raised regarding the application of a paternalistic approach to addressing harm, Schonsheck concludes that the paternalistic rationale for criminalisation is problematic on several levels and therefore argues that the perceived harms ought to be addressed "by means less coercive than criminal statutes".[139]

As illustrated earlier, the merits of the individual autonomy arguments significantly outweigh the harms that are claimed to arise from polygamous marriages. Somerfield[140] and Den Otter[141] argue that modern social attitudes towards the institution of marriage favour freedom of marital choice. Somerfield applies the analogy that the decriminalisation of homosexual acts between consenting

[136] Schonsheck (n 58) at 107-141
[137] Schonsheck (n 58) at 110.
[138] Schonsheck (n 58) at 111.
[139] Schonsheck (n 58) at 140-141.
[140] Somerfield (n 19) at 363.
[141] Den Otter (n 20).

adults and other milestones in relevant legislation[142] and case law,[143] ultimately led to the change in the definition of "marriage" which allowed the legalisation of same-sex marriages.[144] Somerfield suggests that it may not yet be socially acceptable in New Zealand that polygamous families exist in the same way as same-sex couples, but the increasing numbers of cultures that are represented in New Zealand points to a possible change in social attitudes towards polygamy. In recognising the changing attitudes towards marriage, the likely influx of people from cultures that practice polygamy, the rare use of ss 205 and 206 to prosecute polygamists and the difficulties in discerning the claims of harm arising from plural marriages, I suggest, supports the contention that the criminalisation of polygamy is no longer the most appropriate course for addressing the claimed harms. Accordingly, a less coercive approach towards polygamy would be warranted.

6.3.3 The Degree of State Interference versus the Severity of the Sanction

An aspect of the paternalistic approach that is advanced by Kleinig revolves around the contention that criminalisation "threatens a serious state intrusion" but because such intrusion is condemnatory (in that it takes the form of punishments), criminalisation must therefore "ground state interference in appropriate reasons that accommodate the censure that punitive interventions communicate."[145] The focus therefore should be to distinguish the degree of interference by the State against the level of sanction to be imposed for a breach of the law. The irregularities of this perspective of the paternalistic approach, I suggest, can be illustrated by way of an examination of the sanctions envisaged by criminalising polygamy and FGM.

I argue in this regard that the sanctions set by the criminalising provisions are out of step with the harm that is alleged to have occurred. For example, the extent to which a polygamous marriage (or a bigamous act) is viewed pursuant to ss 205 and 206 of the Crimes Act 1961 is extremely serious as it may result in a sentence of imprisonment up to a maximum of seven years. As illustrated above, the changing perspectives to marriage, the likelihood that plural relationships (in its various forms) may become a more common practice within New Zealand and the limited number of prosecutions under ss 205 and 206 are indicative of a softened social attitude towards plural relationships. All of these factors suggest that the maximum penalty of seven years imprisonment for a contravention of ss 205 and 206 may now be regarded as a disproportionately severe response by the State.

[142] For example, the passing of the Civil Union Act 2004.
[143] *Quilter v Attorney-General* [1997] NZCA 207; [1998] 1 NZLR 523.
[144] Somerfield (n 19) at 336-340.
[145] John Kleinig *The Paternalistic Principle* (2016) Criminal Law and Philosophy, vol. 10, 315-327 at 316. For a wider discussion of these conflicts see Schonsheck (n 58) at 107-109.

A further example of the discrepancies in the level of sanctions can be found in the context of ss 204A and 204B of the Crimes Act 1961 in comparison with ss 188 and 189 of the Crimes Act 1961. As illustrated in earlier discussion, "the excision, infibulation or mutilation" that is unlawful under ss 204A and 20B can equally be prosecuted under s 188(1) that requires an intent to cause grievous bodily harm by wounding, maiming, or disfiguring and s 189(1) that requires an injuring with intent to cause grievous bodily harm. The maximum punishment for a breach of ss 204A and 204B is seven years imprisonment while the maximum sanction for a contravention of s 188(1) is fourteen years imprisonment and a conviction under s 189(1) attracts a maximum penalty of 10 years imprisonment. While it is accepted that the likely penalty will be dependent on a variety of aggravating and mitigating factors as well as the consideration of a series of mandatory sentencing principles articulated within the Sentencing Act 2002, the discrepancy in maximum penalties between these sections, despite the urgings by the advocates for criminalising FGM (for example, UNESCO and CEDAW)[146] that it causes serious physical and psychological harm to the female victims, it is likely that the criminal courts will regard offending under ss 204A and 204B as a moderate "wounding" in comparison to the serious "wounding" or "injuring" envisaged under ss 188(1) and 189(1). The anomaly that arises regarding the sanction for offending under ss 204A and 204B is that despite the fact that there is a wounding in terms of the requirements of ss 188 and 189, the reduced penalty recommended by ss 204A and 204B erroneously suggests FGM is "wounding" of less seriousness.

6.3.4 Criminalising Circumcision – Perpetuating a Cultural and Gender Discrimination

In commenting on the contrast in approach between criminalising FGM and disregarding the acceptability of male circumcision, Wilson et al suggest that this divergence in approach is tantamount to gender discrimination,[147] while Harrop describes the difference in approach as a "conceptual fallacy".[148] Harrop suggests that although male and female circumcision both involve the removal of healthy tissue from an otherwise healthy child, the United Nations Conventions have intentionally created a gender discrimination through the use of the term "mutilation" to refer to female circumcision thereby distinguishing female genital cutting as constituting "a sexual mutilation and violation of bodily integrity" compared to the male genital operation as a benign procedure.[149] Although the contrasting legislative approach to the criminalisation of male and female circumcision perpetuates a gender discrimination, I contend that the foremost rationale for the continued

[146] Refer for example the UNICEF reports July 2013 (n 46) and UN Resolution dated 20 December 2012 (n 47). Also note CEDAW; arts 2f, 5a and 12.
[147] Refer Debra Wilson, Aileen Odgers, Robert Webster *Reconsidering Circumcision* [2014] NZLJ 357.
[148] Phoebe Harrop *Balancing rights on a knife edge: the legality of non-therapeutic male circumcision* [2013] New Zealand Public and International Law Journal, vol. 13, issue 1, 199-212 at 210-211.
[149] Harrop (n 148) at 210. Also see Kirsten Bell *Genital Cutting and Western Discourses on Sexuality* (2005) Medical Anthropology Quarterly, vol. 19, issue 2, 125-148 at 128. Also Billy Ray Boyd *Circumcision Exposed: Rethinking a Medical and Cultural Tradition* (Crossing Press, 1st edition 1998).

criminalisation of FGM is that it represents a cultural discrimination based on the preservation of values aligned with the dominant social paradigm.

The reality is that there are several commonalities between male circumcision and female circumcision not only because the circumcision procedures envisaged for females was comparable to those applied in circumcising males,[150] but the rationale used to justify the criminalisation of female circumcision may equally be applied to the criminalisation of male circumcision. Although it has to be accepted that the practice of female circumcision is deeply cultural within various communities world-wide, it is also important to note that there are no specific religious mandates for this practice.[151] By comparison, the practice of male circumcision is accepted as not only having cultural significance in many Westernised countries[152] but also has religious foundations within Jewish and Muslim communities.[153]Wilson et al observed that the cultural reasons for male circumcision (such as repression of libido, medical reasons and personal hygiene) are similar to the reasons advanced in justifying the cultural practice of FGM.[154] Bell highlights the extensive literature documenting the development of perspectives on the need to circumcise males during the Victorian era where male circumcision was viewed as necessary in addressing health issues such as asthma, insanity, epilepsy, gout, headaches, rheumatism, curvature of the spine, hip disease, kidney failure;[155] as well as a propensity to masturbate.[156] Wilson et al analysed the practice of male circumcision globally and noted that such procedure was performed for both religious (mainly Jewish and Islamic religions) and cultural reasons (for example, in the United States, it is estimated that 90 per cent of males are circumcised).[157]

As illustrated earlier, the rationale for justifying male circumcision on the basis of health reasons, can equally be applied to justifying female circumcision. In recognising this factor, the converse argument could also be made that because male circumcision does not serve a health benefit and therefore presents risks for young males, it should equally be specifically criminalised as an unwarranted wounding similar to FGM. In obiter comments, Lord Templeman intimated in *R v Brown* that male circumcision is a lawful activity but also acknowledged that what society may regard as lawful can

[150] See for example Wilson et al (n 147). Also see Harrop (n 148).
[151] Henrietta Dahan Kalev *Cultural Rights or Human Rights: The Case of Female Genital Mutilation* (2004) Sex Roles, vol. 51, nos. 5/6, 339-348 at 339.
[152] See for example Brian Morris, Richard Wamai, Esther Heneberg, Aaron Tobian, Jeffrey Klausner, Joya Banerjee, Catherine Hankin *Estimation of country-specific and global prevalence of male circumcision* (2016) Population Health Metrics 14:4. Also see Harrop (n 148) at 199-211.
[153] Refer for example Harrop (n 148) at 199. Also see Les Haberfield *The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues* (1997) Monash University Law Review, vol. 23, no. 1, 92- 122.
[154] Wilson et al (n 147).
[155] Bell (n 149) at 131-136. Also refer Boyd (n 149).
[156] See for example, Robert Darby *The Masturbation Taboo and the Rise of Routine Male Circumcision: A Review of the Histography* (2003) Journal of Social History, vol. 36, no. 3, 737-757.
[157] Wilson et al (n 147).

change over time.[158] As highlighted by Bell,[159] and other commentators such as Boyd,[160] and Darby,[161] the misconceived and antiquated "Victorian" rationale that promoted male circumcision has been medically proven to be fallacious and could be contended as simply based on outdated Victorian societal morals. If health reasons can no longer be used as justification for male circumcision and where the health risks from circumcision of a male child reaches a point where they seriously outweigh the benefits, then a non-therapeutic circumcision process could be regarded as an unlawful wounding of the child. In a modern world where medical treatment is readily available, relying on health reasons to justify a circumcision may no longer be viable and therefore male circumcision becomes an unjustified cultural or religious wounding of a child in line with the arguments directed at criminalising female circumcision. In criminalising FGM, the parliamentary debates did not allude to these contradictions and countervailing arguments regarding the practice of female circumcision, therefore it is unclear whether any of these considerations were accounted for in reaching a position where FGM was to be outlawed in New Zealand.

As demonstrated here, a reliance on paternalistic policies for the criminalisation of culture-specific behaviour is not warranted because the results of relevant research and commentary into the perceived self-imposed harms that arise from culturally-loaded practices (such as polygamy) is ambiguous and contradictory. It can be noted further that the criminalisation of plural marriage on the basis of paternalistic principles is also not warranted because the perceived harms from such relationships are not able to be evidentially substantiated and the claimed harms from polygamous relationships can be equally found in any other marital relationship.

Where the physical harms can be substantiated (as with female circumcision or male circumcision), relevant research and commentary are equally adamant that such procedures promote health, social, and cultural benefits. I suggest that a balancing of the merits of competing principles or an analysis of the harms versus the benefits of the cultural behaviours would favour the adoption of policies that fall well short of criminalisation. As illustrated earlier, addressing the issues raised by female circumcision would have been better served by well-structured and targeted education programmes rather than the creation of an offence which is inherently difficult to prove and has yet to be prosecuted in New Zealand and rarely prosecuted in other legal jurisdictions.

[158] *R v Brown* [1994] 1 AC 212 at 231.
[159] Bell (n 149) at 131-136.
[160] Boyd (n 149).
[161] Darby (n 156).

6.4 The Enforcement of Morality and the Offence Principle

In examining the enforcement of societal morals as a justification for the criminalisation of behaviour, I use the terms "morals", "norms" and "values" interchangeably as a reference to the principles or standards that distinguish right and wrong behaviour. It is not within the scope of my research that I engage in an in-depth analysis of a definition of "morals" but utilise this concept as a reference to what is socially accepted as right or wrong. As with earlier discussion, it is necessary to briefly allude to the theoretical foundations of these theories to provide context for the ensuing discourse.

Devlin advances the argument that a society is entitled to use the criminal law against behaviour which may threaten its existence.[162] The foundation for Devlin's argument is that there is a common morality which ensures the cohesion of society and any deviation from this common morality is capable of affecting society injuriously. Therefore, the State will be justified in punishing immoral behaviour. Simester and von Hirsch take the view that the primary task when ascertaining the scope of criminalisation is to identify when conduct is morally wrong.[163] Traditional beliefs, historical factors, environmental influences and geographical isolation may impact the development of societal morals and values. Devlin posits that morals and religion are inextricably linked and the validity of a society's morals arise from the religion on which it is predominantly based.[164] It is acknowledged that Devlin does not attribute the foundation of all morals as arising from religion, but it is implicit in his writings that religious principles play a major role in the formation of societal morals and beliefs. Devlin suggests that within Western civilizations, Christian religions are an influential basis for setting societal morals.[165] As discussed in Chapter Two (part 2.3), New Zealand's Eurocentric-Christian majority has dominated the legislative, judicial and executive branches of New Zealand society and therefore provide the primary influences for all criminal law and its application. As illustrated in Chapter Two (part 2.2.3), it is anticipated that there will be significant challenges to the dominance of the Euro-Christian population and the criminal law must therefore meet the challenges of the conflicts between the various cultures that flow from a superdiverse New Zealand where there will most likely be no clear dominant cultural majority.

In examining Devlin's approach to the enforcement of morals, Wilson emphasises the imposition of sanctions and argues that coercion by the State is only legitimate where it promises to prevent harm or there is risk of harm to the interests of other people.[166] The State, Wilson argues, should not therefore

[162] Patrick Devlin *The Enforcement of Morals* (Oxford University Press 1965) at 1-25. Also see Andrew Ashworth *Principles of the Criminal Law* (sixth edition, Oxford University Press 2009) at 34-35.
[163] Simester, von Hirsch (n 61) at 4.
[164] Devlin (n 162) at 4, 5.
[165] Devlin (n 162) at 4.
[166] Wilson (n 67).

intervene to enforce morality unless the individual concerned needs paternalist protection of some kind. Simester and von Hirsh adopt a similar argument to Wilson and take the view that the criminal sanction should be used sparingly or with restraint. Simester and von Hirsch suggest that the range of sanctions set by the legislature will serve various purposes inclusive of both punitive and deterrent elements but also enforce moral justifications.[167] The criminal law is, according to Simester and von Hirsch, therefore a "morally-loaded regulatory tool" in that:[168]

> the censure embodied in the prescribed sanction has a central role to discharge as a public moral appeal that people should refrain from the conduct in virtue of its wrongfulness.

Ashworth interprets these approaches to the criminalisation of morally wrong behaviour as being measured according to how a certain behaviour evokes feelings of intolerance, indignation and disgust among "ordinary members of society … [and therefore] is sufficient indication that the behaviour threatens the common morality and is therefore a proper purpose of the criminal law."[169] Ashworth surmises that these feelings of ordinary people may also be an "expression of prejudice [rather] than moral judgment", therefore, regard must be given to the reasons advanced for judging a particular behaviour and such reasons must accord with other standards.[170] In adopting this approach, Ashworth argues that a theory about morality and the criminal law must therefore "be based on a defensible definition of morality, not one which confuses it with mere feelings of distaste and disgust."[171]

Simester and von Hirsch argue that the offence principle provides an additional basis for criminalisation and rely on the example of the couple on a bus who take their display of public affection beyond cuddling to a sexual act.[172] Simester and von Hirsch argue that there will not necessarily be harm to the other occupants of the bus as a consequence of the sexual conduct, but some people may feel "offended" by sexual acts in a public place. It is however arguable, that the distinction between a cuddle and a sexual act is clear in that a cuddle will be socially acceptable (for example, in New Zealand society) while the sexual act in a public place will, on the other hand, be socially unacceptable behaviour in most, if not, all societies.

The cultural contrasts, I suggest, can be more sharply emphasised if the bus incident used by Simester and von Hirsch was compared with a 2009 incident in a Dubai restaurant where a British couple were seen kissing by a local family. The Dubai family were so "offended" by the public display of affection between two "unmarried" people that a complaint was made to local police resulting in charges of

[167] Simester, von Hirsch (n 63) at 11.
[168] Simester, von Hirsch (n 63) at 11.
[169] Ashworth (n 162) at 35.
[170] Ashworth (n 162) at 35.
[171] Ashworth (n 162) at 35.
[172] Simester, von Hirsch (n 63) at 91-93. Also see Ashworth (n 162).

breaching Dubai's decency law by kissing on the mouth.[173] The British couple were subsequently convicted and sentenced to a month in prison, fined for consuming alcohol and deported. The cultural divide will be apparent in this example in that kissing in a public place in New Zealand will not necessarily engender "offence", yet such conduct will be highly offensive in another culture.[174] The moral or cultural issue that therefore arises is whether a prosecution could be pursued in New Zealand if the kissing or other public display of affection is witnessed by, for example, a Muslim family in a restaurant in downtown Wellington, New Zealand. While the Muslim family may feel a sense of offence by the public display of affection, a New Zealand court would not encounter difficulties in entertaining a cultural defence based on the contention that public displays of affection (such as kissing on the lips by unmarried people) would not be a contravention of New Zealand's societal morals.

If the basis of morality arguments for criminalising behaviour is that there must be a sense of offence, intolerance, indignation and disgust towards specific behaviour, then the developing approach by New Zealand's Supreme Court in recent decisions such as *Morse v Police*,[175] and *Brooker v Police*,[176] and by the High Court in *Thompson v Police*[177] suggest that a higher threshold must be met before behaviour is to be regarded as "offensive". In *Morse v Police*, Elias CJ commented that the lower court had erred in interpreting "offensive" behaviour under s 4(1)(a) of the Summary Offences Act 1981 as "capable of wounding feelings or arousing outrage" as "… such an approach leaves minorities and those expressing unpopular views insufficiently protected by s 14" of the NZBORA.[178]

In the context of a charge of offensive behaviour under s 4 of the Summary Offences Act 1981, McGrath J in *Brooker v Police*, commented that:[179]

> Infringement of public order necessarily involves a serious interference with community standards of behaviour, in the sense that the behaviour goes beyond what a society respectful of democratic values can be expected to tolerate. The right to express dissenting opinions concerning official action or policy is central to democratic values. It will be rare that expressions of opinion which have no tendency seriously to upset their audience will be categorised as sufficiently intruding on public order. It is not necessary, however, that the conduct is likely to produce a physical response or other reaction resulting in a breach of the peace before the behaviour may properly be found to be disorderly. In any particular situation self-discipline, apprehension or the good judgement of affronted persons may control their overt response to a manner of behaviour which, objectively, they should not have to tolerate.

The query which then arises in the context of the various culture-specific offences that are the focus of this discussion is whether the Euro-Christian values which historically provided the basis for their

[173] Refer BBC News *Jailed Dubai kissing pair lose appeal over conviction* (4 April 2010).
[174] Another example is provided by the Daily Mail *Couple jailed* for *kissing on Dubai beach* (25 January 2013).
[175] *Morse v Police* [2011] NZSC 45, (2011) 25 CRNZ 174.
[176] *Brooker v Police* [2007] NZSC 30.
[177] *Thompson v Police* [2012] NZHC 2234.
[178] *Morse* (n 175) at [36]-[38].
[179] *Brooker* (n 176) at [120].

criminalisation are still justified having regard to New Zealand's developing superdiversity. As Ashworth has properly acknowledged, there are widely-shared moral views on various aspects of the criminal law such as the use of force, fear and fraud but divergence on, for example, sexual matters.[180] As Bok notes, the difficulty with the application of universal values is that the proposer of such values will most likely be "imposing their own religious and political value systems coercively as a pattern for all to adopt."[181] Although these values are acknowledged by legislation in New Zealand (for example, the preservation of cultural rights in s 15, the freedom from discrimination under s 19 and the protection of minority rights in s 20 of the NZBORA), the criminalisation of certain culture specific behaviour suggest that there is considerable conflict between various competing cultural values and morals. In terms of the discussion here, I limit my analysis to issues of criminalisation of culture-specific behaviour.

If the morals aligned with New Zealand's dominant culture are to be protected, are the culturally-specific practices which are traditional to other cultures therefore immoral? If the answer to this query is a negative one, then whose morals are being safeguarded? To illustrate the anomalies that arise in this regard, I refer to earlier discussion regarding the criminalisation of blasphemous libel in New Zealand. While there is arguably sufficient moral basis for a law that discourages the denigration of a particular religion, confining the application of s 123 of the Crimes Act 1961 by the courts to protecting the Christian religion, I suggest, is problematic as it gives the impression that the judiciary (who will predominantly be culturally aligned with New Zealand's Euro-Christian population) is imposing their personal morals on religious issues.[182] The irregularity here is that the intent of the legislation may well have been to provide a general prohibition on blasphemous libel but the courts have limited the application of s 123 to the protection of Christian religions only.

As illustrated in Chapter Two, there is an unprecedented increase in the preponderance and diversity of adherents to various non-Christian religions in New Zealand. There has also been a marked escalation in the number of people who profess to have no religion. A consequence of New Zealand's superdiversity, I suggest, is that the Christian values which have previously provided the foundation and justifications for the criminalisation of certain behaviour may no longer have the same level of influence in criminalisation processes. While it is accepted that values and morals may be shared among the various religious beliefs there are also contrasting views on morals that are pertinent to any given situation.

[180] Ashworth (n 162) at 35-38. Also, refer the facts of the US case of *People v Moua* No. 315972-0 (Fresno County Superior Court0 Feb. 7, 1985.
[181] Bok (n 5) at 11.
[182] I detail the ethnic and cultural make-up of New Zealand's judiciary in Chapter Two (part 2.1).

Reliance on the rationale that Christian religious morals should continue to be protected by s 123 of the Crimes Act 1961 is problematic, because there has been no prosecution under s 123. The fact there has been no prosecution under s 123, I suggest, is indicative of a changing attitude whereby the behaviour, which was previously regarded as unacceptable, may not necessarily engender the same level of offence in a modern New Zealand. This changing attitude on religious issues and an acknowledgement that such provisions are obsolete, is reflected in the repeal of s 123 of the Crimes Act in March 2019. The general policy statement in support of the repeal of s 123 acknowledges all of these anomalies in noting:[183]

> The fact that blasphemous libel remains an offence under New Zealand law is anachronistic and contrary to the basic tenets of free speech in New Zealand. Its retention is not supported by the churches that it was historically designed to protect … More recent attempts to persuade the Crown to prosecute for blasphemous libel have been unsuccessful, and it is unlikely that the law would be used again.

[183] See Explanatory note to the Crimes (Offence of Blasphemous Libel) Amendment Bill (Members Bill 18-1, 2018).

6.5 Individual Autonomy and the Social Contract Theory

The focus of my analysis here will be on exploring the conflicts that arise between various criminalisation principles that recognise, in one respect, that all human beings are autonomous moral agents,[184] but in another respect, accepts that every rational individual recognises, in the form of a "social contract", the authority of a binding set of moral rules, on the condition that others accept the same rules as well.[185] Rachels and Rachels suggest that the relevant morally binding rules are those that promote or facilitate harmonious social living.[186] The onus for setting such rules will ordinary rest on the State. The concept of individual autonomy is therefore often at odds with the concept of paternalism whereby it is the State that creates the rules aimed at advancing people's interests (such as the sanctity of life, and the promotion of good health, welfare and personal safety). The rules created by the State may serve benevolent purposes but will, at times, be achieved through coercive means (for example, the imposition of sanctions for a breach of the rules) and therefore will often conflict with or be enforced at the expense of individual rights. There is considerable debate within relevant literature and overlapping discourse regarding these justifications for the criminalisation of behaviour, therefore, I limit the following discussion to examining the impacts of these concepts within the context of criminalising culture-specific behaviour.

6.5.1 Individual Autonomy

Wilson contends that an underlying premise of the criminal law is that human beings are "autonomous moral agents" characterised by their ability to control their own destiny and therefore "bearing responsibility for their actions whether good or bad".[187] The concept of individualism which regards people as capable of choosing their own course of action is viewed by Ashworth and Horder as a fundamental principle of the criminal law.[188] Ashworth and Horder refer to the principle of "individual autonomy" as the tenet whereby people may conduct their lives as they choose with as few restrictions as possible.[189] Simester and von Hirsch suggest that the concept of autonomy is a more controversial ground for state intervention in that it:[190]

> aims to develop, foster, or protect the capacity for morally responsible personhood: the capacities to reflect upon, endorse, and decide for oneself between competing values, options and forms of life. These kinds of capacities are, in a sense, value-neutral, in that they are preconditions of our abilities to pursue good lives without committing us to do so.

[184] See Ashworth, Horder (n 2) at 23-26.
[185] Refer the discussion of the various social contract theories by Rachels, Rachels (n 120) at 82-97.
[186] Rachels (n 122) at 82-97.
[187] Wilson (n 67) at 32.
[188] Ashworth, Horder (n 2) at 23
[189] Ashworth, Horder (n 2) at 23-26.
[190] Simester, von Hirsch (n 63) at 150.

Wilson suggests that coercive rules exist or "are justified by the fact that they promote human autonomy rather than restrict it."[191] Punishment for a breach of the criminal law, Wilson argues, can then be justified because, "by offending, the individual (free and rational) is deemed to choose not only to offend but also the punishment 'price-tag' attached to this conduct."[192] Wilson therefore posits that because the purpose of rules is to facilitate human autonomy and to maximise a person's life choices, a rational free individual is taken to consent to coercion only insofar as it is necessary for him or her to be able to lead an autonomous life consistent with the enjoyment of rights for others.

The converse position is that where the criminal law involves an unjustified interference with individual autonomy, the individual is therefore also justified in challenging the nature and scope of such interference. My contention is that the principle of individual autonomy applies to all persons regardless of their ethnicity, culture or cultural influences. Because all persons are different, the criminal courts must therefore acknowledge these differences and recognise that what influences the behaviour of individuals are therefore also intrinsic or unique to them. To therefore criminalise culture-specific behaviour, in the absence of adequate countervailing rationale, would, I suggest, contravene fundamental aspects of the principle of individual autonomy.

The irregularities in applying individual autonomy policies in the context of culturally-loaded behaviour can be seen with the addition of Māori-specific criminal offences in the Maori Community Development Act 1962 (MCDA). In passing the MCDA, New Zealand's Parliament had sought to consolidate and revise the Maori Social and Economic Advancement Act 1945.[193] In particular, the explanatory notes to the Maori Welfare Bill of 1962 indicate that the purpose of the MCDA was to empower Māori Committees and Māori wardens to assume responsibility for the "unruly behaviour of Maoris" as well as the "exercise of certain powers in respect of the prevention of Maoris from driving vehicles when they are not capable of exercising control over vehicles".[194]

The offences under the MCDA, I suggest, are superfluous as similar offences were already able to be prosecuted under the Police Offences Act 1927 (which was subsequently incorporated into the Summary Offences Act 1981). Some of the offences under the MCDA are also able to be prosecuted under various provisions of the Crimes Act 1961.[195] Unlike the MCDA, all prosecutions under the Summary Offences Act 1981 and the Crimes Act 1961 are applicable to any offending committed within New Zealand's territorial borders and apply equally to any offender regardless of their cultural

[191] Wilson (n 67) at 32.
[192] Wilson (n 67) at 32, 33.
[193] Refer the explanatory notes to the Maori Welfare Bill 1962.
[194] Refer the explanatory notes to the Maori Welfare Bill 1962.
[195] See for example, Crimes Act 1961, s 87 (rioting); s 145 (criminal nuisance); s 269 (intentional damage).

or ethnic orientation. The New Zealand Māori Council and Māori committees have not used the provisions of the MCDA to prosecute any Māori.

What these provisions illustrate is the creation of specific law and a differentiated enforcement framework for Māori. Rather than the criminalisation of cultural practices per se, this is an example of an attempt to establish parallel processes in which issues of culture can be more adequately addressed. The establishment of alternative or parallel systems of criminal justice, as may be advanced in pursuit of partnership obligations under the Treaty of Waitangi, for example, are beyond the scope of my thesis. Whilst the offences under the MCDA can be said to be cultural in their focus, they are not cultural in their application. The general purpose of the MCDA was to empower Māori to deal with offending by Māori within the context of their own communities, however, the legal structures and systems to support the prosecution and administration of such offending was not provided within the MCDA.

Accordingly, the Māori-specific offences under the MCDA have failed to provide Māori with the autonomy to address offending within their own communities. As illustrated in Chapter Three (part 3.3), the mandate granted to Māori under the MCDA to address offending by Māori within the context of iwi or hapū, can perhaps be attributed to the realities of the assimilation and urbanisation factors that have caused the disconnection of Māori from their traditions. Further, it could also be contended here that the constitutional and jurisdictional hurdles highlighted in Chapter Three (part 3.4.2) will have hindered the goal of the MCDA in promoting individual autonomy for New Zealand's largest minority population.

6.5.2 Social Contract Theory

The theory of individual autonomy is closely aligned with the social contract theory; however, I suggest that an examination of the features of these concepts also highlight contrasting approaches to the criminalisation of culture-specific behaviour. The social contract principle is largely a philosophical construct developed by Hobbes,[196] Rousseau,[197] Rawls[198] and Gauthier,[199] whereby people consent to being governed and focuses on the relationship between the government and its

[196] Thomas Hobbes *Leviathan* (Clarendon Press 1983), originally published 1651.
[197] Jean-Jacques Rousseau *The Basic Political Writings* (Hackett Publishing 1987).
[198] John Rawls *A Theory of Justice* (Columbia University Press 1971).
[199] David Gauthier *Morals by Agreement* (Oxford University Press 1986).

citizens.[200] As a concept, the social contract principle is a valuable aid for the courts as it describes the wrongness of criminal acts and the rightness of criminal prosecutions.[201]

The significance of the social contract principle in the context of the criminal law is widely acknowledged by the Courts. For example, Becton J in the North Carolina Court of Appeal decision of *State v Trexler*, suggests, at [417], that social contract principles enhance the right to a fair trial as it is implicit in our criminal justice system that:[202]

> in exchange for our inability to discover the 'absolute truth', we assure criminal defendants that we will provide them as fair a trial as humanly possible.

The conflicts that arise between individual rights and public interest imperatives advanced by the social contract theory are acknowledged by the New Zealand courts. In *Taylor v Attorney-General*, when considering a prisoner's right to vote in the general elections, Heath J commented, at [25], that:[203]

> the notion of a "social contract" has been invoked as a principle that supports the view that (at least some) serving prisoners should be disenfranchised … those who infringe the laws of society to the extent that they are put into penal institutions should not be entitled to exercise a vote in a general election … A principled view to the contrary is that a sentence of imprisonment should not deprive a person of civil rights, beyond those inherent in the sentence, namely freedom of movement and association.

These conflicts are further highlighted in the case of *R v W (No. 1)*, where Goddard J, in determining an application for the staying of proceedings against a father on a charge of murder for intentionally ending the life of his 5-month old daughter (who was suffering from "the worst possible survivable brain dysfunction"), noted that:[204]

> the taking of a life, even under circumstances such as pertained in this case, constitutes the most serious transgression of the social contract, it is for the representatives of the community to assess how that killing is to be characterised … the obligation of police is to discharge their duty and bring properly investigated prosecutions in the interests of the community.

The social contract approach to the criminalisation of behaviour therefore acknowledges that there will, at times, be a conflict between the protection of individual rights and the societal imperatives that require the State and the Courts to prioritise public interests ahead of individual rights. These conflicts can be emphasised by reference to the criminalising of female circumcision (as discussed

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[200] Refer Rachels (n 122) at 82-96.
[201] Anita Allen *Social Contract Theory in American Case Law* (1999) Florida Law Review, vol. 51, no. 1, 1-39 at 30.
[202] *State v Trexler*, 334 S.E.2d414, 1985 (North Carolina Court of Appeal) at [417] per Becton J.
[203] *Taylor v Attorney-General* (2015) 10 HRNZ 523, per Heath J.
[204] *R v W (No. 1)* (2004) 21 CRNZ 926, Goddard J at [34], [38]. Also see *R v S* (HC Rotorua), 16/10/2008, CRI 2008-077-237 per Allan J.

earlier (part 6.1.2(a)) whereas male circumcision is regarded as lawful in New Zealand. Reliance on social contract principles as justification for the criminalisation of female circumcision, I suggest, will appear contrived and artificial because the public interests that are served by complying with New Zealand's international law obligations (in obeying United Nations or World Health Organisation resolutions) are being prioritised over the social expectations of individuals (for example, the protection of young children, male or female, from non-therapeutic wounding of the genitalia) that the State is obliged to protect.

Summary

In analysing the principal justifications for the criminalisation of culture-specific behaviour, a number of anomalies, inconsistencies and inequalities regarding Parliament's approach to traditional cultural practices have been highlighted. The justifications for the criminalisation of culture-specific behaviour are intricately linked and overlap in terms of their basic rationale. As illustrated in this chapter, the reliance on utilitarian, paternalistic, moralistic and harm prevention policies as validation for criminalising culturally-loaded behaviour have been tenuous, ill-conceived, unwarranted or defective and arise from reasoning that is no longer applicable in a modern superdiverse society. I conclude that the criminalisation of culture specific behaviour has arisen primarily from the erroneous application of utilitarian principles, pressure from external bodies (such as the United Nations) to comply with Universalist policies, and the misapplication of criminalisation principles to maintain the dominance of the prevailing social paradigm.

Although I have highlighted various examples where the criminalisation of culture-specific behaviour within New Zealand's criminal law are defective and fail to align with the rationale advanced for such conduct to be outlawed, I have also emphasised some examples within existing substantive criminal law where the conflict between criminalisation policies and the recognition of cultural factors can be successfully addressed. I suggest that a multi-cultural approach to the criminalisation of behaviour must be a priority for Parliament. In this regard, I advocate for the establishment of clear guidelines and clarification of cultural concepts within the substantive criminal law which will, in turn, promote more meaningful recognition of culture and cultural factors by the criminal courts.

The reality is that culturally-specific offences are rarely (if at all) prosecuted in New Zealand and in the infrequent occasion where there has been a prosecution, the courts have struggled to deal with the cultural issues involved. I argue that the anomalies arising from existing justifications for the development of the criminal law require resetting as a consequence of New Zealand's developing superdiversity and the forecast decline in the dominance of the Euro-Christian culture.

Part Four: The Significance of Culture to Criminality and Culpability

Chapter Seven:
The Relevance of Culture to Criminal Offences and Defences

In this chapter, I argue that culture is relevant to both the definition of substantive offences through the mens rea of intent and to specific and established defences through general concepts of criminal liability such as reasonableness and proportionality. My argument develops over four stages.

First, I contend that culture influences emotion and criminal behaviour is ambiguously constructed around a variety of emotions that are complex in nature and scope. Culture provides the structure, rules, guidelines and expectations to help us understand, interpret and express various emotions. Culture and cultural factors can operate to rationalise and explain why an individual has undertaken a particular course of conduct and these factors are manifested in the emotional response of offenders to given situations.

Second, I link culturally-derived emotion to motive in the commission of criminal activity. I contend that culturally derived motive ought to be seen as relevant to the mens rea element of criminal offences. In arguing for the relevance of culturally-influenced emotion to establishing criminal culpability, I isolate culturally-derived emotion from other sources of emotion. The extent to which emotionally derived motive is relevant beyond the realms of culture is beyond the scope of my thesis albeit I acknowledge that motive derived from emotion beyond culture might remain irrelevant to the determination of mens rea. Accordingly, I narrow the focus of discussion in this part to a number of emotions that, I argue, are culturally-driven and significantly impact criminal behaviour. Here, I examine the impacts of the concepts of shame, fear, honour, religious beliefs, and the defending of morals within the context of key principles of the criminal law such as reasonableness, special reasons, compulsion (necessity), consent, mental impairment, the partial defence of provocation and self-defence.

Third, I contend that culturally-derived motive is relevant to ‘intention’ as part of mens rea, but not other forms of mens rea. In support of this contention I examine specific cultural considerations that impact the culpability of defendants, particularly the cultural factors that are relevant to individuals who are aligned with New Zealand’s minority ethnic and cultural groupings. I also tackle, in this part, the traditional approach in the criminal law of excluding the relevance of motive to assessments of criminal liability.

I then move to address the relevance of culture to defences. Rather than advocating for the creation of a new defence specific to 'culture', I argue here for the relevance of culture to the existing defences of self-defence, compulsion (necessity), consent and reasonable excuse. Further, and more generally, culture is relevant to the reasonable person test and a culturally-refined balancing exercise of proportionality. In the course of this discussion, I advocate for the return of provocation as a partial defence because of the significance and relevance of cultural factors to the concepts of loss of self-control, special characteristics, uncontrolled anger and suddenness of provocation. These are all elements that may still be recognised at sentencing but are not adequately accounted for in assessing culpability.

I commence the discussion in this chapter by developing a "relevance of culture" methodology that, I argue, will provide guidance in assessing the relevance of culture to offences and defences. Ultimately, the framework of relevance I advance in this chapter will provide a roadmap that can be applied to any factual situation, the application of which can determine the relevance or otherwise of culture to either the mens rea of an offence or the application of a defence.

7.1 A Framework for Determining the Relevance of Culture

In clarifying the position my thesis takes regarding the relevance of culture to the mens rea (intent) of offences and in assessing the elements of established defences, I advance a "relevance of culture framework" (my framework) for application within criminal law.[1] This framework requires the adoption of a six phase inquiry into the claimed culture and cultural factors that have induced the defendant's actions or course of conduct. This framework, I contend, provides a methodology that can be applied to any factual situation in determining the relevance or otherwise of culture to either the mens rea of an offence or the application of a defence.

7.1.1 Is the Culture Valid?

First, it must be established that the claimed culture is a valid and qualifying culture for the purposes of the criminal law. As discussed in Chapter Four, part 4.1.4, cultures, such as office culture, sports culture, prison culture, gang culture, or social media culture, are not valid and qualifying cultures for the purposes of my argument. If, however, it is established that the defendant is closely connected with one of New Zealand's ethnic minorities such as the Māori, Pacific or Asian communities, then, these are examples of qualifying cultures. In Chapter Four, part 4.2.2, I argued that ethnicity provides the clearest distinction between cultural groupings as it is a concept that can incorporate references to the vast array of factors that characterise a cultural group whether those factors are religious, geographical, political, historical or biological. Where there is doubt or uncertainty about an aspect of the claimed culture, evidence ought to be adduced as to whether the specific culture exists having regard to relevant components of a culture such as its enduring language, customs and practices that are shared and passed on inter-generationally.

7.1.2 Identifying a Specific Cultural Factor

Second, it must be shown that the specific cultural norm that is relied upon is actually an established norm. As demonstrated in earlier discussion, the ad hoc approach to culture by the courts has resulted in cultural factors being misinterpreted, mis-construed and mis-applied resulting in incidences of unfairness, unequal treatment and inconsistency in decision-making. I argue that clear and unequivocal evidence regarding the significance of a cultural factor to the mens rea of an offence or

[1] In Alison Dundes Renteln *Cultural Defense* (2004) Oxford University Press at 207, the author provides a "cultural defense test" outlining 3 questions that the court ought to ask to "ensure appropriate use of cultural imperatives". Also see Alison Dundes Renteln *The Use and Abuse of the Cultural Defense* at 64 of Marie-Claire Foblets, Alison Dundes Renteln *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (2009) Hart Publishing. I have utilised Renteln's "cultural defense test" as a basis for developing my "Relevance of Culture Framework".

the elements of a defence must be provided for the court's consideration so that the cultural factors are clearly understood, and appropriate context is given to its relevance to the mental element of offences or the requirements of an established defence.

7.1.3 Connections with the Asserted Culture and Cultural Factor

Third, it must be demonstrated that the defendant is sufficiently connected with the claimed culture. As illustrated in Chapter Three, it cannot be assumed, for example, that all Māori have close associations with their traditional iwi or hapū. Further, past policies of assimilation and urbanisation have impacted Māori to such an extent that the connections and disconnections with traditional iwi and customs are no longer clear. As contended earlier, cultures evolve over time and aspects of a culture can be lost, re-ignited or developed anew.

7.1.4 Has the Cultural Factor Induced the Defendant's Behaviour?

Fourth, it must be demonstrated, with sufficient clarity, that the defendant was acting in accordance with the cultural norm at the time of the act that is the subject of the charge. As illustrated earlier (and further affirmed in this chapter), there must be a clear connection between the asserted cultural factor and the actions of the defendant. A culturally derived motive will only be relevant to determinations of culpability if the defendant's actions have been undertaken in accordance with the asserted cultural factor and, in turn, bears upon the elements of an offence or defence.

7.1.5 Is the Cultural Factor Relevant to Mens Rea?

My framework ought to be applied initially in ascertaining whether the asserted cultural factor is relevant to the intent required by the definition of an offence. Where the culturally derived motives are found to be relevant to the formation of a defendant's intent, then the cultural factors will operate to either exculpate, mitigate or affirm the specified intent. In part 7.3 below I argue that culturally derived emotion is relevant to motive and in part 7.4, I demonstrate the significance of culturally derived motives to assessments of criminality and culpability. Where the cultural factors have no relevance to the mens rea of the offence then consideration ought to be given to whether the cultural factors are relevant in establishing an element of a defence.

7.1.6 Is the Cultural Factor Relevant to a Defence?

Where cultural factors are advanced in support of a defence, my methodology can be used to assess the relevance of culture to the elements of that defence. I argue in part 7.5 below that culturally

derived motives will be relevant to assessments of reasonableness and proportionality and are therefore an essential consideration in the context of defences such as self-defence, compulsion and necessity, consent, reasonable excuse and provocation.

7.2 The Significance of Culture to Emotions

Emotions are both universal and culturally-driven.[2] Matsumoto and Hwang contend that culture provides the structure, rules, guidelines and expectations to help us understand, interpret and express various emotions.[3] I argue that criminal behaviour is ambiguously constructed around a variety of emotions that are complex in nature and scope. Further, the extent to which the criminal law recognises emotion as factors that explain criminal behaviour is variable and inconsistent. White and Perrone suggest that there is accordingly, "a need to … study the feelings of offenders, victims and community members and how these are represented as well as dealt with within the institutions of criminal justice."[4] In this part, I explore the main theories advanced by commentators regarding the impact of culture on emotions.

The incontrovertible conclusion to be drawn from the extensive research into the development and construction of emotions (from a psychological perspective) is that emotions are deeply cultural.[5] Tsai takes the view that emotions that are a fundamental influence on the behaviour of any individual, will be cultural in nature and often motivated or guided by an individual's cultural orientation.[6] Tsai reached these conclusions after an examination of research by Markus and Kitayama that compared the cultural nuances and factors that shaped emotions within East Asian cultures (China, Japan, Korea) and North American cultures (Canada and the United States).[7] Markus and Kitayama found that in the North American model, the "dominant model of self" is an independent one in which being a person means being distinct from others and behaving similarly across given situations, whereas in the East Asian context, the "dominant model of self" was an interdependent one in which being a person means being fundamentally connected to others and being responsive to situational needs. Tsai notes that the different models of "self" shape various aspects of emotional functioning where the independent grouping would be more likely to express their emotions openly and to influence others

[2] See for example, David Matsumoto, Hyi Sung Hwang *Culture and Emotion: The Integration of Biological and Cultural Contributions* (2012) Journal of Cross-Cultural Psychology, vol. 43, no. 1, 91-118 at 92-94.
[3] Matsumoto, Hwang (n 2) at 92-94.
[4] Rob White, Santina Perrone *Crime, Criminality & Criminal Justice* (Oxford University Press 2010) at 94.
[5] Paul Ekman *Emotions Revealed: Recognising Faces and Feelings to Improve Communication and Emotional Life* (Times Books 2003) at 1-17 and 18-37. Also see David Matsumoto *The Handbook of Culture and Psychology* (2008) at 171. Also see David Matsumoto, Linda Juang *Culture and Emotion* (Thomson Wadworth 2008).
[6]See for example, Jeanne Tsai *Ideal Effect: Cultural Causes and Behavioural Consequences* (2007) Perspectives on Psychological Science, vol. 2, 242-259. Also see, Jeanne Tsai *The Cultural Shaping of Emotion (and other feelings)* (2013) NOBA Stanford University Culture and Emotion website (accessed Feb 2019 and August 2019).
[7] See the research by Hazel Markus, Shinobu Kitayama *Culture and the Self: Implications for Cognition, Emotion and Motivation* (1991) Psychological Review, vol. 98, no. 2, 224-253. Also see similar research by Steven D Cousins *Culture and Self-Possession in Japan and the United States* (1989) Journal of Personality and Social Psychology, vol. 56, no. 1, 124-131.

whereas the interdependent model of "self" teaches people to suppress their own beliefs and desires in order to adjust to the beliefs and desires of others to fit into their environment.[8]

In analysing research into cultural shaping of emotions between individualist cultures (represented by the North American groupings) and collectivist cultures (represented by the East Asian communities), Hofstede concludes that within the North American cultural context, members were encouraged to prioritise personal needs over the needs of the group, whereas, within the East Asian cultural context, members were encouraged to prioritise group needs over personal needs.[9] The supposition to be drawn from these studies is that cultural factors impact the way people express different emotions and it cannot be assumed that all people will express the same emotions given similar circumstances because their personal cultural orientation might engender differing emotional responses to a given situation.

Tsai further argues that uncovering cultural similarities and differences in emotion "is critical to understanding emotions in general and the malleability of emotional processes more specifically".[10] Tsai reasons that because emotions play a central role in the way people communicate, understanding cultural similarities and differences in emotion will serve to prevent "miscommunications and misunderstandings that may have unintended but detrimental consequences for certain ethnic groups". In illustrating this point, the example that Tsai and other commentators provide is that because Asian Americans are often characterised as "too quiet and reserved", these "low arousal states" are misinterpreted negatively in North American contexts as expressions of disengagement, being cold, stoic and inscrutable. However, within an Asian cultural perspective, being outwardly quiet and maintaining a reserved attitude, signifies calmness as a positive characteristic.[11] In researching the effects of these misconceptions of cultural cues, Hyun suggests that misinterpretations of behaviour can result in negative consequences for Asian Americans because such factors may contribute to their being overlooked for top leadership positions.[12]

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[8] Tsai *Cultural Shaping* (n 6) at 3. Also refer research by Beth Morling, Shinobu Kitayama, Yuri Miyamoto *Cultural practices emphasize influence in the United States and adjustment in Japan* (2002) Personality and Social Psychology Bulletin, vol. 28, 311-323; Steven Heine, Darrin Lehman, Hazel Rose Markus, Shinobu Kitayama *Is there a universal need for positive regard?* (1999) Psychological Review, vol. 106, no. 4, 766-794; John Weisz, Fred Rothbaum, Thomas Blackburn *Standing out and Standing in: The psychology of control in America and Japan* (1984) American Psychologist, vol. 39, 955-969.

[9] Geert Hofstede *Culture's Consequences: Comparing Values, Behaviours, Institutions and Organisations Across Nations* (Second Edition, Thousand Oaks Sage Publications 2001) at 209-21, 225-273. Also see Harry Triandis *Collectivism v Individualism: A Reconceptualization of a Basic Concept in Cross-Cultural Social Psychology* at 60-95 in Gajendra K Verma and Christopher Bagley (eds.) *Cross Cultural Studies of Personality, Attitudes and Cognition* (Palgrave MacMillan UK 1988).

[10] Refer Tsai *Cultural Shaping* (n 6) at 7.

[11] Tsai *Cultural Shaping* (n 6) at 7.

[12] Jane Hyun *Breaking the Bamboo Ceiling: Career Strategies for Asians* (Harper Collins 2005).

Ekman contends that humans experience seven basic emotions, namely, happiness, sadness, anger, contempt, fear, disgust and surprise.[13] Matsumoto and Hwang assert that although these basic emotions are found in all human beings, the way in which emotions are expressed will differ depending on the cultural context and the individual's perception of the given situation.[14] In researching the nature of emotions and the determinants in understanding emotions, Mesquita and Frijda conclude that emotions are both universal (in that they are experienced by everyone) but also culture-specific (because emotional experiences vary greatly across cultures).[15] In subsequent research Mesquita added a third element where emotional experience is to be understood and predicted from cultural models (forms of knowledge and social practices) which, she argued, was necessary to recognise and predict variations in emotional responses.[16]

The significance of cultural factors within criminal proceedings is confirmed by research undertaken by White and Perrone into the impact of emotions on criminal conduct and the relationship between crime and the emotional states of offenders.[17] White and Perrone note that emotions such as humiliation, arrogance, ridicule, pleasure and excitement are often central to why people behave in particular ways. De Hann and Loader argue that the range of factors which induce different states of emotional arousal, from fear and anger through to pleasure and excitement, has a major bearing on individual and group behaviour.[18] Within the context of the criminal law, culturally-driven emotions will be an important consideration in assessing the motivations for conduct that may be regarded as criminal. As the cases discussed below demonstrate, culture and cultural factors can operate to rationalise and explain why an individual has undertaken a particular course of conduct and these factors are manifested in the emotional responses of offenders to given situations.

As illustrated in my cultural audit of New Zealand's criminal law, a fragmented and spasmodic approach has been applied by legislators and the courts to how culturally-loaded emotions impact behaviour. As reiterated below in more detail, the courts treat emotions inconsistently in defining offences and defences by allowing excuses based on some emotions (for example, anger) and not

[13] Paul Ekman *Are There Basic Emotions?* (1992) Psychological Review, vol. 99, no. 3, 550-553. Also see Ekman (2003) (n 3) at Chapters 1 and 2.
[14] Matsumoto, Hwang (n 2) at 92, 93. Also see Bo Shao, Lorna Doucet, David Caruso *Universality versus Cultural Specificity of Three Emotion Domains: Some Evidence Based on the Cascading Model of Emotional Intelligence* (published online 6 November 2014) Sage Publications, 1-23 and Nangyeon Lim *Cultural Differences in Emotion: Differences in Emotional Arousal Level Between the East and the West* (online version 2016) Integrative Medicine Research, 105-109.
[15] Batja Mesquita, Nico Frijda *Cultural Variations in Emotions: A Review* (1992) Psychological Bulletin, vol. 112, no. 2, 179-204. Also see Batja Mesquita, Michael Boiger, Jozefien de Leersnyder *Doing Emotions: The Role of Culture in everyday emotions* (2017) European Review of Social Psychology, vol. 28, no. 1, 95-133.
[16] Batja Mesquita *Emotions as Dynamic Cultural Phenomena* at 871-890 in R Davidson, K Scherer, H Goldsmith (eds.) *Handbook of Affective Sciences* (Oxford University Press 2003).
[17] White, Perrone (n 4) at 96-99. Also, refer Tsai, *Ideal Affect* (n 6) and Tsai, *Cultural Shaping of Emotion* (n 6).
[18] Willem De Hann, Ian Loader *On the Emotions of Crime, Punishment and Social Control* (2002) Theoretical Criminology, vol. 6, Issue 3, 243-254.

others (for example, fear). Spain notes that "the law has adopted a piecemeal approach and accepted defences based on some emotions but refused to acknowledge the role of other emotions in offender behaviour."[19] A major challenge for the criminal law, according to Spain, is the formulation of compelling reasons why the criminal law facilitates either partial or complete exculpation on the basis of some emotions but not others.

Emotions such as shame, honour, fear and the preservation of cultural norms, I contend, are an influential component of the rationale for an offender's actions, however, the courts have dealt with these emotions inadequately and inconsistently. In the context of a partial defence of provocation, for example, the case law indicates that a gender bias exists where the courts will reject a defence by men that they were acting under the effects of an uncontrollable jealous rage (for example in *Uluakiola v R*,[20] *Mesui v R*,[21] and *R v Aiono*)[22] or a breach of their mana (as was the case in *Fane v R*);[23] while the courts will accept that an uncontrollable violent response by women was more likely provoked as a consequence of a long history of physical and psychological abuse (for example, *Suluape*),[24] or cultural shame (as was the case in *Fate*),[25] rather than an expression of uncontrolled anger or jealousy. In the context of a duress or compulsion defence, as was the case in *Kapi v Ministry of Transport*,[26] the court was primarily concerned with the fact that Mr Kapi had left the scene of the accident but ignored the reality that Mr Kapi had done so because of a genuine fear for his personal safety which he claimed was induced by his cultural orientation.

Despite the significance of the vast array of emotions to the rationale for an offender's actions, the courts have focused on specific emotions and largely ignored other relevant emotions. As illustrated, emotions are experienced universally but how emotions are expressed may be culturally influenced or dependent on a person's cultural orientation. While it is accepted that not all emotions (for example, physical pain) may harbour a cultural component,[27] my focus in this discussion is on culturally-

[19] Eimear Spain *The Role of Emotion in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge University Press 2011).
[20] *Uluakiola v R* (2006) CA 123/06 (CA).
[21] *Mesui v R* (1 December 1999) CA485/99 (CA).
[22] *R v Aiono* [2012] NZHC 1752 (HC).
[23] *Fane v R* [2015] NZCA 561 per Asher J.
[24] *R v Suluape* (2002) 19 CRNZ 492 (CA).
[25] *R v Fate* (1998) 16 CRNZ 88 (CA). I expand on the nature of these inconsistencies in the application of the partial defence of provocation in part 7.5.2 below.
[26] *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA).
[27] See Mark Lumley, Jay Cohen, George Borszcz, Annmarie Cano, Alison Radcliffe, Laura Porter, Howard Schubiner, Francis Keefe *Pain and Emotion: A Biopsychosocial Review of Recent Research* (2011) Journal of Clinical Psychology, vol. 67, issue 9, 942-968. Also see Sue Peacock, Shilpa Patel *Cultural Influences on Pain* (2008) Reviews in Pain, British Pain Society. Also Richard Eckersley *Culture, Spirituality, Religion and Health: Looking at the big picture* (2007) MJA vol. 186, no. 10, S54-S56.

derived emotion. For example, psychological pain or the depth of hurt felt may arise as a consequence of a person's cultural orientation.[28]

Having established that emotions can be expressed in a culturally-influenced way and an analysis of cultural factors and influences will aid understanding of why people become emotional given a specific situation, I now examine the significance of emotions within the criminal law.

[28] See for example, my discussion of the cases of *R v Sagatea* and *Trujillo-Garcia v Rowland* in parts 7.3.1 and 7.5.2(a) below.

7.3 The Relevance of Emotion to Motive

Emotions are a ubiquitous part of life and sometimes arise due to a person's culturally influenced normative view of the world. Emotions may operate to aggravate criminal offending in some situations and will exculpate or mitigate the criminality of the defendant's conduct in the context of other circumstances. My hypothesis is that a defendant's intentions to act in a particular way is, at times, driven by cultural factors and therefore provides motivation for the way he or she behaves.

In this part, I link culturally-derived emotion to motive in the context of intention as an element of mens rea. I do this through an examination of the impacts of the concepts of shame, fear, honour, the defending of morals and spirituality. I argue that these emotions are culturally-driven and significantly impact criminal behaviour and therefore ought to be relevant to establishing mens rea.

7.3.1 Shame and "Loss of Face" Contentions

Shame is generally understood to be a reference to "feelings of humiliation or distress caused by the consciousness of wrong or foolish behaviour".[29] Shame, as experienced by humans, is considerably more than this dictionary definition and is a vastly more complex sentiment. Lewis suggests that shame is an emotion which is contingent on specific perspectives and associated with other emotions and conduct.[30] Lewis further notes that the level of response which an individual may feel due to being "shamed" is difficult to quantify because of the many variables involved in any assessment of embarrassment or sense of humiliation that is felt. While shame can be felt on a personal level it can also be felt collectively within some close-knit communities. The "hidden" character of shame and humiliation was noted by Nash as "often hard to encounter and may be systematically submerged within … society".[31]

A distinction to be drawn in the discussion of the relevance of emotions within the criminal law can be illustrated by reference to what has been referred to as the seductions of crime.[32] Katz analysed the importance of examining the impacts of emotions such as humiliation, arrogance, ridicule, pleasure

[29] Catherine Soanes, Angus Stevenson *Concise Oxford English Dictionary* (Eleventh edition, Oxford University Press 2006) at 1322.
[30] Michael Lewis *Self-Conscious Emotions: Embarrassment, Pride, Shame and Guilt* at 623-36 in Michael Lewis & Jeannette M. De Havilland-Jones (eds.) *Handbook of Emotions* (2nd edition, New York Guildford Press, 2000)
[31] David Nash *Towards an agenda for the wider study of shame – Theorising from nineteenth century British evidence*, chapter three, 43-59 of Judith Rowbotham, Marianna Murayeva and David Nash (eds.) *Shame, Blame and Culpability* (Routledge Taylor Francis 2013) at 43. Also refer the discussion of the issues regarding shame and culpability by Judith Rowbotham, Marianna Murayeva, David Nash (eds.) *Shame Blame and Culpability* (Taylor & Francis, 2013), Chapter 4, 63-79.
[32] For example, see Jack Katz *Seductions of Crime: Moral and Sensual Attractions of Doing Evil* (Basic Books New York 1988).

and excitement on criminal behaviour and concluded that emotional factors explain criminal behaviour.[33] Katz's research was focused on the relationship between crime and the emotional states of offenders, in particular, the "seductions of crime" and the compulsion that people feel in engaging in criminal activities.[34] Katz's research was centred on the thrill of crime and the risks that are taken by offenders to avoid the shame of being caught. While it is accepted that shame can be experienced for varying reasons, the emphasis in the ensuing discussion will be on shame from the cultural perspective of the defendant that has caused them to act criminally as opposed to the "seductions of crime" referred to by Katz.

Because of the range of variables involved with expressions of shame and the variability of cultural influences that impact the concept of shame, considerable complexities and misinterpretations arise in assuming that shame will be experienced in a consistent and universal manner. Shame is a universal emotion that can be experienced by any person, but the way people react to and deal with shame will differ according to the cultural context within which the emotions have arisen. In some Western cultures, shame may be considered a negative, destructive or bad emotion because a stigma is attached to the "shameful" act or conduct, therefore the reaction to shame is to remove oneself from the situation.[35] In other cultures, shame engenders a positive result where the perpetrator of the shame is required to atone for their "shameful" act or conduct.[36] As illustrated by the cases of *R v Sagatea*[37] and *Trujillo-Garcia v Rowlands*,[38] feelings of being offended or affronted and the consequent feelings of shame, are felt far more intensely in some cultures. Here, I examine various cultural situations that give rise to feelings of shame and explore the differences in cultural responses to shame.

The concept of shame is at times contended as a justification for certain acts which are regarded as "face-saving".[39] Within the New Zealand context, "saving face" contentions have been advanced in regard to applications for permanent suppression of the defendant's name,[40] and in seeking a merciful approach in sentencing,[41] however, one of the few cases which has directly addressed the concept of shame in support of a defence was the case of *R v Fate*.[42] On discovering that her husband was having a clandestine affair with her elder sister, Mrs Fate stabbed her husband several times causing his

[33] Katz (n 32) at 52-80, 164-195 and 310-324.
[34] Katz (n 32) at 310-324.
[35] Refer for example, Lewis (n 30); Nash (n 31).
[36] Refer for example, Pacific cultures where the concept of ifoga (apology) in Chapter Five part 5.5.3 and utu (compensation and reciprocity) in Chapter Three, part 3.2 are fundamental aspects of traditional justice systems.
[37] *R v Sagatea* 20 May 2010, HC, Auckland, CRI2009-092-17953.
[38] *Trujillo-Garcia v Rowland* (1993) (USCA, California) 9F3d 1553 No. 93-15096 US. Also see *People v Kimura* (1985) No. A-091133 (Los Angeles Superior Court).
[39] See for example, *Sanjeet v Police* [2017] NZHC 3 at [4]; *Roberts v R* [2016] NZHC 2588 at [80]; *Zheng v Police* [2013] NZHC 2255 at [22]; *Bian v Police* [2013] NZHC2192 at [17].
[40] *H v R* 1/7/2015, High Court Rotorua, CIV 2015-463-19, per Duffy J at [35].
[41] *R v Zhan* 19/5/2011, District Court, Auckland, CRI 2009-004-23366, per Judge Mathers at [14].
[42] *Fate* (n 25).

death. Mrs Fate was charged with the murder of her husband but was ultimately found guilty of his manslaughter. The sentencing judge assessed the culpability of the offender having regard to the strength of the provocation, the extent to which it brought about a loss of self-control and the impact that these factors had on Mrs Fate's violent response, in imposing a "merciful" sentence of two years imprisonment. The sentencing judge observed that the isolation and inability to escape social shame and hurt were at least part of the explanation for the unusual situation that had developed.[43] The Solicitor-General appealed the sentence on the basis that it was manifestly inadequate and had placed too much emphasis on the provocation aspect. The Court of Appeal was not prepared to interfere with the sentencing judge's discretion to impose a merciful sentence on the basis that the trial judge was in the best position to assess the culpability of the offender.[44] Significant to this discussion however, was that the Court of Appeal also recognised that the cultural factors that contributed to the offender's "deep sense of shame" associated with the infidelity, "the powerful feeling of shame associated with the status of being an abandoned woman and the Nanumean Islander's predisposition to bouts of violent jealous rage", had all contributed to Mrs Fate's violent response.[45]

The reality is that the increasing diversity of New Zealand's population will inevitably require New Zealand's courts to more regularly consider whether motivations for criminal conduct should encompass an accounting for contentions involving "shame", "face-saving" or "honour". Because New Zealand case law has yet to comprehensively address situations where shame has been advanced as a defence, I refer below to a number of cases from other jurisdictions where varying approaches have been adopted by the courts to the recognition of shame as an element of the defence.

The position taken by criminal courts in other jurisdictions is that the "saving face" motivation can be sufficient to displace a murderous intent to the extent that a voluntary manslaughter conviction can then be sustained.[46] The reasoning behind such an approach is that, while a death has ensued, the intent to murder was not present. Because the primary motivation for the criminal act was therefore a reliance on a deeply-felt cultural norm, this was sufficient to displace the intent to murder. As the cases illustrate, the cultural factors have at times been used successfully by the defence to support a defence contention based on established defences such as mental impairment or diminished responsibility. The defence of diminished responsibility is not presently available in New Zealand but reference to caselaw in other jurisdictions will nevertheless aid understanding of my contentions.

[43] *Fate* (n 25) at 91, lines 38-38.
[44] *Fate* (n 25) at 94.
[45] *Fate* (n 25) at 91, lines 4-21.
[46] *Kimura* (n 38). The court in *Kimura* accepted a plea bargain in reducing the charge from murder to manslaughter. Therefore, some caution ought to be taken as to the extent in which cultural factors influenced the ultimate bargain in this case and, further, the outcome ought to be seen as specific to the facts of this case. Also refer *People v Chen*, No. 87-7774 (Superior Court of New York County) December 2, 1988, where, again, the court accepted a unique set of facts and circumstances in allowing a plea to a reduced charge.

In the United States case of *People v Kimura*, Mrs Kimura's actions were framed by the defence as resulting from her discovering that her husband was having an affair which she viewed as reflecting badly on her as a wife who was unable to please her husband.[47] The defence claimed that Mrs Kimura felt deeply shamed and dejected as a consequence of her husband's infidelity. The defence was based on a claim of temporary insanity founded in part on the belief that a mother who kills her children must therefore be insane. The defence in *Kimura* relied on existing United States definitions of psychiatric defences and argued that Mrs Kimura was under a state of temporary insanity when she walked into the Pacific Ocean with her two young children thereby causing their deaths.[48] The defence tendered expert cultural evidence and letters of community support for their cultural contentions that Mrs Kimura was acting in accordance with Japanese cultural practices. The evidence adduced in court by experts and the supporting Japanese community satisfied the prosecution and the presiding Judge that the concept of "oya-ko shinju" was the primary motivation for the accused's attempted suicide and therefore displaced the intention to murder. The Court accepted that Mrs Kimura had acted in compliance with the norms of her Japanese culture and convicted her of involuntary manslaughter. The sentence imposed on Mrs Kimura of 5 years' probation subsequently engendered considerable criticism and commentary.[49]

The significance of the court's ruling in *Kimura* is that the cultural factors operated to negative the intent to murder. However, a difficulty with the approach taken by the court in *Kimura* is that the cultural factors have so impacted Mrs Kimura that she suffered temporary insanity and because of her mental impairment it was accepted that she did not possess an intent to murder. If Mrs Kimura was deeply shamed by her husband's infidelity and therefore was acting in accordance with the imperatives of her Japanese culture, then her state of temporary insanity is difficult to reconcile with the fact that her actions were taken with full cognisance of the cultural reasons for doing so and of the likely consequences.[50] The point to be emphasised here is that this was a case where cultural factors played a significant role in the assessment of culpability. However, it must also be acknowledged that the circumstances of *Kimura* provide an example where cultural factors have been recognised within a unique fact scenario and the application of those facts within the specific defence of mental impairment or diminished responsibility.

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[47] *Kimura* (n 38).
[48] *Kimura* (n 38).
[49] See for example, Mark Tunnick *Can culture excuse crime?* (Sage Publications 2004) Punishment & Society, vol. 6, issue 4, 395-409, at 404-406. Also see, Tamar Tomer-Fishman *Cultural Defense, Cultural Offense, or no Culture at All: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and the Factors Affecting them* (2010) Journal of Criminal Law and Criminology, vol. 100, issue 2, article 4, 475-522 at 481-483. Also see Rashmi Goel *Can I call Kimura Crazy? Ethical Tensions in Cultural Defense* (2004) Seattle Journal of Social Justice, vol. 3, issue 1, article 42, 443-464.
[50] This was the argument raised by Goel (n 49) at 443.

Perhaps more importantly for the purposes of my overall contention, the approach by the court in *Kimura*, while recognising the relevance of culture, did so within the context of a deficiency of the mind. This, I argue, is indefensible. It is untenable to regard culture as relevant due to a deficiency, disease or abnormality of the mind. Far from equitably incorporating culture into a nuanced approach to criminality, such an approach establishes culture as an abnormality to be considered only as a deviance from the norm.

Another example of recognising cultural influences in the extreme circumstances of a homicide was provided by the United States case of *People v Chen*,[51] where it was argued that Mr Chen was deeply shamed by the discovery of his wife's infidelity and that "cultural pressures had provoked him into an extreme state of diminished capacity". The Superior Court of New York accepted the cultural evidence provided by an anthropologist that the reaction by Mr Chen was culturally appropriate and consistent with that of a Chinese man in similar circumstances.[52] Mr Chen was convicted on a reduced charge of second-degree manslaughter. The punishment imposed by the Court of 5 years' probation engendered considerable protest and criticism.[53]

The court's ruling in *Chen* suggests that it was accepted that Mr Chen had killed his unfaithful wife because of cultural pressures. Although the *Chen* decision has been the subject of much criticism regarding the reasons for a conviction to a reduced charge and the leniency of the sentence, *Chen* nevertheless highlights the limits of a "cultural defence" and the dangers of misinterpreting or misunderstanding the relevance and significance of cultural considerations. It is somewhat difficult to come to terms with this decision because although the cultural factors may have been accepted as relevant to Mr Chen's motivations to kill his wife, I suggest that inadequate regard in this case has been given to the possibility that his cultural influences may have also encompassed other cultural alternatives in addressing his culturally derived shame. The *Chen* judgment does not address the possibility that Mr Chen could have adopted other less violent responses to address his cultural shame. What was not clear from the *Chen* judgment is whether Mr Chen's violent actions were entirely within the sphere of his cultural norms (and therefore a homicide was the only option) or whether an alternative (less violent or non-violent) response to his cultural shame would also be acceptable within his culture. The limitations I refer to here is that the court in *Chen* has focused on the cultural acceptability of addressing cultural shame by way of a "killing" without regard to other

[51] *Chen* (n 46).
[52] *Chen* (n 46). Refer the criticism of the *Chen* decision by Cher Weixia Chen *A Critique of the 'Loss of Face' Arguments in Cultural Defence cases: A Comparative Study*, at 247-259 in Marie-Claire Foblets, Alison Dundes Renteln (eds.) *Multicultural Jurisprudence – Comparative Perspectives on the Cultural Defence* (Hart Publishing, 2009).
[53] Refer for example, Damian Sikora *Differing Cultures, Differing Culpabilities? A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing* (2001) Ohio State Law Journal, vol. 62, 1695.

cultural alternatives. The cases of *Kimura* and *Chen*, I suggest, indicates inconsistency and confusion in the way the courts in the Unites States have dealt with shame or "saving face" as an element of a defence. In part 7.5.2(c) below I analyse the fact scenarios in *Kimura* and *Chen* to demonstrate the relevance of the asserted cultural factors within the context of my framework.

In two other United States cases, "loss of face" arguments were made by the defence, but the expert evidence was either not accepted by the court or was not admitted for consideration by the jury; consequently the respective courts provided limited accommodation for the cultural contentions in direct contrast to *Kimura* and *Chen*. In *Yi Ching Chou v Colorado*,[54] the accused, Mr Chou was convicted and sentenced to life imprisonment for killing a popular Chinese restaurant owner who had "dishonoured" him. In *Chou*, the expert cultural witnesses called by the defence and the prosecution could not agree on whether the actions of Mr Chou were "face-saving" so, ultimately, the Court did not accept the "loss of face" defence to the charge of murder.[55]

In *Lee v The State*,[56] the defendant shot his ex-wife's lover twice and claimed that the first shot was accidental, but the second shot was in self-defence as the victim had tried to take his gun off him and was also lunging at him with a pair of scissors. The victim was found by police with a pair of scissors in his right hand, one bullet wound to the chest and another bullet wound to the back of his head. The court noted there was premeditation to the offending in that Mr Lee (a resident of Texas) was armed on both occasions when he flew to Georgia in an effort to "convince" the victim to stop seeing his ex-wife. The Court in *Lee* refused to hear expert evidence regarding the effects of cultural influences on the Chinese male, family matters from a Chinese perspective, the distinction between the roles of males and females and further, was to suggest that Mr Lee's actions were culturally motivated to "save face" before his community. The trial judge in *Lee* ruled that the cultural evidence could not be admitted due to its unduly prejudicial nature because "the evidence of the effects of Chinese culture on the defendant in firing the shots would not have aided the jury in its search for truth". The Georgia Supreme Court affirmed the ruling of the lower court that the cultural evidence was inadmissible and accepted that the defendant's own testimony regarding aspects of his Chinese culture was sufficient to inform the jury of general cultural matters. The significance of the *Lee* approach to my argument is that the court accepted that some cultural evidence was of general relevance but in the context of the reasons why the appellant shot the victim and whether a defence of self-defence could be established the evidence of culture was held to be "prejudicial".

[54] *Yi Ching Chou v Colorado*, No. 99SC345, Supreme Court of Colorado, 1999 Colo. LEXIS 783. Also see Marie-Claire Foblets, Alison Dundes Renteln (eds.) *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defence* (Hart Publishing 2009) at 247-258.
[55] Refer Cher Weixia Chen (n 52) at 249.
[56] *Lee v The State*, No. S92A0725, Supreme Court of Georgia, 262 Ga 593; 423 SE2d 249, (1992) 92 Fulton County DR 3087.

In contrast with the approach by the courts in *Kimura* and *Chen*, I suggest, that the court in *Lee* has adopted a more circumspect approach to the cultural contentions in circumstances where, other motivations are more apparent (such as the defendant's expressions of anger), the evidence of premeditation, the bullet wounds suggesting the second shot was not defensive and the resort to a killing instead of other (perhaps less violent) means of addressing his cultural shame. For example, in *Lee*, the defendant claimed that he only wanted to "convince the victim to stop" seeing his ex-wife. So the taking of the gun to the meeting with the victim was perhaps either a "strategy" to assist with that purpose or might suggest that he had formed the intention to shoot the victim prior to the meeting. While cultural evidence may have assisted in clarifying the cognitive process undertaken by Mr Lee, it is unclear how cultural factors will have supported his claim that he was acting in self-defence in these circumstances. *Lee* therefore demonstrates, in contrast with *Kimura* and *Chen*, the limited relevance of cultural factors when other motives and intents are more apparent.

In analysing these cases, Goel suggests that the legal system in the United States was hamstrung with little room for acknowledgement of the cultural factors that had affected Mrs Kimura because the legal system only allowed the acknowledgement of legal wrongs. However, Goel also notes that there have been a number of improvements in approach whereby the focus is on individual influences rather than a reasonable person standard which would allow for more effective use of cultural evidence.[57] Although the circumstances and facts before the Court in *Kimura* and *Chen* suggest a pushing of the recognition of cultural factors to the limits of its relevance (in the sense that cultural motivations are prioritised over "other' motives), the case of *Trujillo-Garcia v Rowland* demonstrates that the United States Courts have been willing to move on from those rulings and will impose limitations on the extent to which cultural factors should be applied to assessments of criminal culpability on the grounds of proportionality.[58] The defendant in *Trujillo-Garcia* felt so affronted by an insult referencing his mother that he then shot the person who insulted him. The issue before the Court was whether the cultural perspective of the accused should be a factor to be considered in assessing the degree of provocation involved when the accused shot the victim.[59] While the court accepted that the defendant's response was culturally motivated in that the insult would have been particularly offensive to a person of Mexican ethnicity, the act of shooting the victim was held to be disproportionate to the degree of incitement and further "that a reasonable Mexican male would not have been provoked to act out of passion by the insults".[60]

[57] Refer Goel (n 49) at 459-460.
[58] *Trujillo-Garcia* (n 38).
[59] *Trujillo-Garcia* (n 38) at paras 7 and 8. At para 9, the court noted that the issue was "whether a reasonable person would have acted out of passion rather than judgement".
[60] *Trujillo-Garcia* (n 38) at para 10.

In contrast with the approach taken by the United States courts in cases such as *Kimura*, *Chen* and *Lee*, (where sexual infidelity was the primary reason for the cultural shame) the United Kingdom Court of Appeal has taken the position that infidelity in itself will be an insufficient trigger for the "loss of self-control" but may be relevant where that fact is part of a "cohesive whole" (reasons) for the appellant's loss of self-control. Sections 54 and 55 of the Coroners and Justice Act 2009 created a new self-contained partial defence to murder of "loss of self-control" which required a "trigger" (provocation).[61] In *R v Clinton, Parker & Evans*, the three appellants were all convicted of murdering their respective wives and were appealing their convictions on the basis that the infidelity of their respective wives had deeply shamed them and provoked each of them to lose self-control prompting them to respond violently in causing the death of their respective spouses. During the trial, the judge held that a reliance on the uttering of words relating to sexual infidelity as the trigger were insufficient to justify a defence of loss of self-control.

The issue on appeal was the extent to which the fact of sexual infidelity could be raised as a "qualifying trigger" for the defence of loss of self-control. A distinction that can perhaps be drawn between the United States and United Kingdom decisions is that in *Kimura* and *Chen*, the sexual infidelity (breach of a cultural norm) prompted a deep sense of cultural shame leading to a loss of self-control (or mental impairment), while in *Clinton, Parker, Evans*, the focus was on whether sexual infidelity could be considered a "trigger" that could be relied upon as a causal factor for the loss of self-control.[62] The Court of Appeal in *Clinton, Parker, Evans* accepted that it was bound by the express exclusion of "sexual infidelity" as a trigger for loss of self-control,[63] but acknowledged that if the victim's actions were to elicit the defendant's "justifiable sense of being seriously wronged" (which is mandated by s 55(4)(b) of the Coroners and Justice Act 2009) or the things said or done amount to circumstances of an "extremely grave character" (s 55(4)(a)), then there may be scope whereby the fact of the sexual infidelity may then become relevant in determining whether there has been a loss of self-control.[64] On the basis of this reasoning the appeals by Mr Parker and Mr Evans were dismissed because they were solely reliant on the sexual infidelity of their respective wives as the trigger for their actions. The appeal by Mr Clinton was allowed and a new trial was ordered on the basis that Mrs Clinton's taunts of infidelity were part and parcel of a wider range of abusive comments made by Mrs Clinton immediately prior to the violent acts by Mr Clinton that led to Mrs Clinton's death.

[61] Refer a useful discussion of this defence by Jeremy Horder, Kate Fitz-Gibbon *When sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing* (2015) Cambridge Law Journal (online version June 2015)
[62] *R v Clinton, Parker & Evans* [2012] EWCA Crim 2.
[63] Refer Coroners and Justice Act 2009, s 55(6)(c).
[64] *Clinton, Parker, Evans* (n 62) at [77] per Henriques LCJ.

The approach by the court in *Clinton, Parker & Evans,* I suggest, aligns with the position taken by the New Zealand High Court in *Sagatea* where the cultural factor which prompted the violent response was recognised by the Court as relevant to assessments of overall culpability of the offender.[65] As illustrated in earlier discussion (Chapter Five, part 5.3.6), the court in *Sagatea* has attributed greater weight to the "shame" which was felt as a consequence of the cultural insult and recognised that the "one punch" response to the "culturally significant insult from a Samoan perspective" was sufficiently proportionate to warrant a reduction of the conviction to manslaughter. A measured approach was also adopted in *Trujillo-Garcia,* where a United States court held that the shooting of a person who made a verbal insult, cannot be mitigated by claims of an intensified sense of being aggrieved or offended because of cultural factors. In *Sagatea* and *Trujillo-Garcia* the respective courts, I suggest, have applied a culturally-nuanced proportionality balancing test as to whether the claimed cultural factors were relevant to the determinations of criminality.

As with each of the emotions analysed here, the impact of shame on an offender's criminal acts (from a cultural perspective) will be varied and require an assessment of a range of relevant criminal law considerations. Although I argue that the criminal law ought to recognise culturally-derived emotions, the recognition of cultural factors must, I suggest, be subject to reasonable limitations. In part 7.4 below, I argue that culture and cultural factors are essential aspects of an offender's motives and intentions. Although the substantive criminal law will be specific about the mens rea required to establish an offence, an offender's culturally derived motives will, I argue, provide a clearer perspective of the offender's purposes and intents for criminal activity. In part 7.5 below, I examine the significance of culture in the context of the defences of self-defence, compulsion (necessity), consent and provocation with a focus on how cultural factors can operate to explain, mitigate or exculpate offending. In the course of that discussion, I demonstrate how culture and cultural factors impose limitations through the concepts of reasonableness and proportionality.

7.3.2 Fear

Fear is a powerful human emotion that alerts us to the presence of a threat or danger. As with shame, fear is experienced universally, is multifaceted and is not only culturally-influenced but how it is manifested will depend on the specific circumstances and the idiosyncrasies of the individual involved.[66] Fear is closely associated with other concepts such as anxiety, dread, distress or panic but it cannot be said that these terms are interchangeable with each referring to differing states within the

[65] *Sagatea* (HC) (n 37).
[66] See for example Julia Christensen, S Di Costa, B Beck, P Haggard *I just lost it! Fear and Anger reduce the sense of agency: a study using intentional binding* (2019) Experimental Brain Research, vol. 239, 1205-1212. Also Ralph Adolphs *The Biology of Fear* (2013) Current Biology, vol. 23, issue 2, R79-R93.

concept of fear. As with each of the emotions analysed here, the impact of fear on an offender's criminal acts (from a cultural perspective) will be variable and require an assessment of a range of relevant criminal law considerations. For example, Aly and Green acknowledge that fear and anxiety are related emotions but from a psychological standpoint noted that:[67]

> the perception of threat does not necessarily manifest in fear, but in anxiety: which may be described as a precursor to fear. Anxiety is a pervasive feeling of dread in response to a danger which is sensed but unspecified. Where that danger becomes objectified, imminent and unavoidable, the human response is fear. At the individual level fear and anxiety are instinctive, inherent to our psychological makeup and serve a deep psychological need. At the communal level, social anxiety and fear are experienced where the consensus is that a perceived threat to existence (or the values associated with that existence) cannot be contained or managed using traditional defences.

Research by Adolphs suggest that fear generates a biochemical and an emotional response where the biochemical response is universal, but the emotional response will be highly individual.[68] From a biological perspective, Adolphs suggests that fear represents the link between "sets of stimuli to patterns of behaviour" and therefore the response to feelings of fear will vary considerably.[69] In referring to earlier research by Easterbrook,[70] Christensen et al suggest that "extreme stress and negative emotional states influence brain mechanisms underlying action control, focusing cognition on a single action and limiting the consideration of alternative responses and their outcomes".[71] Some fears may be a result of prior experiences or trauma, while some fears may occur because they cause physical symptoms such as being afraid of heights or being in a crowded room that may cause dizziness or nausea. For example, feelings of fear may facilitate automatic withdrawal responses such as fleeing, hiding or freezing.[72] Accordingly the emotional response to fear will be variable and is deeply personal. I narrow the focus of this discussion to the impacts of fear (and its variations in intensity and state) on the responses and behaviour of defendants. To illustrate my contentions, I examine the relevance and significance of fear as a factor within the related defences of compulsion, necessity (duress of circumstances) and self-defence.

(a) Compulsion, Duress and Necessity

There is considerable commonality in the requirements of the defences of compulsion (or coercion), duress of circumstances and necessity in that these defences require the existence of a threat of harm meaning that the defendant will be acting under a state of fear. However, the differences in

[67] Anne Aly, Leila Green *Fear, Anxiety and the State of Terror* (2010) Studies in Conflict & Terrorism, vol. 33, no. 3, 268-281 at 269.
[68] See for example Adolphs (n 66).
[69] Adolphs (n 66) at R80.
[70] John A Easterbrook *The effects of emotion on cue utilization and the organization of behaviour* (1959) Psychological Review, vol 66, 183-201.
[71] Christensen et al (n 66).
[72] Refer Christensen et al (n 66) at 1206.

requirements between these defences, I argue, also provide opportunities whereby culturally-loaded emotions such as fear can play a major role in support of these defences. The defence of compulsion under s 24 of the Crimes Act 1961, I suggest, provides a stark example of where fear plays a significant role in the rationale for a defendant's behaviour yet the requirements of s 24 ignores the relevance of fear as a factor that often defines the rationale for a defendant's actions in these circumstances. Although the common law defence of necessity is acknowledged as an available defence under s 20 of the Crimes Act, where the common law defence is inconsistent with s 24, then the common law defence of necessity will not apply.[73]

The difference between these defences is that s 24 of the Crimes Act requires that there be a threat "of immediate death or grievous bodily harm" while the defence of necessity will require a reasonable belief by the defendant that there was an actual, or specific threat that required immediate attention. Section 24 requires proof of a more serious threat and therefore forestalls the requirement of a higher degree of fear, while the defence of necessity deals with the situation where there was a reasonable perception of a threat and fear ensues, but the threat of harm will be of a lesser degree and therefore will not engender the same level of fear. Further, in requiring that the threat be immediate, that the threat was delivered by a person who is present when the offence is committed and that there be a belief by the offender that the threat will be carried out, s 24, requires not only that the level of fear experienced by the offender be heightened, but the existence of all of these factors infer that the offender must have acted out of a deep sense of fear. In requiring that there be a "stand-over situation" where the threat of death or serious violence is by a person who is present at the time the offence was committed, s 24 therefore excludes situations where the threat of death or serious harm is made to persons in another locality.

Although fear is a fundamental feature of the requirements of both s 24 and the common law defence of necessity, the criminal law takes limited account of the defendant's perception of the threats or the level of fear experienced by the defendant in determining the causality of the offending and the proportionality (or reasonableness) of the defendant's response to the threats. I argue here that the "reasonable man" standards that are commonly applied by the criminal courts in these circumstances fail to account for the defendant's subjective perceptions of the danger or threat. Although there have been significant challenges to the legitimacy of what has been seen to be an arbitrary line in these defences, particularly relating to the requirements of a "stand-over" situation[74] and the immediacy of the threat, I am only concerned here with the subjective nature of the threat and the induced fear.

[73] *Kapi* (n 25). Also see *Akulue v R* [2014] 1 NZLR 17 (SC) at [7] – [10] and [11] – [14].
[74] Refer New Zealand Law Commission *Some Criminal Law Defences with Particular Reference to Battered Defendants: Report 73* (Wellington, NZLC R 73, 2001) at 73-74.

In terms of the latter issues, two cases I have previously referred to are of relevance, *Kapi v Ministry of Transport*,[75] and *Akulue v R*.[76] It is important, however, to note that neither of these cases are "cultural" for the purposes of my thesis. Although defence counsel in both of these cases sought to rely on cultural contentions in support of the defence of compulsion or necessity and the defendants are able to claim affiliation with a specific ethnic grouping, I suggest that an application of my relevance of culture framework to the fact scenario of these cases will show that neither culture (for example, Porirua or Nigeria as inherently violent places) meet the requirements of a valid culture and the asserted factor as the basis for the fear experienced by the defendant was not able to be substantiated evidentially.

In illustrating the relevance of culture to the creation of a threat, and consequent fear, that I argue ought to be relevant to s 24 and necessity, I use the example of voodoo. As discussed further in part 7.3.5 below, voodoo, muti and muti killings, evil spirits (makutu) or the practice of the occult are ancient and particularly engrained practices in many cultures. To the Western world, the practice of voodoo or muti killings are regarded as nothing more than superstition. Fear induced by a threat that takes the form of a voodoo curse would likely be insufficient to satisfy the requirements of a s 24 defence or necessity. However, I argue that a person in whom the cultural norm of voodoo is ingrained, a subjective effect of a threat of voodoo against them or a loved one, would be as powerful in terms of fear and the apprehension of impending death as a more traditional Western threat of violence through, say, a shooting or a serious assault. It is this circumstance, I argue, in which culture ought to be taken as a legitimate basis for fear to be a relevant consideration for the purposes of these defences.

(b) Self-Defence

The arguments advanced regarding the impacts of fear within the defence of compulsion and necessity, I suggest, can equally be made regarding the complete defence of self-defence. The degree of fear felt by the offender because of the level of provocation, threat of harm and imminence of such threats being carried out also impact the objective and subjective requirements of s 48 of the Crimes Act 1961. The pursuit or recognition of a cultural norm ought to form the basis of a subjective belief as recognised by the law in the case of s 48. The threats of harm, provocation or a belief that you will be subject to physical injury will engender a subjective assessment of the perceived harm.[77] I argue here that a defendant's perception of the threat to his or her personal safety also requires an evaluation

[75] *Kapi* (CA) (n 26).
[76] *Akulue* (SC) (n 73).
[77] Refer for example *R v Wang* [1990] 2 NZLR 529 at 535-536.

of the nature and extent of the fear that is felt by the defendant.[78] For example, a threat of harm from a group of individuals armed with a variety of weapons will engender a far greater degree of fear than a physical threat from an unarmed individual. The reasonableness of the response to the threat of harm will therefore, I argue, be moderated or aggravated by the level of fear experienced by the defendant. As a result, the proportionality of the response is as influenced by the cultural reality of the situation as will the gravity of the subjective perception of the situation.

Ashworth and Horder raise the proposition that a sudden threat to one's physical safety may engender strong emotions of fear and panic "producing physiological changes which take the individual out of their normal self.[79] Further, they suggest that in these circumstances, the use of force may have been innocent or instinctive and therefore may require a consideration of the role that emotions have played in the defendant's actions. As discussed earlier, cultural factors significantly influence the emotional responses of individuals. The question for the Court must therefore be how much indulgence should be granted to the innocent victim of a sudden attack who reacts instinctively with strong force?[80] In referring to the comments of Lord Morris in the case of *R v Palmer*,[81] Ashworth and Horder suggest that, in the context of self-defence, the most potent evidence of reasonableness is that the defendant only did what he or she "honestly and instinctively thought necessary".[82] I suggest that the fear of likely consequences from a threat of harm will undoubtedly form a constitutive aspect of a defendant's motivations and intentions in responding to the threat.

There is no equivalent New Zealand authority therefore I refer to the United States case of *People v Croy* to illustrate the impacts of a genuine fear on the actions of a defendant in the context of a claim of self-defence[83]. In *Croy*, the Supreme Court quashed Mr Croy's earlier conviction for murder and in a subsequent re-trial in 1990 was acquitted of the murder of a policeman. The defence in *Croy* argued that Mr Croy was so fearful for his life due to past discrimination, his cultural orientation, his perception that he was being wrongly accused of a robbery, and a deep sense of distrust of "white" authorities, that he felt compelled to shoot at pursuing police. These cultural factors, I suggest, were relevant to assessments of the danger Mr Croy believed he was in and the reasonableness of his response to that threat. It was accordingly contended that the shooting of the police officer was a defensive act on the part of the accused who genuinely believed that he would have been killed by police officers if he was apprehended.[84] The jury's verdict in acquitting the defendant of murder suggests an acceptance of the defence contention that Mr Croy's response in shooting at pursuing

[78] *Wang* (n 77) at 536.
[79] Andrew Ashworth, Jeremy Horder *Principles of the Criminal Law* (6th ed., Oxford University Press 2013).
[80] Refer Ashworth, Horder (n 79) at 128-129.
[81] *R v Palmer* [1971] AC 814 (PC) at 832.
[82] Ashworth, Horder (n 79) at 128-129.
[83] *People v Croy* 42 Cal3d 1 California Supreme Court (1985).
[84] Refer the discussion of the defence case in *People v Croy* by Renteln (n 1) at 37-38.

police was proportionate to his heightened feelings of fear and the perceived threat to his personal safety.[85]

While it cannot be said that police brutality of non-whites is a cultural attribute that is intrinsic to cultures in the United States through recognised practice, it is nevertheless a cultural reality that, for African-Americans, Native Americans, or other minority groupings, it is so specific to them that it, I argue, forms a part of the cultural nuance of those people in that environment and therefore will be sufficient to be considered a cultural factor for the purposes of the criminal law.

As discussed earlier (Chapter Five part 5.3.6), arguments pertaining to a claim of provocation have also been entertained by the Courts based on assertions that the defendant has acted in defence of herself where the threat is based on "battered women's syndrome".[86] The essence of these claims is that because the defendant has been the victim of prolonged domestic violence and abuse, her resort to violence was a defensive act in response to the enduring threat of abuse. Although a vast array of cultural factors were considered in *Suluape* the defence focused on a strategy where battered women's syndrome was advanced as the self-defence rationale that motivated the defendant to use an axe to kill her husband. There were no indications that the threat of harm to the defendant was immediate or imminent but rather that the cumulative effect of a prolonged period of abuse from the victim had ultimately led the defendant to kill her husband as a defensive act.[87] It is not apparent from the judgment whether the court considered the possibility that, because self-defence was an issue, then the defendant could have addressed her fears by removing herself from the situation instead of resorting to violence. Although the case of *R v Oakes* did not address issues of culture, the Court of Appeal in *Oakes* affirmed the approach taken in *Suluape* in recognising that evidence suggesting the defendant suffered from battered women's syndrome was relevant to the determination of the imminence and degree of force the defendant may have anticipated and therefore provide perspective on any suggestions that the defendant should have opted to leave the victim instead of resorting to actions that led to the victim's death.[88]

It is important to the discussion of the *Suluape* case to note that Mrs Suluape was charged with murder and ultimately convicted of manslaughter. The defences advanced on behalf of Mrs Suluape was the full defence of self-defence based on a claim of battered women's syndrome, and in the alternative, a partial defence of provocation based on cultural factors similar to those in the *Fate* case (refer discussion above in part 7.3.1). It is unclear to what extent the claims of battered women's

[85] Refer the discussion of the *Croy case* by Renteln (n 1) at 37. Also see James Donovan, John Stuart Garth *Delimiting the Culture Defence* (2007) QLR, 109-146 at 140.
[86] See for example *Suluape* (CA) (n 24).
[87] *Suluape* (CA) (n 24) at [16].
[88] *R v Oakes* [1995] 2 NZLR 673 (CA).

syndrome had on assessments of criminality but the jury verdict of not guilty to murder and guilty to manslaughter suggest that the partial defence of provocation was accepted by the jury. I suggest that cultural factors will have had limited relevance to the defence of self-defence in these circumstances because there was no threat of death or serious injury to Mrs Suluape immediately prior to her using an axe to kill her husband (who was sitting at a piano in the garage and was unaware of Mrs Suluape's intentions) but she had become aware that her husband was intending to leave her for another woman. As illustrated in earlier discussions and further below in part 7.3.4, while the feagaiga cultural norm was not specifically referred to, it can be inferred from the judgment that this was the cultural norm relied upon by the defence in support of the provocation defence.

The Court of Appeal in *Suluape* acknowledged the significance of the fact that the appellant "was a woman of a traditional culture, to whom much of the analysis …is relevant",[89] and "both the history of abuse and the cultural factors" were highly germane to an assessment of the appellant's criminality.[90] In assessing the overall culpability of the appellant, the Court of Appeal reasoned that it was significant to have regard to the sustained pattern of abusive and insulting conduct by the victim towards the appellant, the gross humiliation of the appellant and her family by the deceased and the appellant's perception of her situation from her Samoan culture.[91] These are all factors, I suggest, that demonstrate the relevance of the "feagaiga" cultural norm, not only to the appellant's perception of the breach of a traditional norm by the victim but also provides rationale for the appellant's culturally-influenced response to the violation of a cultural norm.[92] As illustrated in part 7.3.4 below, the Court of Appeal in *Suluape* has given limited recognition to the feagaiga norm but it is difficult to quantify the weight given by the Court to the culture of the appellant save for the verdict of guilty to manslaughter and the overall reduction in sentence. Although the Court of Appeal in the earlier case of *Fate* (in dealing with a similar fact scenario) relied on the equivalent Tuvaluan cultural norm of "fakavalevale" as the primary causal factor which provoked Mrs Fate to stab her husband causing his death, it can be inferred that the Court of Appeal in *Suluape* was satisfied that the cultural factors were of limited relevance to a defence of self-defence but far more significant in support of provocation.

7.3.3 Crimes in the Name of Honour

The use of the term "honour" to characterise criminal offending, I suggest, wrongly implies that the perpetrator of the offending was morally justified in undertaking the criminal conduct. Because the term "honour" has become deeply embedded within the discourse and in media references, I maintain

[89] *Suluape* (CA) (n 24) at [16].
[90] *Suluape* (CA) (n 24) at [15].
[91] *Suluape* (CA) (n 24) at [16].
[92] Refer discussion below at part 7.3.4 regarding the significance and influences of the "feagaiga" norms within Pacific cultures.

the use of this term for the sake of consistency. I examine below the varying approaches to what has been mislabelled as "honour" crimes,[93] yet I argue, that the more accurate characterisation of these crimes is that they primarily arise from cultural perceptions of shame and anger, which are then manifested in domestic violence or other criminal acts.

(a) The Mislabelling of Offending as "Honour Crimes"

The labelling of offending that is perceived to have a cultural undertone by media as "honour crimes", I suggest, is problematic because this is an inaccurate characterisation of the offending and misconstrues whether "honour" played any part in determining the culpability of the offender. As the discussion below will affirm, when the conduct of perpetrators of culturally-derived crime is closely scrutinised, it will be shown that, rather than being motivated by "honour", the cases illustrate the motivation for the offending was a variety of emotions such as shame, rage, and embarrassment. Mason suggests that the media reporting of certain crimes has led to misunderstandings of what are essentially acts of domestic violence.[94] I argue that the focus should not be on the "honour" which is sought to be preserved by the perpetrator's actions but rather whether the conduct is relevant to determinations of criminal culpability.[95]

Media have characterised offending as "honour" crimes,[96] yet in New Zealand, there has been no case where the courts have acknowledged that offending was directly motivated by honour. In New Zealand, there has been no case where the courts have acknowledged that a death (or other impacts of offending) result from the perpetrator being motivated by "honour". However, there have been several recent incidents where the media has mis-labelled or mistakenly suggested that a killing was induced by feelings of "honour".[97] For example, the New Zealand media mis-labelled the offending by Diwesh Sharma in killing his wife as an "honour killing",[98] but the High Court, in sentencing Mr Sharma to life imprisonment for the murder of his wife, made no reference to "honour" and viewed the actions of Mr Sharma as resulting from anger in discovering that his wife had formed a relationship with another man.[99] In *Sharma*, Andrews J took particular note of Mr Sharma's previous conviction for assaulting his wife, that he was on bail awaiting the resolution of another charge of assault on his

[93] Corinne Mason *The "Kingston Mills Murder" and the Construction of "Honour Killings" in Canadian News Media* (2015) Atlantis, vol. 37, no. 1, 106-118. Also see Wendy Aujla, Aisha Gill *Conceptualizing 'Honour' Killings in Canada: An Extreme form of Domestic Violence?* (2014) International Journal of Criminal Justice Sciences, vol. 9, issue 1, 153-166.
[94] This is also an argument advanced by Mason (n 93) at 106.
[95] Refer John Alan Cohan *Honor Killings and the Cultural Defense* (2010) California Western International Law Journal, vol. 40, no. 2, 177-252 at 181-185.
[96] Mason (n 93). Also see Aujla, Gill (n 93).
[97] For example, see Stuff News, *Man admits stabbing wife and daughter to death* 23 December 2014.
[98] The New Zealand Herald *Real threat of honour killings in NZ; Women's group says* January 2011. Also, TV3 article 19 February 2012 *Man who set wife alight admits murder*.
[99] *R v Sharma* [2012] NZHC 621, per Andrews J at [13].

wife, was subject to a restraining order for violence on his wife and the premeditation involved in the killing; as indicative of Mr Sharma's overbearing and controlling attitude towards his wife.[100] Accordingly, Mr Sharma's offending should not have been characterised as arising from a breach of his honour but more accurately as a consequence of his inability to control his anger and his overbearing attitude towards the victim.

In *R v Malik*,[101] the offender had been convicted of two counts of murder after he pleaded guilty to stabbing his wife and daughter thereby causing their deaths. In sentencing the offender to life imprisonment (with a minimum non-parole term of 18 years), Moore J noted that there was concern about whether Mr Malik was fit to stand trial due to a claimed mental disorder. On appeal against the length of the minimum period of imprisonment, the Court of Appeal noted that the various medical experts who assessed Mr Malik could not agree on the nature of his mental illness and Moore J, in his ruling of 15 December 2014, had concluded that Mr Malik's "narcissistic personality structure did not amount to a mental impairment".[102] The Court of Appeal held that the delays in the entering of the guilty pleas was a consequence of Mr Malik's malingering which reflected poorly on his character and was also indicative of his pattern of behaviour towards his family that culminated in the murders.[103] In sentencing, Moore J made no reference to "honour" being a factor in the offending, however the media suggested in various reports that the actions of Mr Malik amounted to an "honour killing".[104] Again, the media has mis-characterised the significance of cultural factors to Mr Malik's offending and ignored the reality that the offending was primarily a consequence of Mr Malik's anger issues and inordinately harsh treatment of members of his family through domestic violence.

A feature that was common to *Sharma* and *Malik* is that both were not honour killings despite the suggestions of media. It is also unclear from the judgments whether the offender's actions could have been motivated by "shame" or "face-saving". Both cases, I suggest, involved a male who wanted to exercise overbearing control and power over the female members of his family, was angered when his authority was challenged or undermined and acted disproportionately to the perceived threat to his pride or any conception of embarrassment arising from the victim's actions. I suggest that the approach adopted by the Court in each case was appropriate as the Court gave proper regard to the evidential support (or lack of it) for the factors that were relevant to culpability,[105] and appropriately assessed the proportionality of the response from the offender for any perceived "injury to his

[100] *Sharma* (HC) (n 99) at [15], [20] and [22]
[101] *R v Malik* [2015] NZHC 466, per Moore J, HC Auckland.
[102] *Malik v R* [2015] NZCA 597 at [11] – [17], per Miller J for the CA.
[103] *Malik* (CA) (n 102) at [42]
[104] See for example, Christian Action Network article *Muslim murders wife, teen daughter in double 'honor killing'* 22 May 2014.
[105] Refer for example *Sharma* (HC) (n 99) at [18] to [23]. I contend that none of these factors that went to culpability could be construed as strictly cultural.

feelings" as well as the inherent rights and interests of the victims. Although cultural factors may have had some bearing on the reasons for the offending, in each of these cases, the significance of the cultural factors to the determination of culpability was limited.

As illustrated here, the media reporting of these two cases assumed the relevance of cultural factors to the offending, however the sentencing notes and appeal judgments for these two cases focus on the psychological factors intrinsic to the offenders but make no reference to "honour" as a causal factor of the offending.

(b) "Honour" as a Feature of Offending

The difficulty that arises in characterising "honour" is that it is an intangible concept that is vastly complex and therefore difficult to discern. It must also be acknowledged that numerous cultures adhere to the fundamentals of "honour" and characterise these cultural factors in other terms. For example, the Māori concept of "mana"[106] is closely aligned with the understanding of "honour" adopted in this discussion, as are the concepts of "feagaiga",[107] "fakavalevale" and "faka'apa'apa" within Pacific communities. The variability in understandings of honour will therefore present challenges in introducing sufficiently probative and compelling evidence to substantiate the nature of the defendant's reputation or the cultural standing that has been damaged. Even more complex would be undertaking a process for quantifying the damage that has been done to the defendant's "honour" or the loss of mana. A further factor that must also be considered is whether there are any cultural norms regarding the accepted response to a breach of one's honour and whether there are any consequences for the perpetrator if such norms are breached or exceeded by the perpetrator of the criminal act.

Cohan argues that it is not entirely clear how "honour" can be recognised or defined and whether it is to be regarded as an intrinsic feature of an individual's character or a virtue that is cultivated.[108] Cohan further queries whether the concept of honour should have any relevance in modern society as it is something which is latent and can be gained or lost without any outward signs of change in the individual. Cohan equates the loss of honour with feelings of humiliation, shame, disgrace, and loss of reputation. Despite these concerns, the concept of "honour" crimes remains an important consideration in the context of my thesis as numerous crimes world-wide continue to be characterised in this way.

[106] Refer the discussions regarding "mana" in Chapter Three, parts 3.5 and 3.6.4.
[107] Refer earlier discussion in Chapter Five, part 5.3.6 and further below at part 7.3.4.
[108] Refer Cohan (n 95) at 181.

Sen suggests that honour crimes are often based on the rationale (from the perpetrator's perspective) that the harm done to the victim was prompted by heightened feelings of shame (again on the part of the perpetrator) because of the actions of the victim.[109] Sen provides a perspective on what is to be understood as an honour crime and the "value" attached to the actions of the perpetrators and observes that the interests of the victim will, in most cases, be an irrelevant consideration for the perpetrator.[110] The victims of "honour crimes" are mainly women who are alleged to have humiliated their families and the perpetrators of violence on the victim will usually be male members of her family or community who claim that their "honour" has been damaged as a consequence of the victim's actions.[111] Cohan suggests that the reasons advanced (by perpetrators) for the commission of an "honour killing" have been a refusal by the victim to participate in an arranged marriage, seeking a divorce or an act of infidelity by the victim.[112] In patriarchal cultures, where arranged marriages and associated practices pertaining to the responsibilities of women and the obligations imposed on family members by such practices are well understood and date back many generations, any breaches of the protocols involved will be regarded as highly offensive and engender considerable "loss of face" within the community.[113]

For example, the embarrassment or humiliation arising from an anticipated marriage not proceeding will perhaps be felt more intensely within a culture where arranged marriages are common and where various obligations, such as the payment of a dowry, has been promised. In such communities the failure to proceed with the arranged marriage carries considerable stigma within the community and the shame involved will be intensely felt.[114] In modern Westernised communities, the consequences of a marriage not proceeding may not necessarily harbour the same level of shame and there is usually unlikely to be any consequences for the parties and families involved beyond the disappointment of an event that had been planned but has not occurred.[115]

Although the majority of victims of "honour" killings are women, men have also, on comparatively rare occasions, been victims of "honour" killings. There have been some recent instances in Middle

[109] See Purna Sen *Crimes of honour, value and meaning*, chapter two, 42-63 in Lynn Welchman, Sara Hossain (eds.) *Honour: Crimes, Paradigms and Violence Against Women* (Zed Books 2005).
[110] Refer Sen (n 109) and comments by Jane Connors *United Nations approaches to 'crimes of honour'*, chapter one, 22-41 in Lynn Welchman, Sara Hossain (eds.) *Honour: Crimes, Paradigms and Violence Against Women* (Zed Books 2005).
[111] Radhika Coomaraswamy *Violence against women and 'crimes of honour'*, preface (at xi) in Lynn Welchman, Sara Hossain (eds.) *Honour: Crimes, Paradigms and Violence Against Women* (Zed Books 2005).
[112] Cohan (n 95) at 181-199. Also, Tamar Tomer-Fishman (n 49) at 487-494
[113] See Maria del Mar Pastor Bravo, Pilar Almansa Martinez, Ismael Jimenez Ruiz *Arranged Marriages: Women for Sale* (2014) Procedia Social and Behavioural Sciences 132, 564-569. Also refer Keera Allendorf, Roshan Pandian *The Decline of Arranged Marriage? Marital Change and continuity in India* (2016) vol. 42, issue 3, 435-464.3
[114] Bravo et al (n 113).
[115] Allendorf et al (n 113).

Eastern countries where young gay men have been killed by family members to preserve a family's "honour". For example, a Turkish-Kurdish student, Ahmet Yildiz, was shot dead in Turkey in 2008 following a disclosure that he was gay,[116] and in July 2012, a father in Southern Turkey pleaded guilty to the honour killing of his homosexual son, Rosin Cicek.[117] While the media reports into the killing had labelled it as a "gay honour killing", the reality was that the actions of the perpetrator in killing the victim resulted from shame and embarrassment that was deeply felt at a communal level by the victim's family.

Bearing in mind that honour crimes may not necessarily result in a homicide and often involve offences such as disfiguring (by, for example, using acid), stoning, assaults or banishment from the victim's community, a common feature of honour crimes is that feelings of shame, social stigma or breach of traditional cultural protocols will be advanced by the perpetrators as justification for their actions. In many traditional legal jurisdictions (such as Pakistan, Egypt, India and Turkey) where "honour crimes" are committed on a relatively frequent basis, the killing, disfigurement or other assaults of a family member, regardless of the motivation, is still a criminal offence. This suggests that there are no substantive law justifications for these "honour" crimes. I suggest that any feelings of shame experienced by the victim's family or community (regardless of the degree of seriousness in which the shame is perceived) will rarely ever overcome the rights of a victim to their fundamental entitlements such as the right to life, the right to freedom of expression and the right to not be harmed.

7.3.4 In Defence of Morals and the Feagaiga Concept

There is, I suggest, a need to distinguish here the references to morals that form the basis of a culture's values and cultural morals (morality) that impact an individual's motivations or intentions to act or undertake a particular course of conduct. As illustrated earlier, each society will have absolute standards and clear rules about what is considered right (moral) or wrong (immoral) behaviour. The specific standards and elements of offences set by the substantive criminal law define how legal culpability is to be determined. Moral culpability refers to the explanation for the intent or motivation of the defendant. The explanation advanced by the defendant may excuse the immoral act due to intentional immorality.[118] Although the immorality will be apparent from the elements of an offence

[116] Refer article by Nicholas Birch *Was Ahmet Yildiz the victim of Turkey's first gay honour killing?* The Independent (19 July 2008).
[117] Star Observer *Life Imprisonment for 'Honour Killing' of Gay Turkish Teenager* 21 February 2014.
[118] See for example Jay Geyer *Moral Uncertainty and Moral Culpability* (Dec 2018) Utilitas, Cambridge, vol. 30, issue 4, 399-416. Also Michael S Moore *Intention as a Marker of Moral Culpability and Legal Permissibility* at 179-205 in R A Duff, Stuart Green *Philosophical Foundations of the Criminal Law* (Oxford University Press, 2011). Also see Michael S Moore *Intentions and Mens Rea* chapter 11 in Michael S Moore *Placing Blame: A Theory of Criminal Law* (Oxford University Press, 2010).

that determine legal culpability, there are "moral" considerations that the Courts are obliged to have regard to ascertain the overall blameworthiness or wrongfulness of offending.

(a) Assessing Moral Culpability

While criminal culpability will be apparent in a situation where an offender has accepted a charge of "shoplifting",[119] the issue of moral culpability or the degree of wrongfulness will be a material factor when dealing with the offender. The inflexibility of the legal criterion (the standards set by statute and common law)[120] can be distinguished from the moral position associated with the theft if the facts show that the reason for taking a loaf of bread from a supermarket was the offender's dire financial and personal circumstances and the pressing need to feed a hungry family. The moral position where the offending is committed out of necessity can be distinguished from a theft for financial gain or purely personal reasons. While a judge will accept that the offence of shoplifting has been committed, the element of moral culpability involved in the offending will be a relevant and material factor in assessments of penalty to be imposed for the offending. It would be within the Judge's discretion to deal with such offending in various ways, inclusive of a discharge or other nominal sanction.

Similarly, moral justifications can be advanced in the context of an alleged assault where an accused person claims that he or she was acting in self-defence.[121] If the court accepts that there has been an assault of another person but in doing so, the defendant exercised reasonable force in repelling an immediate threat to his own well-being (or the defence of another person), then a full defence has been made out warranting a discharge. Where a judge takes the view that the level of moral culpability is low (for example, because the defendant was justified in defending herself or himself from an attack) then the judge may exercise his or her inherent discretion to discharge the defendant or quash a conviction.[122] This situation must be distinguished from an intentional and unprovoked interference by a third party who has acted out of a sense of loyalty to the defendant (by way of retribution), rather than in self-defence. In these circumstances, the third party would be guilty of assault (regardless of the main offender being found not guilty by way of self-defence).[123]

An example of the moral justifications I refer to here can be seen in the case of *Katipa v Police*.[124] In *Katipa*, the prosecution did not dispute that the appellant's actions in taking a baby from the arms of its mother (who was lying in the middle of a road), were motivated by an intention to defend the

[119] Theft from a shop (Crimes Act 1961, ss 219 and 223(d)).
[120] Theft is defined in Crimes Act 1961, s 220.
[121] Crimes Act 1961, s 48.
[122] *Katipa v Police* [2016] NZHC 2217 – per Simon France J.
[123] In *R v Oates* [1997] 15 CRNZ 95, the third party was held to have acted in defence of another.
[124] *Katipa* (n 122) at [7]-[9].

safety of the baby. However, the conviction for male assaults female was still entered in the lower court as the trial judge was satisfied that in prising the mother's arms apart (so that the child could be taken off her), amounted to an assault on the mother. On appeal, Simon France J quashed the conviction for assault as there was no evidence to suggest that the appellant's actions amounted to anything other than to defend the baby from the potentially harmful actions of its mother. Although the defendant's actions in defending the child will be apparent because of the nature of the threat to the safety of the child, the "assault" on the mother was nevertheless a reasonable response and therefore morally justified in the circumstances.

(b) The Preservation of Cultural Norms and the Feagaiga Concept

As discussed, an accused person's culture and cultural factors significantly impact the formation of motivations or rationale for an accused's actions.[125] Because it cannot be assumed that all individuals will necessarily share the same culture and range of cultural influences, it cannot therefore be assumed that all individuals will respond to a given threat or other culturally-loaded reason for reacting to a specific situation as any other individual.[126] A person's conduct may have been influenced in some way by their cultural orientation so that their response, for example to a verbal insult, engenders a far greater sense of emotional upset than would an individual from another culture.[127]

In some cultures, the moral obligation to defend the honour or reputation of oneself or the duty imposed by one's culture to protect another person are felt particularly strongly. This was the basis for the cultural contentions in the New Zealand cases of *Uluakiola v R*,[128] and *Mesui v R*,[129] where the related concepts of "feagaiga" and "faka'apa'apa" were advanced in support of a defence claim that the defendant possessed a special characteristic or was influenced by a cultural factor that made him respond to provocation differently. I discuss below the irregularities in the contentions made regarding culture in these and various other similar cases but first, I provide a brief outline of how the feagaiga concept is understood within Pacific cultures to give context to this discussion.

The feagaiga concept is widely acknowledged within Pacific cultures and obliges a male to be especially protective of his female relatives.[130] The "feagaiga" is a cultural covenant which governs

[125] Refer the research by Tsai *Ideal Effect* (n 6) and Matsumoto *Handbook* (n 5).
[126] See for example *Croy* (n 83). Also refer the discussion of the *Croy* defence case in Renteln (n 1) at 37-38.
[127] See for example, *Trujillo-Garcia* (n 38).
[128] *Uluakiola* (CA) (n 20).
[129] *Mesui* (n 21).
[130] Refer Penelope Schoeffel *Daughters of Sina: A Study of Gender, Status and Power in Western Samoa*; (PhD Thesis, ANU, 1979) at 295-327 and Latu Latai *Changing Covenants in Samoa? From Brothers and sisters to Husbands and Wives* (2015) Oceania, vol. 85, issue 1, 92-104 at 94.

the relationship between genders. Although unwritten, it is nevertheless a concept which, in the context of the Sāmoan culture, is understood by all Sāmoans and remains a fundamental feature of Sāmoan cultural norms that dictate the behaviour of individuals. Within the Tongan culture, this concept is referred to as 'faka'apa'apa" and in the Tuvaluan culture it is known as "fakavalevale". These cultural norms are found in numerous other Pacific communities. For the purposes of this discussion, I refer to this concept as the "feagaiga".

Va'a asserts that feagaiga rights are special rights which operate to maintain a balanced relationship between genders.[131] Schoeffel observed that the feagaiga:[132]

> expresses the idealised principles by which order exists in Samoan society at all levels of organisation. It contrasts sacred, moral ideological principles with utilitarian, functional or 'profane' human actions, in a social contract by which the former imposes order and dignity upon the latter.

In modern times, this covenant has been expanded from being a reciprocal obligation between a brother and sister to preserve each other's interests to a covenant whereby Sāmoan males assume the role of protector for female relatives and mutual obligations are imposed on female relatives to protect the interests of male relatives.[133] To dishonour or threaten the safety of a female can engender aggressive responses from a male relative which at times may include violent reactions. Similarly, a female may respond more intensely to a situation because of her cultural orientation to protect her male relatives. While the cultural background to the violent response may not necessarily afford a full defence to, for example, an assault charge, it will, I suggest, be relevant to assessments of the degree of wrongfulness or mitigation.

(c) The Misapplication and Misinterpretation of Feagaiga Values

The significance of the feagaiga concept can be seen in the context of cases where the defence advanced involves aspects of provocation. In *R v Fate*,[134] and *R v Suluape*,[135] the respective courts accepted that cultural factors had significantly impacted the actions of the female offenders in using a weapon to kill their respective husbands. However, the reasoning for the determination of culpability by the courts in these decisions were markedly divergent.

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[131] Unasa Va'a *Samoan Custom and Human Rights: An Indigenous View* (2009) VUWLR 237 at 243 & 245-246. Also see Penelope Schoeffel (n 130) and Ieti Lima *Tafesilafa'i: Exploring Samoan Alcohol Use and Health within the Framework of Fa'asamoa* (2004) PhD dissertation in Sociology, University of Auckland.
[132] Schoeffel (n 130) at 280.
[133] Refer discussion of this concept in Penelope Schoeffel *The Samoan Concept of Feagaiga and its Transformation* Chapter 5 at 85-109 in Judith Huntsman (ed.) *Tonga and Samoa: Images of Gender and Polity* (Macmillan Brown Centre for Pacific Studies 1995).
[134] *Fate* (n 25).
[135] *Suluape* (n 24).

In *R v Fate*, the Court of Appeal accepted that the offender's isolation within her Tuvalu community, the heightened feelings of anger and shame she felt (referred to by the Court as "fakavalevale") within her small community and her inability to speak English; were all factors relevant to the level of provocation that prompted the violent response on discovering her husband's "clandestine affair with her eldest sister". The Court of Appeal recognised that assessments of the significance and value of the cultural factors were matters within the province of the trial judge and affirmed the "merciful approach" of the sentencing judge in imposing a sentence of two year's imprisonment.[136]

Although the facts of *Suluape* were largely analogous with those of *Fate*, the trial court in *Suluape* recognised the cultural factors that were relevant to the level of provocation involved when the offender used an axe to strike her husband several times to the head, causing his death. The Court in *Suluape*, accepted that the victim's sustained pattern of abusive and insulting conduct towards the appellant, the gross humiliation of the appellant and her family by the deceased and the appellant's perception of her situation from the perspective of her Sāmoan culture were all factors that contributed to her mental state when she killed her husband. The Court of Appeal acknowledged that the defence experts focused on the cultural factors in support of battered women's syndrome but did not address the vital element that the appellant "was a woman of a traditional culture, to whom much of the analysis … is relevant".[137] As noted above in part 5.3.2, the full defence of self-defence based on battered women's syndrome was a focus of the defence expert evidence, however, I argue, the jury must have rejected the self-defence claim and instead accepted the significance of the cultural factors in support of the provocation defence in returning their verdicts of not guilty to murder and guilty to manslaughter. Although it can be accepted that the evidence of earlier sustained domestic abuse was relevant to the self-defence assertions, it is unclear from the judgment whether domestic abuse was argued in support of the provocation defence.

The courts have encountered claims of culturally-loaded rationale for violent responses to specific stimuli but have rejected such cultural contentions largely on the basis of insufficiency of supporting cultural evidence,[138] or the cultural evidence failing to establish a connection between the cultural characteristic and the appellant at the time of the offending.[139] This can be highlighted by the approach adopted in cases such as *Uluakiola v R*,[140] *R v Aiono*,[141] and *Mesui v R*.[142] The defence strategies applied in each of these cases relied on the cultural contention of "feagaiga" which operates

[136] *Fate* (n 25) at 93 (line 25) – 94 (line 16).
[137] *Suluape* (n 24) at [16]
[138] *Uluakiola* (CA) (n 20), *Mesui* (n 21).
[139] See for example *R v Tai* [1976] 1 NZLR 102 at 106, lines 48-50 and 107, lines 33-44 and later adopted by the CA in *Uluakiola* (n 20).
[140] *Uluakiola* (CA) (n 20).
[141] *Aiono* (HC) (n 22).
[142] *Mesui* (n 21).

on the basis that a Sāmoan male (or other Pacific men) may experience inordinately heightened feelings of outrage when another person threatens the safety of his sister, a female relative or his wife. The other side to this concept is that there are also expectations of appropriate behaviour from females.[143]

In *Uluakiola*, it was argued by the defence that the defendant's cultural orientation as a Tongan male made him more susceptible to violent responses because of the abuse he had been subjected to by his wife and her continuous demeaning of his position within their family. Although the term "faka'apa'apa" was not specifically used in the judgment nor referred to by counsel, a reading of the judgment strongly suggests that this was the basis of the provocation defence. The trial judge (Keane J) ruled that the cultural evidence as to a qualifying characteristic relevant to a defence of provocation was inadmissible. Keane J commented that, despite the expert witness being "an educationalist and linguist with an authoritative understanding of Tongan language and culture … he was not qualified to express … any authoritative comparative opinion" concerning the claimed cultural characteristic.[144]

The problem with this ruling is that the prosecution did not introduce any countervailing witness or evidence to challenge the defence expert. Assessment of the cultural expert's qualifications and the significance of the expert's opinion was therefore left to be decided by a member of the judiciary who, I suggest, was not provided with adequate evidence to accurately determine the admissibility of the cultural contention. The burden for presenting the required cultural evidence rests with the defence and in this instance, the relevant cultural factors were not fully explained before the court. This was especially in regard to the factors that made the appellant respond in a far more violent way than would be expected of a "mixed racial person" in similar circumstances.[145]

Similarly in *Mesui v R*, the evidence of two well-qualified experts regarding the "effect on the perceptions or emotions of the appellant of behaviour which may have been threatening or provocative by reason of ethnic or cultural considerations" was held by the Court of Appeal to have been justifiably excluded by the trial judge. The trial judge reasoned that the expert cultural evidence was provided in the nature of personal opinion and based on ordinary experience rather than medical expertise.[146] The reality, I suggest, is that defence counsel did not fully appreciate the significance and relevance of the cultural factors involved (the feagaiga concept) and therefore did not appreciate the depth and scope of the evidence required to substantiate the cultural factors involved.

[143] Latai (n 130) at 94-95.
[144] *Uluakiola* (CA) (n 20) at [28]–[29].
[145] *Uluakiola* (CA) (n 20) at [31]–[35].
[146] *Mesui* (n 21) at [2]–[8].

As discussed earlier (Chapter Five, part 5.3.6) in *Aiono*,[147] the defence advanced on behalf of the defendant was that when he assaulted the victim he was acting in accordance with specific Sāmoan cultural norms to protect the interests of his wife and was provoked by the belief that his wife had been raped by the victim. A factor that complicated the evidence for the jury was that Mrs Aiono subsequently admitted that she had lied in an attempt to hide an extra-marital affair with the victim but was inconsistent in her evidence during the three trials as to when she had informed her husband of the sexual conduct with the victim being consensual. A contrasting rationale was therefore also advanced in support of the motivation for Mr Aiono's actions that there was a disruption to the social equilibrium because his son had become ill due to his mother's infidelity.[148] The defence contended that this combination of cultural factors and their significance to Mr Aiono was indicative of a special characteristic which distinguished Mr Aiono from the "ordinary person" and was relevant to what might cause him to lose self-control. The significance of the cultural factors to the reasons for the appellant's actions were not only lost amongst the confusion raised by the wife's prevarications but the court also noted that if:[149]

> a special characteristic with a sufficient degree of permanence was latent in Samoan men, it would be reasonable to expect some expert evidence, or at least some corroborating factual evidence, about its existence and relatively how persuasive it was. There was nothing of that sort in the evidence in this case.

The contrasting approaches to the recognition of culturally-based responses to an insult, threat or other distressing situation can be further demonstrated in the New Zealand context by reference to how the court in *R v Sagatea* acknowledged the cultural factors involved in the offending.[150] Mr Sagatea was convicted of manslaughter after assaulting the victim. The court accepted that the single punch assault, which was prompted by a "culturally significant insult", was "not a case of true provocation" but was accepted as a "spontaneous reaction".[151] The contrast in the approach taken by the New Zealand High Court in *Sagatea* was that the cultural information placed before the court at sentencing was found by the judge to be sufficient to warrant the imposition of a sentence short of imprisonment. This is in direct contrast with *Uluakiola*, *Mesui*, *Kimura* and *Chen* where a considerable volume of cultural evidence was introduced for the court's consideration.

The approach taken by the Courts in *Uluakiola* and *Mesui*, when contrasted with the approach to the cultural evidence in *Sagatea*, *Fate* and *Suluape*, I suggest, highlights the troubling, extemporised methodologies applied by the Courts. In *Sagatea*, no expert witnesses were called to give evidence, instead the cultural information was provided through a pre-sentence report prepared by a probation

[147] *Aiono* (HC) (n 22). Also see *R v Aiono* [2013] NZCA 280 (CA).
[148] *Aiono* (CA) (n 147) at [48]-[51].
[149] *Aiono* (CA) (n 147) at [54].
[150] *Sagatea* (n 37) at [7], [13] to [23].
[151] *Sagatea* (n 37) at [7] and [10].

officer, letters in the form of character references, and other evidence of character provided by a neighbour and the minister of Mr Sagatea's church. In *Sagatea*, Harrison J assessed all of the cultural information as influential in reaching the conclusion that Mr Sagatea be considered for a sentence of home detention.[152] In *Fate*, the Court of Appeal gave considerable weight to the expert evidence of a professor of anthropology who explained that there would be a powerful feeling of shame associated with being a woman who had been abandoned by her husband in Tuvalu and particularly so if she was from the island of Nanumea. The expert evidence indicated that one of the behavioural characteristics which distinguishes Nanumean Islanders from others was:[153]

> their propensity for extreme and violent outbursts of jealous rage. Suicides and other forms of violence are causally related to this propensity amongst Nanumean Islanders. The powerful feelings of shame associated with the status of being an abandoned woman and the Nanumean islander's predisposition to bouts of violent jealous rage can give rise to a state of irrational distress …

The cultural factor that was common to each of the cases discussed here is that the actions of the defendant/appellant could all be founded on a profound belief in or understanding of the feagaiga concept. It must also be acknowledged that other emotions (such as shame, anger and jealousy) will also have motivated or provided rationale for the defendant's actions. Although the cultural factors discussed here are accepted by the courts to be relevant to the issues of criminal culpability, the lack of a clear legal framework for the introduction, application and interpretation of cultural evidence perpetuates the irregularities and inequalities that arise in the use of culture within the criminal law.

As illustrated above, the lack of a clear framework for dealing with culture has not only created inconsistencies in the way cultural evidence is adduced before the court but a gender distinction has also developed where cultural shame and reliance on the feagaiga concept are applied inconsistently. For example, in *Fate* the defendant's heightened feelings of shame were accepted by the court as negating the intent to murder and in *Suluape* the claim of "battered women's syndrome" (in preference to the cultural factors relevant to the offender) was accepted by the courts as sufficient to warrant a conviction for manslaughter on the basis of a provocation argument. As illustrated above, these cultural accommodations by the courts have not been made in regard to male defendants (for example, in *Uluakiola*, *Mesui* and *Aiono*) who advance defence strategies based on comparable emotions and the feagaiga concept. I do not suggest that this discrepancy in approach was intentional however a review of the cases suggest that inconsistencies in approach nonetheless exist.

[152] *Sagatea* (n 37) at [13] to [23].
[153] *Fate* (n 25) at 9 (per Thomas J).

7.3.5 Superstition, Spirituality and Religious Beliefs

The significance of cultural factors in the context of assessing criminal culpability can be demonstrated further by reference to the relevance of superstitions, religious devotion, or the belief in the supernatural which are deeply ingrained in many cultures. Carstens asserts that belief in the supernatural and devout adherence to religious doctrines are apparent in many cultures.[154] For some cultures superstitions are real and significantly impact the conduct of people who have close affiliations with certain cultural belief. Because these beliefs and superstitions impact the behaviour of individuals in meaningful ways, they are increasingly being advanced in criminal proceedings as factors that are relevant to assessments of criminal culpability or in mitigation of offending. In this part, I examine the impact that spiritual and religious beliefs have on the behaviour of individuals and analyse the approaches taken by the Courts in various jurisdictions towards the recognition or rejection of such cultural factors within criminal justice processes.

As there are no established substantive or procedural frameworks to guide a court's assessment of cultural contentions, acknowledgement by the court of relevant cultural factors will be ad hoc, inconsistent and at times reliant on the application of other principles of the criminal law such as the proportionality test to give perspective to the contentions proffered. For example, in South Africa, where the prevailing human-rights-driven substantive law are often in conflict with customary practices,[155] defendants have claimed that their actions have been motivated by superstitions that are deeply rooted in their culture. I refer here to the cultural beliefs in witchcraft that form the basis for practices known as muti, muti killings and "necklacing". These beliefs in the supernatural are profoundly ingrained within the thinking of many South Africans. Carstens highlights several criminal prosecutions in South Africa where these cultural practices are advanced by perpetrators in support of contentions that cultural traditions and rituals, which are centuries old and deeply embedded in an individual's cognitive processes, have so affected the individual that there was a consequent lack of awareness that their conduct was unlawful.[156]

While the South African criminal courts have rejected defence contentions based on a belief in witchcraft and the supernatural, Carstens refers to the case of *R v Mbombela* where the defendant honestly believed that he was striking at an evil spirit (tokoloshe) instead of a young child. On appeal, it was held that the appellant's belief he was striking at an evil spirit was unreasonably held, but nevertheless, this belief amounted to a mistake and therefore warranted an amendment of his

[154] Refer for example Pieter Carstens *The Cultural Defence in Criminal Law: South African Perspectives*, Chapter 7, 175–195 in Marie-Claire Foblets, Alison Dundes Renteln (eds.) *Multicultural Jurisprudence – Comparative Perspectives on the Cultural Defence* (Hart Publishing 2009).
[155] Carstens (n 154).
[156] Carstens (n 154).

conviction for murder to one of culpable homicide.[157] The significance of this case is that it highlights the reluctance of the criminal courts in South Africa to recognise a cultural defence based on a belief in witchcraft yet, by utilising reasoning which referenced "the yardstick of the reasonable man in the same circumstances" (a reliance on the mens rea test for criminal negligence),[158] the court has reached a position which, I suggest, would have been achieved had the belief in witchcraft been acknowledged as a substantive law requirement to recognise the subjective motivations of the accused.

In English law, it is well established that any belief, if deeply held, can be the basis for the defence of mistake.[159] The counter argument will be that ignorance of the law is no defence. This counter argument is cogent, but must also be considered within the context of the many other principles of the criminal law and an acknowledgement that cultural factors and influences may be characteristic of an inadequacy or absence of malice, which then makes compliance with the law difficult or the existence of a misapprehension of obligations under certain crimes. The observation of cultural practices in the United Kingdom was considered in the case of *R v Adesanya*,[160] where a mother from Nigeria who scarified the cheeks of her daughter in observance of her Yoruba customs was convicted because a minority custom was not a defence to a prosecution for scarification under English law. Judge King Hamilton QC recognised that although the scarification process was in contravention of the criminal law provision in the United Kingdom, he nevertheless exercised his common-law discretion to give the mother an absolute discharge in recognition of the cultural motivations behind her actions.

The position in Australia regarding the recognition of cultural beliefs was well-established after the decision of the Supreme Court of Western Australia in the case of *Re Unchango: Ex parte Unchango*.[161] The Court in *Unchango* ruled that the cultural beliefs of the applicant will always be a relevant factor in the Court's considerations, however, each case must be considered on the basis of its own facts. In the case of *R v Mika*,[162] the New South Wales Supreme Court (per Grove J) was faced with the sentencing of various offenders who had participated in an "exorcism" process which led to the death (by drowning) of the three-year-old victim. It was contended on behalf of the offenders that the process they had undertaken was based on their religious beliefs that the child was possessed by evil spirits. It should be noted that, although the belief that a person could be possessed by evil spirits was recognised by the Assembly of God (AOG) religion, it was not accepted by

[157] *R v Mbombela* (1933) AD 269 (South Africa) as discussed by Carstens (n 154) at 175-195.
[158] Carstens (n 154) at 184.
[159] *R v Williams* [1987] All ER 411 at 415.
[160] *R v Adesanya* (unreported) but referred to in [1975] 24 ICQL, at 137-139. Also refer discussion of *Adesanya* by Renteln (n 1) at 49-51 in which the author highlights how the courts characterise cultural practices as contrary to public policy.
[161] *Re Unchango: Ex parte Unchango* (1997) 95 Australian Criminal Reports 65 per Walsh J.
[162] *R v Mika* [2000] NSWSC 852, (2000) 116 Australian Criminal Reports 31 (NSW Supreme Court). Also refer the discussion of the rulings by the New Zealand courts in *R v Lee* and *R v Rawiri and others* in Chapter Five, part 5.3.4 regarding the relevance of spiritual and religious beliefs to consent.

members of the AOG that the exorcism procedure undertaken was an acceptable method for the removal of such evil spirits. The sentencing judge in *Mika* recognised the cultural and religious beliefs of the participants in the exorcism meant that their actions were carried out "in the absence of malice and in a genuine belief that the victim was possessed by evil spirits".[163] The significance of the cultural and religious beliefs appeared to have been particularly influential on the sentencing judge when he imposed a sentence of two years imprisonment (suspended for two years) together with the imposition of "good behaviour" conditions and a requirement that the offenders undertake courses to address their parenting skills.

By comparison, in *R v Belghar*,[164] the trial judge was faced with an application that the defendant's trial be held before a judge alone. The trial judge held that the intimated defence for the offences faced by the defendant was founded on the defendant's attitude towards the complainant and were based on religious and cultural beliefs. The defence contended that the defendant's attitude towards women would generally be unacceptable to members of the Australian community and as a result the defendant's apprehension that he would not receive a fair trial "before his peers" was reasonable in the circumstances. This was especially so, argued the defence, as there was no prejudice to the prosecution if the defendant was tried by a Judge alone. On appeal, the New South Wales Court of Appeal unanimously rejected the reasoning by the trial judge for allowing the trial by judge alone and instead took the view that, because there was no evidential support for the defendant's claims of community bias towards Muslims and that the existing rules for the selection of members of the community on a jury were sufficiently robust to allay any fears of bias, the ruling of the trial judge would be overturned.[165] The reasoning of the Court of Appeal in *Belghar* rested on the insufficiency of evidential support for the claimed bias. The difficulties with any claims of indirect or unconscious bias will always be that cultural bias is extremely difficult to prove. It may also be extremely problematic to develop a process whereby members of the community will overtly acknowledge their individual biases, prejudices, and cultural stereotypes.

In Chapter Five, part 5.3.4, I examined the approach adopted by the New Zealand courts regarding the relevance of spiritual and religious beliefs to consent in *R v Lee*,[166] and *R v Rawiri and others*.[167] In the context of the present discussion it is pertinent to note the willingness of New Zealand courts to entertain defence cultural contentions regarding consent to the infliction of physical harm. The significance of *Lee* and *Rawiri* is that the Court, in both cases, accepted that the actions of the perpetrators when undertaking an "exorcism" process were based on and motivated by firmly held

[163] *Mika* (n 161) at [15] – [16].
[164] *R v Belghar* (2012) 217 Australian Criminal Reports 1 at [17].
[165] *Belghar* (n 164) at [88] – [114] per McClellan CJ.
[166] *R v Lee* (2006) 22 CRNZ 586 (CA).
[167] *R v Rawiri and Others* [2009] HC Wellington (CRI2007-032-5294).

cultural and religious beliefs that they were exorcising "demons" from the victim. In each of these cases the court accepted that a reduction of the convictions to manslaughter was warranted as there was no murderous intent.

Although the criminal courts in New Zealand and in other jurisdictions have increasingly been confronted with culture, the concern for my research is that no clear framework or methodology for the introduction and application of culture and cultural contentions is apparent within any of the legal jurisdictions discussed above. The response by the criminal courts to cultural contentions has been inconstant and raises the concern that some of the determinations have been unfair for individuals from minority cultures. The cases discussed above highlight a variability of approach by the criminal courts to cultural emotions. However, these variations can largely be attributed to the nature of the cultural evidence adduced and the reluctance of the court to accept cultural considerations as a factor in supporting a defence. I suggest that if counsel fully appreciate the relevance and significance of the cultural factors involved then they will in turn appreciate the magnitude and nature of the cultural and expert evidence necessary to substantiate the cultural factors involved.

As the above discussion illustrates, an individual's response or reaction to a specific situation or stimuli will, at times, be driven by cultural factors and influences and therefore will be intrinsic to that individual. I suggest that this presents a challenge to the viability of adopting an objective reasonable person approach to the assessment of intent in circumstances where cultural factors are relevant. It is not within the scope of my thesis that I engage in a detailed review of the standards applied by the courts in clarifying issues of intent and therefore limit my suggestions to a brief reflection on the relevance of culture in criminal law.

Having demonstrated that a vast array of culturally-derived emotions influence the way people behave or respond to specific situations, it has also become apparent from the discussion above that an examination of these emotions provides rationale or explanations for an individual's motivations to behave given a specific set of circumstances. Because cultural factors can operate to mitigate, exculpate, or aggravate offending, I argue that culture and cultural influences must, where relevant, be a fundamental consideration in assessing criminality. The variability of factors and influences that impact a person's behaviour therefore means that the criminal law cannot assume or infer an offender's motivations by using standards in assessing criminal culpability that reflect the dominant social paradigm.[168] In the ensuing discussion, I examine the significance of assessments of motivations to the determination of the mens rea element of criminal offences.

[168] As illustrated in Chapter Three, part 3.1, the dominant influences for the development of New Zealand's criminal law emanate from English common law. As discussed earlier (Chapter Five, part 5.3.6) regarding the position adopted by the Supreme Court in *Uluakiola* following the earlier approach by the Court of Appeal in *R*

7.4 The Significance of Motive to Assessments of Criminal Liability

As established, cultural considerations significantly impact the rationale for an individual's actions. This is particularly so where those actions are deemed criminal by the substantive law. Cultural influences, I suggest, may operate to exculpate, or explain a defendant's conduct. Although the criminal law has well established rules regarding the determination of the various forms of the mental element of an offence, I argue that a defendant's motive ought to be a significant consideration in the determination of the mens rea element of an offence. The objective of the discussion in this part is to examine why the criminal law ought to acknowledge culture and cultural influences in assessing an offender's motive and the significance of motive to assessments of criminal liability.

Nominally, the criminal law purports to be blind to the motivation of an individual in the creation of the mens rea of an offence. As illustrated, limited recognition of motivation is apparent in the context of particular defences. The criminal law does not assume that all individuals are culturally the same and therefore it must be accepted that it cannot be assumed that all individuals will harbour the same motivations for their actions. Far from making an assumption either way, the criminal law purports to be largely agnostic to the notion of motivation and the factors which contribute to the formation of motive. Here, however, I seek to illustrate how culture is, in fact, important to the question of criminality and does act, despite the sceptical nature of the criminal law, to discriminate against minorities in favour of the majority where the dominant paradigm is often applied in assessing the motivations of individuals from other cultures.

7.4.1 Intent

The requirement of intent is generally referred to as the *mens rea* or mental element of an offence and encompass various concepts including a defendant's purpose and knowledge of the consequences for his or her actions. Although the focus of the discussion in this part will be to highlight the relevance of motivation to assessments of criminal culpability, this discussion necessitates my clarification of the distinctions between intent and motive which has fostered the traditional approach of the criminal law that motivation is irrelevant to the determination of criminal responsibility.[169]

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v Tai, the objective standard of a person from "New Zealand's mixed society rather than someone of British blood or background" is no longer reflective of the ordinary reasonable person standard. As indicated earlier, expansion of this issue is beyond the scope of my thesis.

[169] See for example Alan Norrie *Crime, Reason, and History: A Critical Introduction to the Criminal Law* (Second edition, Cambridge University Press 2006) at 36-45. See also Whitley Kaufman *Motive, Intention, and Morality in the Criminal Law* (2003) Criminal Justice Review, vol. 28, No. 2, 317-335 at 318, 319.

The mental element of a criminal offence is referred to in varying ways within the criminal law and is governed by the various *mens rea* principles. Although various principles are attached to the *mens rea* concept, I focus here on what Ashworth refers to as the belief principle which holds that criminal liability should be based on what the defendant believed he or she was doing or risking, not on actual facts that were not known at the time.[170] Aligned with the belief principle is the requirement that there be correspondence between the fault element for a crime and the conduct specified for the crime.[171] Therefore the intention or recklessness involved must correspond with the express requirements of the crime. As noted by Ashworth, *mens rea*, as a concept, requires that criminal liability only be imposed:[172]

> on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences.

A fundamental principle of the criminal law is that a defendant must have intended the consequences of his or her actions. The conventional use of *mens rea* is that it requires "intention or recklessness as to a specified consequence, and knowledge of, or recklessness as to a specified circumstance."[173] This view of mens rea suggests that intention can be categorised into four main forms of fault.[174] First, the intent required by the offence may be the primary element of the offence as with attempt offences (s 72), assault offences (ss 188 (wounding with intent), s 189 (injuring with intent) and s 204B (intent to undertake an FGM procedure)). Second, the intent element is used to distinguish the seriousness of offending (for example s 188 (wounding with intent) and s 189 (injuring with intent)) where different forms of intent reflect the seriousness of the offending. The third and fourth forms of mens rea referred to by Ashworth and Horder require proof of knowledge (for example ss 78A, 108, 256) and recklessness (for example, ss 78A, 167(b), 188, 189).

The essence of these requirements of intent is that the defendant acted intentionally, willingly and with the knowledge that his or her actions were unlawful. Because intent is determined within the mind of the defendant, it must therefore be implied from the facts. The focus is accordingly on a person's purpose or objective in making the conscious decision to act or refrain from acting. It will become apparent in the ensuing discussion that although various commentators have sought to distinguish intent from motive, similar processes are involved in formulating and carrying out motives and intentions.

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[170] Andrew Ashworth *Principles of Criminal Law* (Sixth Edition, Oxford University Press 2009) at 154,155
[171] Ashworth (n 170) at 155.
[172] Ashworth (n 170) at 154, 155.
[173] Jeremy Horder *Ashworth*'s *Principles of Criminal Law* (Eighth Edition, Oxford University Press 2016) at 188.
[174] Horder (n 173) at 189.

In adopting the view that intent requires a conscious objective or purpose, Ormerod notes that, "a person intends to cause a result if he acts with the purpose of doing so."[175] Accordingly, a person commits a criminal act with intent when that person's conscious objective or purpose is to engage in the act which is forbidden by the law or, by his or her acts or omissions, induces or gives effect to an unlawful outcome. Because the specific intent required by an offence is defined within the offence itself, the substantive criminal law therefore dictates the nature of the intent and the parameters required to prove the intent. An anomaly within the criminal law is that, although the distinctions between intent and motive are not always clearly stated (because "motive" is not a specified element of a crime), there is no obligation on the prosecution to prove motive. However, despite the fact that "motive" is not a specified element of the definition of an offence, the establishment of a motive will nevertheless be a factor that can be considered by a jury (or judge of fact) as relevant in supporting a finding of guilt. Alternatively, it will be open to a jury to accept that a lack of motive by the defendant to commit the alleged offending will be a relevant factor in support of an acquittal.

A further pertinent issue is that the criminal law will only be concerned with the intent that is required by the definition of the offence.[176] In some situations however, the defendant may have formed several "intents". If the court finds that the intent required by the definition of the offence can be corroborated on the basis of the accepted facts then a consideration of the other "intents" or "motives" held by the defendant will, I suggest, impact the viability of the intent required by the specific section of the criminal statute.

This processing of intents, purposes and motives can be illustrated by reference to the example of a shooting. It can be accepted that the offender (the shooter) possesses the intention to shoot the victim. It can also be inferred that the offender will also possess the intent to either wound, maim, or physically disable the victim and in that regard the shooter may also be reckless as to whether the victim dies. If the shooter's purpose was to disable the victim's ability to continue what the offender perceives to be the victim's purpose (for example an attempted mass killing of random members of the public), then the shooter will also possess the motive of defending the random members of the public. It can perhaps be argued that despite the variety of intentions, the primary purpose for the shooter's actions was the motive to defend others. This example, I suggest, illustrates the significance and relevance of establishing all of the intents and motivations involved in order to fully comprehend the aims, objectives and purposes for the shooter's actions.

It is accepted that there will be situations where a defendant's motives and intents will be clearly distinguishable. This distinction will be apparent in a protest situation where, for example, a group of

[175] David Ormerod *Smith and Hogan's Criminal Law* (13th ed., Oxford University Press, 2011) at 106.
[176] Ashworth (n 170) at 155. Horder (n 173) at 189.

protesters obstruct a major arterial roadway to highlight, say, climate change impacts. Although the motive was to protest (which is not illegal), the intention to obstruct a major highway will be a breach of traffic and criminal offences. In establishing whether offences have been committed, the criminal law will only be interested in establishing the "intent" elements of the relevant sections of the Transport Act or the Crimes Act with no regard for the protester's motives in assessing criminality. In these circumstances, the offender's motives will only be a relevant consideration in sentencing.

A discussion of the numerous conceptions of a person's "intent" within the criminal law is too unwieldy and is not necessary within the context of my thesis. Because the focus of the present discussion is on cultural influences and the substantive criminal law defines the required mental element or intent relevant to a specific offence, I narrow the scope of the discussion here to those offences where culture will be a relevant consideration to establishing the elements of an offence. My contention is that culture and cultural factors are a significant influence on the motivations or rationale for a person's behaviour and therefore provides insight into that person's "aims, objectives and purposes" for their actions. These motives, I suggest, also directly and indirectly impact the intent of a defendant.

7.4.2 The Fallacies of the "Irrelevance of Motive" Maxim

Before I examine the significance of motive to the determination of criminality and culpability, I must inexorably allude to the theoretical impediment that is often raised in opposition to the recognition of motive as a consideration in determining issues of criminal liability or culpability. I engage in this analysis from the perspective of culture and the relevance of culturally-derived motive to intent. While this concept is often referred to as the "irrelevance of motive" maxim, I argue here, first, that this maxim is descriptively untrue because motive (whether culturally derived or not) is already a relevant consideration within criminal law and; second, although the substantive criminal law is focused on the proof of specific intents, culturally derived motives will nevertheless be a relevant consideration in assessments of culpability because it provides the rationale or explanation for the offending behaviour.

Binder notes that "the criminal law is concerned only with intent, not motive",[177] and Norrie affirms the view that the irrelevance of motive to liability is "as firmly established … as any rule can be."[178] Kaufman also favours the traditional view and maintains that the "irrelevance of motive doctrine" remains a fundamental principle of the criminal law because "even a good motive does not exonerate

[177] Guyora Binder *The Rhetoric of Motive and Intent* (2002) Buffalo Criminal Law Review, vol. 6, no. 1 at 1.
[178] Norrie (n 169) at 37. Also refer Michael Rosenberg *The Continued Relevance of the Irrelevance-of-Motive Maxim* (2008) Duke Law Journal, vol. 57, no. 4, 1143-1177 at 1176.

one from culpability".[179] Although Kaufman acknowledges that morality and the law do not treat motive and intention in identical fashion, he notes an important distinction is that:[180]

> "the traditional moral theory recognises that a good motive does not excuse a bad intention and a bad ulterior motive does not render an otherwise good action impermissible".

The orthodox doctrine, according to Kaufman, therefore, holds that motives in general are irrelevant, whether they are good or bad. Kaufman further notes that "although the good or bad motive of the agent may be relevant for judging a person's moral culpability, it is irrelevant for criminal liability."[181] Tadros focuses on the morality of the defendant's motivations in highlighting the distinctions between motive and intent when he comments that:[182]

> the criminal law is not in the business of investigating the full motivational structure that guided the defendant's decision in deciding to do what he did. Morality, in this way, is much more stringent than the criminal law. Only a person who properly recognises the value of those he harms and those he saves has acted in a morally permissible way in harming others.

Although a person's intentions may equate with his or her aims or plans to achieve a desired (foreseen) outcome, Eldar and Laist acknowledge the traditional view that motive (regardless of whether they are good or bad) is an irrelevant consideration in assessments of criminal liability.[183] However, when the irrelevance of motive arguments are analysed in terms of rule of law considerations, Eldar and Laist concede that:[184]

> in some instances the rule of law will be advanced by the introduction of motive to the assessment of liability. If motives are carefully analysed and their scope of application plainly defined, motives may be used to provide both clarity and substantial equality where other elements of crime prove inadequate. When neither *actus reus* nor the non-motivational elements of *mens rea* are suited to distinguish between what society has sanctioned and prohibited, progress could be achieved by the application of motive.

I argue here that, in the context of culturally-derived motives, the traditional objections to the relevance of motive to assessments of criminal culpability, are no longer justified. Instead, developments within criminal law suggest that, where the situation or circumstances demand such an approach, the culturally-based motives of a defendant ought to operate to either exculpate or aggravate offending. To highlight the distinctions between the criminal law's approach to intent and

[179] Kaufman (n 169) at 333.
[180] Kaufman (n 169) at 334.
[181] Kaufman (n 169) at 317.
[182] Victor Tadros *Wrongdoing and Motivation* Chapter 10, 206-227 in R A Duff, Stuart P Green (eds.) *Philosophical Foundations of the Criminal Law* (Oxford University Press 2011).
[183] Shacher Eldar, Elkana Laist *The Irrelevance of Motive and the Rule of Law* (2017) New Criminal Law Review, Vol. 20, No. 3, 433-464. Also refer Kaufman (n 168) 317-335.
[184] Eldar, Laist (n 183) at 463-464.

motive, I utilise a distinction applied by Husak where he suggests that there are two phases of the criminal justice process where motive will be relevant to assessments of criminal culpability.[185]

Husak notes that the first phase requires the determination of criminal liability where the criminal law has traditionally sought substantiation of a defendant's blameworthiness in the form of his or her purpose, knowledge, recklessness or negligence. The orthodox approach of the criminal law is that motive is an irrelevant consideration in determining criminal liability.[186] However, it is not uncommon in the course of a criminal trial to hear the prosecution urge a jury (or other judges of facts), to consider a defendant's motive for their criminal conduct.[187] I suggest that motive has always been relevant in assessing criminal liability in the context of "heat of the moment offending" such as self-defence or provocation, crimes of passion, reasonable excuse defences, and necessity. The abundance of instances where motive is recognised by the criminal law provides a strong counter to those who argue in favour of the "irrelevance of motive" to the determination of culpability.

Husak further notes that there is inconsistency in the "irrelevance of motive" approach because, in the second phase, motive is a relevant consideration to assessments of an offender's culpability in sentencing. During the sentencing stage there are no restrictions and all other mental factors become relevant in assessing the offender's culpability. Husak argues that the orthodox view on the irrelevance of motivation is "deeply mistaken" both factually and normatively, because the courts have in fact always considered motive and indeed such recognition should be reflected in statutes where, not only should objectionable conduct be identified, but statutes should also "draw whatever distinctions are necessary to indicate the extent to which conduct is blameworthy".[188] Husak's contention is that motive is relevant to criminal liability according to virtually any conception of motive that satisfies the most minimal criteria of adequacy. I concur with this view.

7.4.3 The Significance and Relevance of Motive

In a modern superdiverse world, the criminal law cannot be sceptical about the variety and multiplicity of factors that influence the cognitive processes of defendants and therefore the culturally-derived motivation for a defendant's behaviour must, where relevant, be a consideration in assessing criminality and culpability. I argue here that an individual's culturally induced motive is strongly associated with his or her "intent" as it is an essential element of the cognitive processes applied by any individual and therefore influences how a person behaves in a specific situation.

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[185] Douglas Husak *Motive and Criminal Liability* (1989) Criminal Justice Ethics, vol. 3, 1-13 at 3.
[186] Refer Kaufman (n 169) at 318-9.
[187] See for example, *R v Howse* [2003] 3 NZLR 767 at [9]-[10] per Tipping J
[188] Husak (n 185) at 4. See also Kaufman (n 169) at 317.

The dilemma that arises is whether a person should be exonerated for their actions where their motives were good or moral rather than being immoral and unacceptable. As stated earlier, morality is not an express criterion of criminality. What is criminal will often be immoral and in some instances, something which may be regarded as positively moral will nonetheless be criminal. For example, the use of reasonable force in defending someone from an attack may be regarded as the moral thing to do and therefore will not be criminal, however, the moral intentions to defend someone from a threat of harm will become a criminal act where the force used is excessive or unreasonable.

There are no clear definitions of motive.[189] Some commentators suggest that motive "is merely a type of intention"[190] Other commentators distinguish motive by referring to it as the ulterior intent.[191] It is not my objective here to enter into the extensive discourse that has sought to define and distinguish motive from intent. The perspective taken by my hypothesis is that motive is the driving force that compels a person to act in a particular way and therefore is the ulterior rationale that induces a person to act or abstain from a particular act. Like intent, motive is an unseen factor that must be implied from the facts. Where this driving force can be evidentially visited upon a cultural norm, I argue it ought to be considered in the context of whether the mens rea element of an offence has been substantiated. As illustrated in discussion throughout this dissertation, culturally-driven emotions such as shame, fear, provocation, cultural beliefs, and spirituality are part and parcel of the factors that provide, rationale, reasoning or motivation for a defendant's criminal acts.

Husak suggests that "motives explain why a person acted, while intentions describe what action was performed".[192] This distinction, I suggest, affirms the position taken here, that motives and intents are mutually dependent and when considered together, provides a clearer perspective of the purposes and objectives of an offender. Because motives provide explanations and clarifications for the defendant's actions beyond the scope of the "intents" required by the substantive law, a defendant's culturally-driven motives operate to put in perspective the criminality of the offending. For example, a deep sense of jealousy or feelings of hurt may be the motivations behind an offender's intentions in assaulting the victim; greed may be the primary motivation for, say, making a false claim on an insurance policy and self-defence may be the primary motivation for causing serious harm to someone. The motive in each instance operates to either aggravate, exculpate, or mitigate the offending. Viewing motive and intent in this way, there is a clear distinction between the relevance of the factors that go to the determination of moral culpability (motives) and substantive law culpability

[189] Kaufman (n 169) at 321.
[190] Kaufman (n 169) at 321.
[191] Kaufman (n 169) at 322-323. Also note the commentary by Rosenberg (n 178) at 1158-1165.
[192] Husak (n 185) at 8.

(specific intent). Framed in another way, the primary intent may well be to shoot someone, but if the primary motive for the shooting is the defence of self or others then self-defence will be the primary motivation and intent for the shooting. Viewing motive and intent in this way, both elements become essential to the determination of the shooter's criminality.

The reality is that motive and intent are used and applied interchangeably within the criminal law. In querying why the criminal law is so focused on distinguishing intent from motive, Kaufman argues that almost all intentions (apart from specific intentions) "are also characterised as motives".[193] Chiu points out that motive is already relevant within the criminal law and provides the outwardly obvious example of motive being a relevant factor regardless of whether a defendant has acted intentionally or unintentionally.[194] The significance of motive is therefore apparent because, as noted by Chiu, "only intentional acts are done with a motive in mind".[195]

To advance the contentions to flow from my thesis, I focus here on the significance of motivation to assessments of criminal culpability. From the legal psychologist perspective, the significance of motivation to the reasons why individuals will implement criminal behaviour is noted by Liu as the:[196]

> inner cause or a psychological strength stimulating and promoting the perpetrator to implement criminal behaviour, which explores a core issue of what the psychological reasons are for the perpetrator implementing criminal behaviour … several types of learning not only affect the formation of motivation, but also affect the means of expression of motivation in behaviour.

Motive focuses on the "causes" or rationale for a defendant's actions. A defendant's motivation to act in a particular way is largely cultural in nature because emotions such as shame, fear, "the concept of honour" and the need to respond to specific stimuli in a particular way is deeply cultural. Accordingly, I argue that, where relevant, cultural factors must be recognised by the criminal courts in determining criminal liability.

The significance and relevance of motive to assessments of culpability and criminality can be demonstrated by reference to specific scenarios. One example is the shooting of someone because that person was about to commit an offence which would have resulted in the deaths of many people. Although a serious wounding or death was intended by the shooter, his motivation was to prevent the deaths of many others. In these circumstances the court is faced with distinguishing the intention to cause a death and the motivation to defend others where, for example, a defence of self-defence is

[193] Kaufman (n 169) at 323.
[194] Elaine Chiu *The Challenge of Motive in the Criminal Law* (2005) Buffalo Criminal Law Review, vol. 8, no. 2, 653-729 at 666.
[195] Chiu (n 194) at 667.
[196] See for example Liu Jianqing *An Interpretation of Behavioural Traits of Criminal Motivation* (2015) Canadian Social Science, vol. 11, no. 1, 52-56, at 52, 53.

proffered by the shooter. Although the inferred intent of the shooter was to cause bodily injury likely to cause death, the defence of others motive would not be so apparent and could not be assumed without further corroborating evidence. As noted by Ashworth, it is well known that a sudden threat to one's personal safety (or the safety of another) may lead to strong emotions of fear and panic, producing physiological changes which take the individual out of his or her "normal self".[197] I argue that the criminal law cannot assume that all individuals will react to a given situation in the same way. While the shooter's intent may be inferred, I suggest, an assessment of the individual's subjective motives for taking a particular course of conduct, may not necessarily equate with the assumed intent, as the above scenario was dependent on the shooter's knowledge of the victim's intentions. If the shooter's inferred intent was based on misinformation then this would significantly impact the likely outcome of the defence advanced. Although the shooter's intentions to cause serious harm to the victim can be clearly inferred, the primary reasons for the shooter's actions could not be truly known without regard to the shooter's motivations.

Another example which highlights the close interplay between intent and motivation can be found with the example of a surgery where the surgeon has taken every care possible, but the patient nevertheless dies. If, however, the surgeon was motivated by a wish to marry the patient's wife and was therefore not bothered if the patient dies, then the surgeon's intentions to take every possible care with the patient might well be subject to inquiry where there is concern that a death has ensued because of an omission or intentional act by the surgeon. If the surgeon's motive was irrelevant then no offence has been committed as death ensued despite every possible care being taken. If motive was regarded as a relevant mental element, then, I suggest a far more accurate assessment of the surgeon's reasons or purposes for any omission or intentional act will be a significant consideration in assessing the surgeon's criminality and culpability.

A scenario that emphasises the significance of culturally derived motive to the determination of culpability can be found in the context of a theft. The removing of a cultural taonga (treasure)[198] from, say, a museum, will be a theft if the intention in doing so was to permanently deprive the "owner" of their rights to that taonga.[199] It can be assumed for the purposes of this exercise that the museum acquired the taonga legitimately. If, however, it was established that the theft was motivated by the offender's desire to restore the taonga to its "rightful traditional owners", the present wording of s 219 of the Crimes Act 1961 would prevent motive being a consideration on the issue of criminal liability for a theft. However, in the context of sentencing, motive is relevant not only in determining the

[197] Ashworth (n 167) at 125.
[198] For example, a Māori carving of cultural significance, a pounamu carving, or an item of traditional dress with cultural significance.
[199] Crimes Act 1961, s 219(1)(a).

gravity of the offending or culpability of the offender but is also a mandatory consideration as a mitigating or aggravating feature of offending. The presence or absence of aggravating or mitigating features will determine the offending's degree of seriousness. The inconsistency in recognition of motivation in this theft scenario illustrates what I suggest is an anomaly in the criminal law. Although motive is irrelevant to the determination of criminal liability, thereby ensuring that a conviction for theft is entered, the recognition of motive in sentencing brings into play the possibility that a judge will be able to exercise his or her inherent discretion to give recognition to the factors that motivated the offender and possibly discharge him or her without conviction under s 106 of the Sentencing Act 2002.

The anomalies between how motive and intent is treated by the criminal law can also be demonstrated in the context of "hate crimes". The Crimes Act 1961 does not specifically refer to 'hate crimes" or crimes that are motivated by hostility towards a specific group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender, sexual orientation, age, or disability. Although it will be accepted that the commission of an offence that is motivated by hostility towards a specific group because of their common characteristics can be categorised as a "hate crime" and is deplorable, such factor is not relevant to the blameworthiness of the offender nor the degree of wrongfulness attached to the offending. The term motivation is not expressly used in the Sentencing Act 2002, but it is implicit in the wording of s 9(1)(h) that a criminal act which is motivated by "hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age or disability …" will be an aggravating feature of the offending. The court in *R v Bright* noted that an offender's motive for committing an offence can be taken into account by the Court in determining the degree of culpability for a defendant's conduct.[200] For example, in *R v Anderson*, the court found that it will be regarded as an aggravating feature of the offending, if an offender's actions were motivated by a desire to effect revenge on a witness who has given contrary evidence.[201] In these circumstances, having regard to an offender's motive provides a clearer assessment of culpability.

As illustrated in earlier discussion, an individual's criminal behaviour is influenced to a significant degree by cultural considerations. The impacts of cultural factors on the behaviour of an individual is varied and complex. Because of the dynamic nature of these cultural influences, their impact on how a person behaves, given a particular set of circumstances, cannot be assumed. If the criminal law maintains its orthodox position that motivation is irrelevant to criminal liability, inequalities and irregularities in the criminal law will be perpetuated. As demonstrated, cultural factors can, where relevant, provide an explanation, rationale, or reasons as to why an individual was motivated to act.

[200] *R v Bright* [1916] 2 KB 441.
[201] *R v Anderson* 24/10/1990, CA133/90 (CA).

These motivations will also have the effect of mitigating or aggravating offending and therefore go to the heart of a defendant's blameworthiness and the level of wrongfulness to be attached to the offending.

The injustices that arise can be highlighted by reference to an analogy applied by Husak.[202] Husak poses the example where one person deliberately causes the death of his wife or an aging and unwell parent to relieve their suffering and a second person is hired to kill a stranger for money.[203] Husak argues that the problem in these scenarios is that, despite the vast discrepancy between the good and bad motives, both are guilty of the same offence. Husak argues that no sentencing guidelines could correct the injustice that arises from convicting both of the same offence.

Husak suggests that irregularities in the recognition of motive by the criminal law will require the identification of the various conditions under which motive will be relevant to criminal liability.[204] Husak's approach accords with the methodology that is envisaged by my thesis in promoting the relevance of motive to the determination of criminal liability. In the context of the culturally loaded defences discussed in earlier chapters, I have provided some insight into how relevant cultural factors have impacted the behaviour of individuals who are affiliated with various minority cultures in New Zealand. The cases analysed in the course of this dissertation focus on attempts by defence counsel to advance a defence based on the impact of cultural factors in which a crime has been committed "in the heat" of emotional distress.[205] The essence of the defence contentions have been that the cultural factors have so intensely influenced the defendant that he or she has acted in the heat of the moment and therefore had no opportunity to form, for example, a murderous intent. As illustrated, the cultural contentions have not been accepted by the courts for various reasons centred on the inadequacy of supporting cultural evidence, misinterpretations or misunderstandings regarding the relevance and significance of the cultural evidence and inconsistent application of culture to the requirements of the relevant offence.

I have limited my "relevance of cultural motive" argument to specific intent offences. However, it must be acknowledged that other requirements of mens rea also provide scope whereby culturally-derived motives may be a relevant consideration in assessments of criminality. For example, s 167(b) murder, s 188(2) wounding with intent, and s 189(2) injuring with intent recognise that recklessness involving the "taking of a risk" will be a relevant mental element to particular offences. As illustrated

[202] Husak (n 185) at 4.
[203] See for example, *R v Stead* (1991) 7 CRNZ 291; *Smail v R* [2011] NZCA 403; *R v Martin* 14/2/2005, CA 199/04.
[204] Husak (n 185) at 12.
[205] For example *Uluakiola* (CA)(n 20), *Mesui* (n 21), *Aiono* CA (n 147), *Aiono* HC (n 22), *Fate* (n 25), *Suluape* (n 24).

(Chapter Five, part 5.3.4), the defendant in *R v Lee*, was convicted of manslaughter after undertaking an "exorcism" process, albeit with the consent of the victim, but which ultimately caused the victim's death.[206] The Court of Appeal accepted that the cultural (and religious) factors were significant to Mr Lee's intentions and consent would be a complete answer to the charge where "there was neither intentional harm, nor recklessness". I suggest that the fact scenario in *Lee* provides a clear example where the cultural and religious factors have operated to disprove the existence of the specific intent (in this case the intent to murder) and a verdict of manslaughter was affirmed. While the court in *Lee* has accepted there was consent to the "exorcism" process, the cultural factors operated to demonstrate the appellant's recklessness in acting beyond the scope of the consent given by the victim.

In the next section, I examine the relevance of culture and cultural factors to criminal law defences.

[206] *Lee* (CA) (n 164).

7.5 Culture as a Defence

As illustrated, cultural factors can operate to mitigate, justify or excuse a defendant's criminal actions. In this part, I underscore the relevance and significance of culture and cultural factors in substantiating elements of a defence. The objective of this discussion is to apply the cultural framework advocated by my thesis to a range of fact scenarios to demonstrate the significance of culture within existing criminal law defences.

While I have contended in earlier discussion that culture is relevant to assessments of the elements of numerous criminal law defences, I narrow the discussion here to demonstrate the applicability of culture in establishing the elements of reasonableness and proportionality to the defences of self-defence, consent, reasonable excuse, compulsion, mental impairment and provocation. In my cultural audit (Chapter Five, part 5.3), I analysed the relevance of culture and cultural factors within the context of defences available under s 59 of the Crimes Act (the use of reasonable force to prevent harm to a child), colour of right, compulsion and necessity, consent, insanity, provocation, reasonable excuse, and self-defence. I will not reiterate such discussion here, but acknowledge that in clarifying the position I take regarding the application of culture in supporting the requirements of a defence, intermittent reference to earlier discussion will be necessary.

7.5.1 Reasonableness and Proportionality

Proportionality and reasonableness are inter-related concepts that are often used inter-changeably within criminal law as either a specific requirement of a defence (for example, self-defence or consent requires an objective assessment of the reasonableness of the defendant's actions) or as factors that mutually support the other. For example, the force used in self-defence is unlikely to be reasonable if it is out of proportion to the danger threatened. Similarly, it will be crucial to a claim of compulsion or necessity that the criminal acts of the defendant are a proportionate and reasonable response to the perceived threat. In this regard, proportionality assists in assessing reasonableness. The Crimes Act 1961 makes no specific reference to the term "proportionality" however, the defences of self-defence and necessity require that the retaliation or force used be proportional.[207] Proportionality is applied by the courts as a methodology in testing the reasonableness of the defendant's actions.[208] Although proportionality is also a principle that is often applied in sentencing, I refer to proportionality here in the context of defences.

[207] See, for example, Stanley Meng Heong Yeo *Proportionality in Criminal Defences* (1988) Criminal Law Journal, vol. 12, 211-227.
[208] See for example, *Timoti v R* (2005) 21 CRNZ 804 (SC) and *R v Rongonui* (2000) 17 CRNZ 310 (CA).

Specific defences will require that the defendant's actions may be excused or justified if such acts were reasonable having regard to the surrounding circumstances. The requirement of reasonableness is often expressed as a belief (by the defendant) on reasonable grounds of imminent peril of death or serious injury which therefore warrant his or her criminal actions (for example, compulsion under s 24 or necessity under s 20);[209] the use of reasonable force to defend oneself or another (s 48),[210] the reasonableness of belief as to consent (Part 7 of the Crimes Act 1961 regarding sexual offending and Part 8 regarding serious assaults) and, reasonable excuse (under ss 20 and 202A of the Crimes Act 1961 or s 13A of the Summary Offences Act 1981).[211]

(a) Self-defence

Self-defence is a justification defence that provides an exception to the criminality of the use of force. The essence of self-defence is that the defendant is deemed to have been morally justified (blameless) in using reasonable force to defend himself or herself. Where the evidence adduced before the court raises a credible or plausible narrative that might lead a jury to entertain the possibility of self-defence, then it is for the prosecution to prove beyond reasonable doubt that the defendant was not acting in self-defence. If a jury cannot properly exclude self-defence, then the defendant ought to be discharged.

In defining self-defence, s 48 requires a subjective inquiry into the "circumstances as he or she believes them to be" and an objective inquiry in assessing the reasonableness of the force used by the defendant. A third inquiry (which is subjective) requires an assessment of whether the defendant was acting in defence of himself or herself or another person. Despite these distinctions, the elements of s 48 are inter-dependent. For example, whether the force used was reasonable, will require consideration of; first, the perceived imminence and seriousness of the attack or anticipated attack; second, whether the defensive reaction was reasonably proportionate to the perceived danger and; third, whether there were alternative courses of action which the defendant could reasonably have taken.[212] The defendant's belief need not be reasonable, although lack of reasonableness may influence a court's finding as to whether the belief was genuinely held.[213] In regard to the nature of the force used by the defendant, reasonableness requires that the force be absolutely necessary.[214] The

[209] Refer discussion in Chapter Five, part 5.3.3.
[210] Refer discussion in Chapter Five, part 5.3.8.
[211] Refer discussion in Chapter Five, part 5.3.7.
[212] *R v Afamasaga* [2014] NZHC 2142 per Woolford J. These comments were affirmed by the Court of Appeal in *Afamasaga v R* [2015] NZCA 615 at [43].
[213] See *R v Thomas* [1991] 3 NZLR 141 (CA). Also *Tuialii v Police* HC Auckland AP310/86, 19 March 1987.
[214] Refer for example, the case of *Katipa* (n 122) where the High Court overturned an assault conviction on the basis that the assault on the mother (who was lying in the middle of a road with the child) involved reasonable force in defending the child from harm. Although the High Court in *Katipa* has used the term "absolutely

force used in self-defence is unlikely to be reasonable if it is out of proportion to the danger threatened.

As noted earlier, there is no clear illustration of the significance of cultural factors to a defence of self-defence in New Zealand,[215] but the United States case of *People v Croy* provides a prime example where cultural issues are emphasised.[216] In *Croy*, self-defence was advanced in defending a charge of murder for shooting a pursuing police officer. The focus of the trial was whether Mr Croy's actions were defensive in nature as opposed to any other motive. The evidence adduced at trial was that Mr Croy harboured deep and engrained fears that he would be killed by police if he was apprehended. The basis for this perception arose from Mr Croy's deep-seated fear of "white authority", his cultural orientation as a "Native American" and past experiences of ill-treatment of other Native Americans. The jury's verdict in acquitting Mr Croy of murder suggests an acceptance of the defence contention that the cultural factors were relevant to Mr Croy's assessments of the danger he was in and the reasonableness of his response to the perceived threat to his safety. It was therefore accepted that Mr Croy's actions in shooting at pursuing police was defensive rather than murderous.

If the fact scenario in *Croy* was to be considered under my cultural framework,[217] a similar verdict of not guilty could be found in applying the elements of s 48 if it could be shown that the relevant culture is valid for the purposes of the criminal law, that the claimed cultural factor does, in fact, exist, and that the defendant has a sufficient connection with the claimed culture.

Assuming that the first three elements of my relevance of culture framework can be substantiated, then the crucial element of a self-defence argument similar to that advanced in *Croy* would be an inquiry into the nature and extent of the defendant's understanding of the claimed cultural factor and whether the defendant had been influenced by that cultural factor to shoot at pursuing police. As difficult as it may be to establish, a relevant consideration would also be the issues of, first, whether or not, the police in New Zealand harbour animus towards a particular cultural grouping or are actively biased towards such group, and, second, that the defendant was not only a member of that group but

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necessary" such assessment was based on the accepted facts. The Australian High Court in *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645, takes the position that the degree of force that is necessary is dependent on the facts of the matter and therefore it is for the court or jury to decide. Also refer *Palmer v The Queen* [1971] 2 WLR 831 (PC) and *Edwards v R* [1971] AC 648 by way of comparison.

[215] I distinguish here the line of cases where self-defence is advanced on the basis of battered women's syndrome such as *R v Oakes* (n 88) because culture was not advanced as a causal factor for the defendant's actions. Similarly, I have chosen to focus on the influences of cultural factors in *R v Suluape* (n 24) that go to the defence of provocation rather than a reliance on battered women's syndrome.

[216] *Croy* (n 83).

[217] I enlarge upon the elements of my relevance of culture methodology in part 7.5 below.

was aware of this propensity by police.[218] Addressing these, albeit significant, evidential hurdles will be crucial to whether a *Croy* self-defence argument would be recognised by the criminal law in New Zealand. How a New Zealand court deals with cultural considerations relevant to self-defence will depend on the specific fact scenario. *Croy*, I suggest, not only demonstrates the difficulties in substantiating cultural considerations, but also illustrates the hurdles involved in connecting the cultural factor to the subjective and objective elements of self-defence.

(b) Compulsion and Necessity

The crux of the compulsion defence under s 24 is that, although the defendant has intentionally committed an offence, he or she is excused because his or her will or freedom of choice has been overborne by "threats of immediate death or grievous bodily harm from a person who is present when the offence is committed". The defendant's actions will still be regarded as criminal, but the conduct is excused because of the circumstances under which the defendant has acted.

The Supreme Court in *Akulue* recognised that the purpose of the list of excluded offences in s 24(2) was an acknowledgement that the harm caused by the defendant's actions must be proportionate to the harm threatened.[219] Ashworth suggests that when a defendant acts because of duress (or compulsion in the New Zealand context) his or her actions are not involuntary, but they are 'non-voluntary' in the sense that free will or choice is limited.[220] According to Ashworth, the focus of the court should be on whether the defendant's actions were a "reasonable response to extreme pressure". Simester and Brookbanks suggest that the defence of compulsion must include the query as to whether the defendant's will or freedom of choice is "overborne" by the threats.[221]

Section 20 of the Crimes Act 1961 recognises the defence of necessity in circumstances where the defendant is not deprived of his or her freedom of choice of action but an offence is committed because commission of the offence was the "lesser of two evils" and a greater harm was avoided.[222] Although the perception of harm in the necessity defence is at a lower level, issues of reasonableness arise under both defences in the context of the defendant's belief of the nature of the threat and the reasonableness of the response. With the necessity defence, objective elements of immediacy and

[218] These claims about police behaviour were also made in the defence of *Croy* (n 83). Also refer discussion of the *Croy* case by Renteln (n 1) at 37-38 where the author suggests that Mr Croy's perception of the threats posed by the police were a significant influence in his actions to defend himself.
[219] *Akulue v R* [2014] 1 NZLR 17 (SC) at [12].
[220] Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, 2006) at 224.
[221] Andrew Simester, Warren Brookbanks, Neil Boister *Principles of Criminal Law* (4th ed, Brookers , Wellington, 2012) at 395
[222] See *Tifaga v Department of Labour* [1980] 2 NZLR 235 (CA) at 243 per Richardson J. Also see *Perka v R* (1984) 13 DLR 1 (SC Canada).

presence do not support the rationale of moral involuntariness because it is not a matter of whether the threat of harm will be carried out immediately but rather that there was an "honest" belief that the threat will be carried out.[223]

I suggest that the requirements of immediacy and presence in s 24 impose a very strict criteria for qualifying elements of the defence and equally stringent requirements as to reasonableness. Although cultural factors may explain the variability in the way people experience the emotion of fear, the strict presence and immediacy requirements of s 24 are likely to exclude a consideration of cultural factors whereas the related defence of necessity which focuses on a defendant's belief of the nature of the threat and the reasonableness of the response is more likely to accommodate a consideration of culturally derived emotions or motives.

As illustrated in earlier discussion (Chapter Five, part 5.3.3 and Chapter Seven, part 7.3.2 (a)) feelings of fear derived from factors that are intrinsic to the defendant, including cultural influences, may be a significant causal factor in the belief, formed on reasonable grounds, of imminent peril of death or serious injury. I refer here to the cases of *Kapi* and *Akulue* to illustrate that a defendant's perceptions of fear may be derived from cultural factors, and, further, that the response by the defendant to the threat may, as a consequence, be reasonable in specific circumstances. As noted above in part 7.3.2, an application of my relevance of culture framework to the cultural contentions in *Kapi* and *Akulue* will demonstrate that these are not cultural cases. It is not my contention that *Kapi* and *Akulue* were wrongly decided but rather that, if the cultural contentions in both of these cases were able to be corroborated evidentially, then the issues of reasonableness and proportionality may well have provided sufficient excuse or mitigation for the offending under the defence of necessity.

In *Kapi*, the defendant was charged under s 65 of the Transport Act 1962 with failing to stop at the scene of an accident (which also implied that he did not ascertain if anyone else was injured in the accident). The defendant argued that it was reasonable for him to leave the scene of the accident as he feared being assaulted by the owners of the parked vehicle he had collided with. It was suggested during the hearing that cultural factors were relevant to establishing that his fears of being assaulted were genuinely held. The Court of Appeal in *Kapi* surmised that the defence of necessity, if it existed in New Zealand, would require at least "a belief formed on reasonable grounds of imminent peril of death or serious injury."[224] The Court of Appeal noted that there were failings on the part of the defence regarding the introduction of cogent and probative cultural evidence. What was required was evidence that would substantiate that Porirua is an inherently violent place especially in the circumstances that the defendant found himself; that the defendant had sufficient connections with the

[223] *Kapi* (CA) (n 26).
[224] *Kapi* (CA) (n 26) at 57.

culture of Porirua, that such a culture existed, and that the defendant had acted because of a cultural factor connected with the claimed culture.

The defence in *Kapi* failed, I suggest, because; first, the defence was not able to point to a specific viable culture with which Mr Kapi had a clear connection. Although it can be inferred that Mr Kapi is of Māori ethnicity (by reference to his name), there was no evidence to support the claim that he would be "assaulted by Samoans", nor that any Sāmoans lived in close proximity to the scene of the accident. Second, there was no cultural evidence in support of the contention that "Porirua is an inherently violent place" and that assaults (provoked or unprovoked) are common-place in Porirua. In failing to adduce evidence in support of these cultural contentions, the cultural claim cannot then progress to the final considerations envisaged by my cultural framework.

In *Akulue* it was argued that Mr Akulue was coerced into acting as a drug mule because of a series of threats from a person in Nigeria to kidnap and kill members of his family in Nigeria. The primary issue for the Supreme Court was whether Mr Akulue's account of events gave rise to a defence under s 24, and if not, whether the appellant could then rely on a defence of necessity. In the course of discounting the defence of compulsion and ruling that the defence of necessity was not available to Mr Akulue, the issue of reasonableness arising from the elements of both compulsion and necessity was thoroughly considered by the court. In the context of a compulsion defence, the issue is whether the defendant's actions were reasonable considering the extreme pressure he was subjected to in continuing with the criminal conduct under threat of harm to family in Nigeria. In the end, a defence of necessity would not be "cultural" in terms of the requirements of my relevance framework, and compulsion was not available to Mr Akulue because the requirements of presence and immediacy cannot be satisfied.

(c) Consent

The significance of cultural factors to the issue of consent, I suggest, focus on whether culture played any part in the formation of the defendant's belief there was consent. As illustrated earlier (Chapter Five, part 5.3.4), the belief in consent must be reasonably held.

In earlier discussion (part 5.3.4) I highlighted the United States cases of *State v Kargar*,[225] and *People v Moua*,[226] where cultural factors played a significant role in establishing that the defendant's motives were not sexual but were in compliance with established cultural norms. While *Kargar* was not a case dealing directly with the issue of consent, its significance to this discussion is that it highlights the

[225] *State v Kargar*, 679, A.2d 81, 82 (Me. 1996).
[226] *People v Moua* No. 328106-0, Fresno Superior Court (1985).

reality that the true nature of particular cultural practices cannot always be taken at face value. In *Kargar*, the court accepted that Mr Kargar's actions in kissing the penis of his nine-month old son during a ceremony was cultural rather than sexual. Considerable evidence by cultural experts had been adduced to demonstrate that according to Afghani culture, Mr Kargar's actions were a demonstration of love for the child rather than having any sexual connotations. It is likely that a prosecution similar to *Kargar* in New Zealand (under one of the sections in Part 7 of the Crimes Act 1961) will also result in an acquittal on cultural grounds if it can be established that Mr Kargar's actions were cultural rather than sexual. The evidence in support of the cultural contention must establish that Mr Kargar was acting in accordance with a valid cultural norm and that the cultural norm emanates from a viable culture.

In *Moua*, the court accepted that, despite the appearance of a kidnapping for the purposes of sexual conduct, Hmong marriage practices involved the feigning of a "taking of the bride" and a demonstration of reluctance by the bride to participate in sexual conduct. The cultural evidence in this case was complex and uncertainty arose because of inconsistencies in the complainant's previous statements regarding the nature of the cultural practices involved. In the end, the judge withdrew the kidnapping and rape charges and Mr Moua pleaded guilty to a charge of false imprisonment. If the fact scenario in *Moua* was prosecuted in New Zealand, the charges will likely arise from s 208 of the Crimes Act which prohibits an abduction for the purposes of marriage or sexual connection. Section 208 recognises that, where there was consent to the "abduction" for the purposes of marriage or sexual connection, then there will be a valid defence to the charge. As noted in *R v Mohi*, the offence under s 208 is complete at the time of the detention or taking away as long as the abduction was accompanied at the time by the necessary intent.[227] Therefore, the offence will be made out once the necessary intent has been established but the fact of consent will operate to negate such intent.

I also argue here that cultural factors will be relevant to consent in the context of the various assault offences under Part 8 of the Crimes Act 1961. In Part 8, the physical injuries and degrees of intended harm referred to in the sections require proof of various levels of intention, namely, wounding with intent, intent to injure, intent to cause grievous bodily harm, reckless disregard for the safety of others and common assault. In *R v Barker*, the Court of Appeal reviewed the law on consent in the context of ss 189(2) (injuring with intent) and s 188(2) (wounding with intent) with regard to the decision of the trial judge to remove the defence of consent because of concerns about the ages of the complainants, the need to protect "young members of society" and that the wounding involved scarification.[228] The Court of Appeal in *Barker* acknowledged that the question of whether the consent was reasonable and whether consent as a defence should be made available to the defendant required a consideration of all

[227] *R v Mohi* [1982] 1 NZLR 1069 (CA).
[228] *R v Barker* (2009) 24 CRNZ 308 (CA).

of the surrounding circumstances, including policy reasons.[229] The surrounding circumstances that the court in *Barker* refers to would, I suggest, envisage a consideration of, not only, whether consent was given (as well as the nature of that consent) but also whether cultural factors were relevant to the reasonableness of the defendant's belief as to consent.

As illustrated in earlier discussion (Chapter Five, part 5.3.4), the Court of Appeal rulings in *R v Lee* demonstrate that the availability of the defence of consent to an assault will require a consideration of public policy reasons and the circumstances of each case.[230] In *Lee*, the court accepted that the victim had consented to the religious and cultural reasons for the "exorcism" procedure that was undertaken but this procedure ultimately led to her death. It was also accepted that the defendants had acted on the basis of cultural and religious beliefs that the exorcism was necessary to rid the victim of her afflictions. The issue for the court was the nature and scope of the consent given by the victim and whether the defendant's actions were reasonable in the circumstances and complied with the scope of the consented activities.

The case of *Lee*, I suggest, provides an ideal example of a fact scenario which falls squarely within the realms of my cultural framework. As noted earlier in part 7.3.5, the Court of Appeal accepted that the cultural (and religious) factors were significant to Mr Lee's intentions to rid the victim of her afflictions and consent would be a complete answer to the charge where "there was neither intentional harm, nor recklessness". The Court of Appeal however noted that the acts performed after consent was given had exceeded the scope of the consent and the appellant had been reckless in undertaking the exorcism procedure beyond the realms of accepted Assembly of God processes.[231] The exorcism was therefore unlawful, and the manslaughter verdict was affirmed. In the latter case of *R v Rawiri and others*,[232] and the Australian decision in *R v Mika*,[233] comparable sets of facts involving a reliance on religious and cultural motivations in performing an "exorcism" also resulted in manslaughter verdicts. In each of these cases the inquiry as to, first, whether the culture was valid, second whether the cultural factors were valid, third, whether the defendants had a close association with the claimed culture and religious beliefs and, fourth, whether the defendant's actions were motivated by the asserted cultural and religious norms, could all be answered in the affirmative. Accordingly, I argue, that each of these "exorcism" cases were cultural in terms of my relevance framework and the asserted cultural factors were influential on the actions and motivations of the defendants.

[229] *Barker* (n 225) at [134] to [139] per O'Regan J.
[230] *Lee* (n 164) (CA).
[231] *Lee* (n 164).
[232] *Rawiri* (HC) (n 165).
[233] *R v Mika* (n 160).

(d) Reasonable Excuse and Special Reasons

As illustrated in Chapter Five (part 5.3.7), numerous provisions within the Crimes Act 1961,[234] and the Summary Offences Act 1981,[235] make available the defence of "reasonable excuse" by way of a defence. Robertson et al note that the test to be applied to a claim of reasonable excuse is the objective test that a reasonable person would consider, in the particular circumstances, that the conduct concerned was acceptable.[236]

The circumstances of the United States case of *People v Singh* was that Mr Singh claimed that he was obliged by his cultural and religious beliefs as an adherent of the Sikh faith to carry a kirpan (ceremonial knife) on his person at all times. By doing so Mr Singh was in contravention of New York laws prohibiting the carrying of a weapon in a public place. Mr Singh was found guilty of the breach of State laws, but Milano J held that the charge should be dismissed because "a continuance of this prosecution would not be in the furtherance of justice and that dismissal is required as a matter of judicial discretion." If the fact scenario in *Singh* was to be considered in New Zealand, the prosecution will likely be under s 202A of the Crimes Act 1961 (possession of an offensive weapon) or s 13A of the Summary Offences Act 1981 (possession of a knife). In *R v Hyde* the High Court took the view that the reasonableness of the excuse must be judged in the light of the particular circumstances and it was for the prosecution to satisfy the court that the knife was not used for the purpose claimed by the appellant. Assuming that the cultural factors and religious beliefs will be corroborated in evidence, the issue for the court will be a balancing of the cultural and human rights considerations against the policy issues in discouraging the carrying of knives in public places.

While not specifically amounting to a defence, s 81 of the Land Transport Act 1998 allows for the consideration of "special reasons" as a factor that can mitigate the criminal actions of an offender. In the High Court appeal decision of *Hamilton v Police*, Keane J accepted that cultural factors were relevant to a contention of special reasons.[237] In *Hamilton*, the appellant was convicted of driving with an excess breath alcohol level but appealed the imposition of a six month mandatory disqualification by the sentencing judge. The appellant contended (in reliance on the discretion given to the judge under s 81(1) of the Land Transport Act 1998) that the sentencing judge had erred in declining her application to be excused the disqualification because of "special reasons relating to the offence".

[234] For example, s 202A (possession of a weapon without reasonable excuse); s 216I (possession of intimate recordings without reasonable excuse).
[235] For example, s 13A (possession of a weapon without reasonable excuse), s 5A (disorderly assembly without reasonable excuse), s 11B (possession of graffiti implements without reasonable excuse), s 29 (being found on a property without reasonable excuse), s 30 (peeing or peering into a dwelling house without reasonable excuse) and s 36 (lighting fires without reasonable excuse).
[236] Bruce Robertson, Jeremy Finn *Adams on Criminal Law – Student Edition* (2015) CA202A.08 at 348.
[237] *Hamilton v Police* (2010) HC, Auckland, CRI 2010-404-233, per Keane J.

Section 81(1) of the Land Transport Act 1998 requires that, on conviction, the court must impose a disqualification from driving for six months "unless for special reasons relating to the offence" the court thinks fit to order otherwise. The special reasons advanced on behalf of the appellant was that she had driven on the morning in question because of cultural expectations to obey a request from an elderly relative to drive him to church and the unexpected family pressure to do so because of other relevant circumstances. Keane J noted that "the reason why Ms Hamilton drove was material … her cultural norms came into play on the instant … and constitute a relevant special reason".[238] The court accepted that these factors amounted to a "mitigating and extenuating circumstance", however, because the special reasons were not sufficient to excuse her completely from the mandatory minimum term of disqualification the suspension of her licence to drive was reduced from six months to three months. The approach adopted by Keane J in *Hamilton* would, I suggest, fall squarely within the methodology advocated by my cultural framework.

7.5.2 Provocation

Despite the reality that provocation as a partial defence to murder was repealed by s 4 of the Crimes (Provocation Repeal) Amendment Act 2009, I maintain it ought to be reinstated at least in terms of cases in which culture plays a significant part in the loss of self-control leading to a homicide.[239] Although numerous other arguments are raised in favour of the re-introduction of the partial defence of provocation,[240] I specifically argue that culture and cultural factors are relevant and significant to assessments of the elements of a provocation defence because culture influences how people perceive a particular set of circumstances and it cannot be assumed that every person is culturally oriented in a similar fashion and therefore will react to a specific situation in the same way.[241]

In the course of earlier discussion regarding the partial defence of provocation (Chapter Five, part 5.3.6), it became apparent that the various provocation cases fell into three categories. The first category of cases focus on the reasonableness or proportionality of the defendant's culturally derived response to provocation. The factor that is common to these cases is that the defendant has spontaneously responded to an unexpected provocation. The second group of cases involve culturally significant provocation arising from the victim's abusive conduct towards the defendant over a prolonged period of time. Common to these cases are the fact that the victim and perpetrator share the same culture and the defendant's violent response was provoked by the victim's breach of a cultural norm that is clearly understood by both parties. The third category of cases can be framed as the cases

[238] *Hamilton* (n 237) at [23].
[239] New Zealand Law Commission *The Partial Defence of Provocation – Report 98* (September 2007) at 51-58.
[240] Refer NZLC Report 98 (n 239). Also see Hannah Norton *Time to bring back the provocation defence* (1 July 2015) NZ Lawyer and Sasha Borissenko *Issues paper may awaken provocation debate* (12 November 2015).
[241] Refer discussion in Chapter Five, part 5.3.6.

where cultural factors have caused the defendant to act in a state of diminished responsibility. I examine here the application of my "relevance of culture" methodology to these categories of the partial defence of provocation.

(a) The Suddenness of Provocation - Proportionality and Reasonableness

The variability in perception of a provocative act or words and range of culturally-derived reactions to the suddenness of provocation, I suggest, can be illustrated by an analysis of the fact scenarios in *R v Lafaele*,[242] *R v Sagatea*,[243] *Mesui v R*,[244] and *Trujillo-Garcia v Rowland*.[245] Each of these cases involved a violent response by the defendant to what was considered, from a cultural perspective, to be a particularly offensive verbal insult.

In *Lafaele* the defendant claimed he felt deeply affronted by some particularly hurtful words spoken (in Sāmoan) by his girlfriend which prompted him to grab a knife and stab her, causing her death. The Court of Appeal accepted that the words used were particularly rude, "very dangerous", engendered a deep sense of anger to the point of provoking a fight and should not be uttered by Sāmoan women.[246] The focus of the appeal was an application to adduce further evidence by a lecturer in sociology and another person regarding the significance and meaning of the language used by the victim. The Court of Appeal ruled that the further evidence would add little to establish the Sāmoan characteristics of the appellant and his response to the language used by the victim. The approach by defence counsel here, I suggest, was defective as there was little to be gained by clarifying the meaning of the language used by the victim. Instead, the cultural expert should have been invited to focus on clarifying the cultural impacts of the victim's language on the appellant and whether the appellant harboured any special characteristics that would cause him to act more violently than the "ordinary reasonable person". It would also have assisted the appellant's defence if the witnesses were able to concentrate on the appellant's affiliations with his Sāmoan culture and the relevance of any cultural norms to his violent response to the provocation.

The case of *R v Mesui*, provides a slight departure to the above narrative in that, although the defences of provocation and self-defence were advanced during the trial, Mr Mesui was found guilty of manslaughter on an indictment of murder. The issue on appeal to the Court of Appeal was whether the trial judge was justified in ruling the opinion evidence of two well qualified experts who were to attest to the cultural reasons for Mr Mesui's violent response to verbal insults from the victims, was

[242] *R v Lafaele* (1987) 2 CRNZ 677 (CA).
[243] *R v Sagatea* 20 May 2010, HC Auckland, CRI 2009-092-17953.
[244] *Mesui v R* (n 22).
[245] *Trujillo-Garcia v Rowland* (n 38).
[246] *Lafaele* (n 242) at 679.

inadmissible. One of the experts (Dr Chaplow) was to testify regarding the "matters of fact concerning the build-up to the ultimate violence" and his conclusion that the appellant had become increasingly fearful of both victims. The other witness (Dr Foliaki) was an expert with "specialist knowledge and qualifications in relation to mental illness, alcohol misuse and gambling amongst Tongans and knowledge of Tongan people and culture". Although some aspects of Dr Foliaki's evidence was allowed by the trial judge, the totality of Dr Chaplow's expert evidence was ruled inadmissible on the basis that the intended evidence amounted to personal, non-medical judgment based on their assessment of the circumstances.[247] Although, the Court of Appeal affirmed the inadmissibility ruling by the trial judge, the consequence of the ruling, I suggest, is that the cultural factors remain relevant, but rather than going to the partial defence of provocation, the admitted cultural evidence will more likely have relevance in supporting the complete defence of self-defence. The focus, I suggest, must accordingly be on whether the cultural factors are relevant to Mr Mesui's assessment and perception of his circumstances, whether there was a cultural element to the threats of harm and whether the cultural factors influenced the reasonableness or proportionality of Mr Mesui's response to the perceived threat.

In *Sagatea*, the court accepted that a single punch causing the death of the victim had been provoked by a particularly offensive insult from a Sāmoan perspective. Although a death eventuated, the High Court in *Sagatea* ruled that, in light of the cultural and character information made available to the court, a sentence of home detention was appropriate to reflect the offender's culpability. Although *Sagatea* highlights that the response to a culturally significant insult must be proportional, the case of *Trujillo-Garcia* illustrates the other extreme where the court held that, even if was to be accepted that the verbal insult was particularly hurtful to a person of Mexican ethnicity, the response in shooting the victim, causing his death, was disproportionate to the nature of the provocation.

The difficulty for the defendants in *Lafaele* and *Sagatea* is that the claimed provocation arose from the use of language which the defendants contended were culturally offensive and so odious as to engender the loss of self-control leading to a violent and spontaneous response. An analysis of these cases in line with my framework, I suggest, would result in a similar result for *Sagatea* because the cultural factors relevant to Mr Sagatea's response to the provocation were adequately considered. Because the expert cultural evidence was not admitted for consideration by the jury in *Lafaele*, it is likely that a rehearing of Mr Lafaele's trial, where all of the cultural evidence clarifying Mr Lafaele's cultural connections and rationale for his response to the provocation is heard, may well engender a different result. By contrast, the factor that perhaps distinguishes the *Trujillo-Garcia* case is that,

[247] *Mesui* (n 21) at [4]-[6].

regardless of the nature and scope of any cultural evidence that could be adduced in his defence, the defendant's response to the verbal insult by shooting the victim was disproportionate.

(b) Cultural Norms and the Special Characteristics of the Defendant

Another line of cases where cultural factors were accepted by the court as relevant to the establishment of a defence of provocation are the "feagaiga" cases.[248] The essence of these cases is that they demonstrate the breaches of cultural norms by the victim and in turn highlight the culturally-derived responses to provocation that characteristically involve uncontrolled expressions of anger.

In the absence of a clear framework for dealing with culture, these cases highlight the variability of approaches by the courts and the inconsistencies in treatment of the cultural contentions. Further, the ad hoc approach by the various courts in dealing with culture have resulted in mis-interpretations and misunderstanding of the cultural contentions which, again, emphasise the need for a structured framework for dealing with culture. I examine the decisions in *R v Fate*,[249] *R v Suluape*,[250] *Uluakiola v R*,[251] and *Aiono v R*,[252] within the context of my framework to demonstrate how a structured methodology will promote uniformity of approach in dealing with culture and consistency in the determination of contentions as to culture.

On discovering that her husband had been having an affair with her elder sister, the appellant in *R v Fate* stabbed her husband several times, causing his death. In the course of the trial, expert cultural evidence was introduced regarding the impacts of Mrs Fate's Tuvaluan (from the Island of Nanumea) culture in explaining the deep shame she felt and that she was provoked into a spontaneous and violent response by the provocation. The verdict of not guilty to murder, but guilty of manslaughter, confirmed that the partial defence of provocation had been made out. I suggest that applying my cultural methodology to the facts of *Fate* would result in an acknowledgement of the partial defence of provocation on the basis of the cultural factors. It can be accepted that Mrs Fate was closely connected to her Tuvaluan culture; that the cultural factor involved here was the "fakavalevale" concept which explained the nature and intensity of her violent response to the provocation; and that Mrs Fate was provoked into reacting in an instinctive and extremely violent manner because of the influence of the cultural factors on her.

[248] Refer earlier discussion in Chapter Five, part 5.3.6 and Chapter Seven, part 7.2.4.
[249] *R v Fate* (n 25).
[250] *R v Suluape* (n 24).
[251] *Uluakiola* (CA) (n 20).
[252] *R v Aiono* (HC) (n 22); *Aiono v R* (CA) (n 147).

Although the facts of *Suluape* are analogous with those in *Fate* because elements of the feagaiga cultural norm were accepted as a motivating factor for the defendant's actions in striking her husband to the back of his head with an axe, causing his death;[253] the primary defence contention was that Mrs Suluape had suffered "chronic domestic abuse and humiliation" in her relationship with the victim and was therefore provoked into killing her husband because she suffered from "battered women's syndrome".[254] The Court of Appeal recognised, however, that although the focus of the defence was on battered women's syndrome, the expert witness did not address the "vital element that the appellant was a woman of a traditional culture, to whom much of the analysis in *R v Fate* is relevant".[255] As with *Fate*, an application of my cultural framework to the facts of *Suluape* suggest that the provocation defence could equally have been established if the focus was on the cultural factors rather than battered women's syndrome. As with Mrs Fate, Mrs Suluape could also rely on her close affiliations with her Sāmoan culture, her reliance on the feagaiga cultural norm to explain her heightened feelings of gross humiliation and hurt as a consequence of the sustained pattern of abusive and insulting conduct from her husband, and "the lack of realistic options available to her to do anything effective to relieve herself of what had become an intolerable burden".[256]

The fact scenario in *Uluakiola v R*, has many similarities with the cultural claims in *Fate* and *Suluape* however, Mr Uluakiola was convicted of murder because the jury rejected the partial defence of provocation. The defence contended that Mr Uluakiola's actions were provoked by his wife's domination and abuse of him for many years and denying him "any sense of self-worth". Further, she constantly abused him about being epileptic and uneducated. On the evening prior to killing his wife, Mr Uluakiola was told by his wife that their relationship was over, he was to have no further part in caring for their children and he was to find somewhere else to live.[257] Significant to the evidence to be considered in this case was that the trial judge ruled against Mr Uluakiola's Tongan ethnicity being treated as a special characteristic.[258] Mrs Uluakiola's behaviour, I argue, represented a considerable breach of her obligations under the Tongan cultural norm of faka'apa'apa which had the effect of significantly diminishing Mr Uluakiola's sense of worth and self-esteem. It may well be argued that the provocation in *Uluakiola* is comparable to that experienced by the defendants in *Fate* and *Suluape*, yet the jury verdict in *Uluakiola* suggests that there was insufficient provocation to reduce the conviction to manslaughter.

[253] *Suluape* (n 24) at [3], [4].
[254] *Suluape* (n 24) at [12], [15].
[255] *Suluape* (n 24) at [16].
[256] *Suluape* (n 24) at [18], [19].
[257] *R v Uluakiola* (2006) HC Auckland, CRI-2005-952-2580 at [13] to [15]. Also see *Uluakiola* (CA) (n 20) at [13] to [16].
[258] *Uluakiola* (CA) (n 20) at [15].

An analysis of the facts in *Uluakiola* within the context of my cultural framework would, I argue, affirm that the faka'apa'apa cultural norm that is the foundation of social responsibilities and behaviour between genders of Tongan ethnicity was a central factor, both to the effects of the abusive behaviour by Mrs Uluakiola and the spontaneous and violent response to such provocation by Mr Uluakiola. It may even be argued that the prolonged and pointed abuse from Mrs Uluakiola was of a greater degree than in *Fate* but perhaps comparable to the claims of battered women's syndrome in *Suluape*. It is accordingly difficult to reconcile how the degree of provocation in *Uluakiola* should be distinguished from that in either *Fate* or *Suluape*, yet the level of provocation was rejected by the jury and Mr Uluakiola was convicted of murder.

By way of contrast with the cases discussed above, another dimension to the relevance of cultural factors in the context of a provocation defence is provided by the case of *R v Aiono*. On being advised by his wife that she had been raped, Mr Aiono sought to "discuss" with the alleged perpetrator (a friend) his heinous treatment of Mrs Aiono while he was in Sāmoa on family business. In the course of the "discussion", a physical fight developed, and the victim was assaulted. The victim later died from his injuries. Mrs Aiono's statements regarding what she told her husband about her interactions with the victim was inconsistent in that she later admitted she was having an affair with the victim.

An analysis of the facts of *Aiono* in line with my relevance of culture methodology will require an inquiry as to whether the defendant acted in accordance with a valid cultural norm. I suggest that the feagaiga cultural norm is valid and arises from a viable culture; the defendant was closely affiliated with his Sāmoan culture and, in confronting the victim he had initially acted in accordance with his cultural norms. Accordingly it can be argued that, if it is accepted that Mr Aiono was responding to the provocation that the victim had raped his wife, then such actions fall squarely within the auspices of the feagaiga cultural norm that required the defendant to be especially protective of the safety and welfare of his wife. If the accepted facts are that Mr Aiono acted out of intensified cultural shame because of his wife's infidelity, then Mr Aiono is placed in the same position as in *Kimura*, *Chen*, *Fate* and *Suluape* where a conviction short of murder was found to be appropriate in comparable circumstances.

(c) Diminished Responsibility and Culturally-Derived Responses to Provocation

Diminished responsibility is a partial defence to murder in other jurisdictions,[259] but is not presently available in New Zealand. It was contended by the New Zealand Law Commission that the lack of a

[259] For example, in English law, s 2 of the Homicide Act 1957 (recently amended by s 52 of the Coroners and Justice Act 2009), allows a partial defence to murder of diminished responsibility where the defendant was "suffering from an abnormality of mental functioning".

diminished responsibility defence was, in part, addressed through the existence of the partial defence of provocation.[260] The repeal of the provocation defence in December 2009 means that there is no scope within the criminal law defences where mental impairments or diminished responsibility beyond the limitations of the insanity defence (under s 23 of the Crimes Act 1961) can be recognised.[261] However, Reed and Bohlander suggest that the language of diminished responsibility is well known to New Zealand judges and is frequently used to describe what is, in reality, a reduction in 'mental responsibility'.[262] For example in *R v Aston*, the Court of Appeal held that an accused's conviction for manslaughter, where there was evidence that he was mentally ill and had experienced some provocation, was 'in substance' manslaughter on grounds of diminished responsibility.[263] Because my focus is on the relevance of culture in criminal law, and no case in New Zealand has specifically dealt with the issue of cultural factors impacting the mental state of a defendant, I am bound to highlight here the United States cases of *People v Kimura*,[264] and *People v Chen*,[265] to demonstrate the significance of cultural factors to assessments of the culpability of offenders where he or she has been provoked by a significant breach of a cultural norm.

As illustrated earlier (part 7.3.1), shame is a powerful emotion that engenders culturally-derived responses that may be viewed as extreme in the circumstances. In the cases of *Kimura* and *Chen* it was contended that the infidelity of their respective spouses had not only provoked them to respond in ways that were culturally acceptable, but the provocation was so odious that it impaired their cognitive functioning.

On discovering her husband's infidelity, Mrs Kimura walked into the Pacific Ocean with her two children with the intention of not only committing suicide but also to cause the deaths of the children. Although attempts were made by strangers to save them from drowning, only Mrs Kimura survived. Mrs Kimura was charged with the murder of her two children. During the trial it was contended by the defence that Mrs Kimura had been provoked into complying with the Japanese cultural norm of oya-ko shinju which required Mrs Kimura address her shame by killing herself and the children. Considerable cultural evidence from both experts and members of the Japanese community was introduced to support the cultural contentions. The court accepted that Mrs Kimura had acted in compliance with the norms of her Japanese culture and that her mental state was diminished to such a

[260] NZLC report (n 239).
[261] The Sentencing Act 2002 allows for the consideration of provocation and mental impairment in sentencing, but I argue that this is an inadequate methodology for addressing the relevance and impacts of these factors on the overall culpability of the offender.
[262] Alan Reed, Michael Bohlander (eds.) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) at 282, 283.
[263] *R v Aston* [1989] 2 NZLR 166 per Cooke P. Also see *R v McCarthy* [1992] 2 NZLR 550 and *R v Rongonui* (2000) 17 CRNZ 310 (CA).
[264] *Kimura* (n 38).
[265] *Chen* (n 46).

state that she must have been suffering from temporary insanity when she attempted to kill herself and her children. Mrs Kimura was convicted of involuntary manslaughter and sentenced to 5 years' probation.

Similarly, Mr Chen fell into a fit of rage when he discovered that his wife was having an affair and killed her by striking her numerous blows with a hammer. Mr Chen was charged with murder. The defence for Mr Chen argued that Mr Chen had killed his wife because "cultural pressures had provoked him into an extreme state of diminished capacity". Considerable expert and cultural evidence was adduced in support of the contention that Mr Chen's actions were culturally appropriate and consistent with that of a Chinese man in similar circumstances. Mr Chen was convicted on a reduced charge of second-degree manslaughter and sentenced to 5 years' probation.

In both *Kimura* and *Chen*, the court accepted that the defendants had responded to the provocation of an unfaithful spouse in compliance with valid cultural norms and that they were so disordered in their thinking that their actions were undertaken during a period of diminished mental capacity. As noted earlier (part 7.3.1), it is difficult to reconcile these rulings because the reliance on a cultural norm as the motivating factor for their actions infers that both Mrs Kimura and Mr Chen would have acted with the full knowledge of the reasons for their actions and a clear appreciation of the consequences. Because both of these killings occurred in the United States, it is unclear whether the court was provided with evidence regarding the connections or disconnections by Mrs Kimura and Mr Chen with their traditional cultures. Clarification of this query will have been relevant to the issue of whether the defendants could justifiably be acting in accordance with the claimed cultural norm instead of, say, anger or jealousy that was not derived from a cultural norm.

Although the fact scenarios in both *Kimura* and *Chen*, if analysed within the elements of my framework will satisfy each of the inquiries regarding the relevance of culture to a defence of provocation, I suggest that the claims of diminished responsibility or mental impairment would be rejected by the New Zealand courts, not only because there is no partial defence of diminished responsibility in New Zealand but the facts of these cases fall outside the scope of the defence of insanity under s 23. I argue that what is required in these circumstances is a two stage analysis. First, there must be a clarification of the nature and seriousness of the provocation from a cultural perspective. I suggest that this will involve an explanation and examination of the accepted cultural responses to a breach of the cultural norm because a wilful killing may not be the only cultural option available to the provoked person. Second, there must be an examination of the "special characteristics" of the defendant that might suggest that he or she will react to provocation in a manner that is contrary to what is expected of the "ordinary reasonable person". As illustrated earlier,

this consideration is necessitated by the fact that not all people are culturally the same and a person's cultural orientation and connections with a particular culture cannot be assumed.

Summary

Culpability requires the consideration of all factors that impact a defendant's conduct. As I have illustrated in this chapter, culture is important to the question of criminality and does act, despite the apparent agnostic nature of the criminal law, to deal with individuals, on issues of culture, unequally.[266] Although culture is often accepted by the criminal courts to be a relevant factor in assessments of criminal liability, its application in the criminal law is ad hoc, inconsistent, and sporadic; due in large part to the fact that there are no clear guidelines for the introduction, interpretation and application of culture in criminal law.

The criminal law purports to be blind to the motivation of an individual in the formation of the mens rea of an offence. Similarly, morality is not an express requirement in establishing criminality despite the reality that sometimes what is absolutely moral is nevertheless criminal and what may be immoral may not be criminalised. Culture and cultural factors are both relevant and significant to the determination of criminal culpability because these factors impact the rationale and motivations for a defendant's actions or conduct. Culture is reflected in the reasons why a person might act in a culturally-influenced way. I have used the concepts of shame, honour, religion, and the defence of traditional morals to demonstrate how culture plays a part in the motivations of a defendant. I contend that culture is a relevant consideration in the context of assessing concepts that are significant within the criminal law, such as, reasonableness, consent, insanity, self-defence and colour of right.

Instead of promoting the creation of a specific and isolated "cultural defence" I have argued that culture is relevant to the elements of existing defences, rather than the development of a new cultural defence based on the recognition of cultural rights and the creation of new offences and defences. As argued, cultural factors not only provide an explanation of the motives for the defendant's actions but can operate to clarify the reasonableness and proportionality of criminal acts.

In this chapter I have discussed relevance on occasion of culture to the substantive notion of mens rea. At other times, culture will be relevant to specific and already established defences. Further, at other times, culture is and ought to be recognised as relevant to general notions of criminal liability such as reasonableness and proportionality. Of specific recommendation is my call for the return of the partial defence of provocation because an express recognition of culture in criminal law will promote the relevance of culture in substantiating concepts that are already recognised by the criminal law (such as

[266] I refer to earlier discussion in part 7.4.2 regarding the inconsistencies in the way the criminal law treats the relevance of motive to assessments of culpability. As illustrated in part 7.4.3, there are circumstances where culturally-derived motives can operate to support, aggravate or diminish the significance of a specified intent.

loss of self-control, special characteristics, uncontrolled anger and suddenness of provocation) but are concepts that are inadequately considered in the determination of culpability.

Ultimately, the framework of relevance I advance in this chapter provides a roadmap that can be applied to any factual situation, the application of which can determine the relevance or otherwise of culture to either the mens rea of an offence or the application of a defence.

Conclusion - Reflections on the Relevance of Culture in Criminal Law

The objective of my thesis is to provide a secure foundation for the need to define culture for the criminal law and to contribute to the development of a workable definition of culture and cultural factors for application in criminal law. A clear delineation of "culture" and "cultural factors", I contend, will not only address the cultural deficiencies that pervade the criminal law but will also promote the development of a methodology for more meaningful recognition of culture by Parliament and the criminal courts.

I demonstrated in Part One that an express recognition of culture in New Zealand's criminal law is needed for three principal reasons. First, the development of superdiversity is set to change the face of public policy in all respects and New Zealand's criminal law ought to be no exception. Second, a clear and express reference to the relevance and significance of culture in criminal law is needed to bring together the currently disparate elements of culture within Aotearoa New Zealand. Third, a definition of culture and cultural factors is essential because there are no clear principles or guidelines to address the cultural inconsistencies, deficiencies and contradictions that permeate New Zealand's criminal law. My central argument is that it is imperative that culture be expressly recognised in substantive criminal law to ensure consistency of approach and therefore fairness and equality of treatment across New Zealand's increasingly diverse population.

The exercise undertaken in Part One of my thesis, I suggest, naturally raises the query as to how and by what means the criminal law ought to recognise culture and cultural factors. In Part Four of my thesis (Chapter Seven), I respond to that query by arguing that culture is relevant to the mens rea (intent) of offences and to specific defences. My relevance argument is advanced in four stages. To aid the development of my contentions, I formulate a six phase "relevance of culture" framework for assessing the relevance of culture and cultural factors to offences and defences.

The first stage of my argument is that culture influences emotion and that criminal behaviour is ambiguously constructed around a variety of emotions that are complex in nature and scope. I contend that culture provides the structure, rules, guidelines and expectations that help us understand, interpret and express various emotions. Culture therefore operates to rationalise and explain why an individual has undertaken a particular course of conduct and these factors are manifested in the emotional responses of offenders to given situations.

Second, I link culturally-derived emotion to motive in the commission of criminal activity. I argue that culturally-loaded emotions are relevant to the mens rea element of criminal offences and use the

example of concepts such as honour, shame, fear, spirituality and the preservation of cultural norms to demonstrate the significance of emotion to motive.

Third, I tackle the traditional approach in criminal law of excluding the relevance of motive to assessments of criminal liability in arguing that culturally-derived motive is significant to the determination of mens rea through 'intention', but not other forms of mens rea. In support of this contention, I examined specific cultural considerations that impact the culpability of defendants, particularly where the recognition of motive in conjunction with the specified intent of an offence will provide a clearer and more precise assessment of overall culpability.

Fourth, I apply my relevance framework to the defences of self-defence, compulsion (necessity), consent, reasonable excuse and provocation to demonstrate the significance of culture in establishing the elements of a defence. To clearly distinguish the approach I have taken in promoting the relevance of culture in assessing the elements of criminal law defences, I have also undertaken a comparative analysis of the methodology advanced by my thesis in contrast with the "cultural defence" that is promoted by other commentators. As illustrated, I do not favour the creation of a "stand-alone" cultural defence but argue that the framework of relevance I advance in Chapter Seven provides a roadmap that can be applied to any factual situation, the application of which can determine the relevance or otherwise of culture to either the mens rea of an offence or the application of a defence.

Having established the basis for an express acknowledgement of culture in criminal law and also demonstrating that culture is relevant and significant to the determination of criminality and culpability, my definition of culture is developed solely for application in criminal law. My definition of culture is specifically for the purpose of identifying the cultural features and elements that demonstrate the claimed culture is viable. Further, the cultural factors that have induced the defendant's behaviour must be valid. It is significant that I limit my reference to ethnic and national cultural groupings, as this provides the clearest identifiable distinction between cultural groups taking into account the features that represent a particular culture and their significance to suspected criminal behaviour. Further, the reference to a "national culture" recognises the larger collective of cultures and ethnicities that exist within a country like New Zealand. A fundamental aspect of my definition of culture is that the defendant must have a close association with the claimed culture and the asserted cultural factors must have "induced" the defendant to act criminally.

In addressing the query as to how my definition of culture will advance the development of the criminal law, I suggest that there are four areas of the criminal law where a definition of culture will be significant. First, defining culture will facilitate the development of a framework for the

application of culture within criminal law.[1] Second, a definition of culture will allow the courts to address the deficiencies that have been highlighted regarding the need to "diversify" the "ordinary reasonable person" standard.[2] Third, a clearer understanding of the significance of culture in criminal law will enable the courts to develop processes for dealing with concerns regarding unconscious judicial bias and indirect discrimination. Fourth, a clear delineation of culture will promote the development of procedures in addressing the deficiencies in applying and interpreting cultural evidence. In this regard, I advocate the adoption of a process in line with the proposals made by the Supreme Court regarding "counter intuitive evidence" under s 25 of the Evidence Act 2006 but have been limited in application to offending of a sexual nature.[3] These are all areas of the criminal law that, I argue, harbour deficiencies in the application of culture and will require further research and development.

[1] In Chapter Seven, parts 7.1 and 7.4, I have suggested a culture defence framework that can be applied in the context of defences. This framework will require further research and development.
[2] Refer earlier discussion of the decision of *R v Tai* [1976] 1 NZLR 102 and *Uluakiola v R* (2006) CA123/06 regarding the standard of the ordinary "mixed New Zealander". Also see *Ah Chong v R* [2015] NZSC 83.
[3] Refer *DH (SC) 9/2014 v R* [2015] NZSC 35 and *Kohai v R* [2015] NZSC 36.

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