

# Public Perceptions of Migration as a Criminal Law Issue with a Special Focus on “Cultural Defenses”\*

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## Abstract

Immigration is conceived of as a primary law concern, especially one to be addressed through criminal law. Despite its descriptive accuracy of this view, criminalization of immigration has to be seen rather as putting in question the very governability of the Western states. The paper shows that in trying to tackle this global governance crisis at the domestic level, criminal law is utilized as expansion technique of authoritarian regulation, whereby aliens are implicitly considered as tentatively hostile outcast. Further, the paper shows that the proposal to introduce a system of “cultural defences” in criminal law as a tool of taking cultural attitudes of minorities’ members duly under consideration, cannot do. The reason is, the paper assumes, that, where such defences are accepted, this is so due to the similarity of the respective pleas to the stereotypes of the dominant culture itself. The paper concludes then, that the crucial issue is the need to reinvent ways for establishing a polity without social injustice.

## Keywords

Criminal Law, Cultural Defence, Immigration, Social Justice

## 1. Immigration Questioning Governance

Immigration is one of the main problems globalization faces. The abrupt encounter of cultures, the plight of the newcomers and the differing aspects of wrongfulness each culture generates, create a situation very difficult to be handled. In the so called “Western democracies” immigration flows are dealt with as a criminal law problem, despite symbolic evocations of welfare and human

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rights protection. It is well established that within the post-national era of “Empire” liberal virtues like “tolerance” appear in their very essence as forms of “governmentality” and not anymore as what liberal ideology would have us to believe (see respectively [Brown, 2008: Chapters 1, 4, 6-7](#)). Concerning immigration, one speaks therefore poignantly in using the term “*crimmigration*”. The criminalization does not occur explicitly, it is carried out rather implicitly, i.e. through the primacy of expulsion, whereby penal sanctions function in a subsidiary manner, that is when expulsion is for whatever reason hampered. Mass media play here a crucial role in mainstreaming the socially widespread “punitive” attitudes, provoked by the disturbance of normal civic life, which is brought about by mass concentration of wrecked people and ill-assimilation of alien cultural models into the majority culture. Noteworthy is that even countries with high levels of mildness in penal sanctioning and of reintegration as the aim of punishment for insiders, do imprison easier foreigners; neoliberal regimes like the British may paradoxically integrate immigrants more sufficiently into the labor market. Concerning the criminal law ideology, it is the so called “enemy law” or “enemy penology” which rationalizes imprisonment and exclusion of migrants. Mass media function here too as facilitating the digestion of such theories for the “lay people”. But besides political economy, globalization of punitive stances and exclusionary criminal policy models, it is rather the lack of robust sovereignty which is here at stake (on the nexus of marginalization and ethnicity within the “carceral” state, see especially [Wacquant, 2014: passim](#)). Immigration does indeed uncover a *crisis in governance in the West*, a need for reassurance for the insiders feeling threatened and an anxious craving for expressively reaffirming authority and border control. Of course, seeking to strengthen feelings of “belonging” among insiders in order that a minimum of ethnic unity be saved, is a totally precarious undertaking in the framework of a post-national world: making the alien an “other” has rather a spiraling effect, because it disseminates discrimination and undermines solidarity in societies already deeply segmented and morally bankrupt by an unhinged capitalism ([Barker, 2012: pp. 113-118](#); [Saad-Diniz, 2018: passim](#)). Here again, the post-national condition is what undergirds such developments. The more the nation-state tries to reassure its identity and robustness, the more its frailty is displayed. Authoritarianism is a rather vain attempt of over-compensation, that is. Eroded sovereignty is substituted by non-political forces featuring as profane “gods” (see again on this the brilliant analyses of [Brown, 2014: passim](#)). As Brown eloquently says:

“While weakening nation-state sovereigns yoke their fate and legitimacy to God, capital, that most desacralizing of forces, becomes God-like: almighty, limitless, and uncontrollable” (ibid, at p. 66).

## **2. The Domestic Repercussion: Criminal Law as Authoritarian Regulative Mechanism**

How can this international state of affairs be described at the domestic level? In

which transversal modes is this dystopia mirrored domestically? “Risk societies” become in the postmodern condition all the more thus disoriented, that criminal policy is instrumentalized as a remedy, which allegedly offers “reassurance” to persons feeling extremely vulnerable, insecure and unprotected (see as the “locus classicus” on this: Ramsay, 2012: *passim*; from a criminological viewpoint see also Williams, 2012: pp. 588-601; Jones, 2013: pp. 200-201). This is a situation where even inclusory multiculturalism is obsolete in being superseded by a “hyper cultural” condition, where identity and otherness become elusive, personal narratives are steadily gliding and shifting themselves and postmodern joyful play of identity change disappears (Young, 2007: *passim*, and especially at pp. 197 et seq.).

In trying to bridge the gap arising out of the symbolic inclusion of citizens and the real exclusion of alien non-citizens, countries like UK have tried to managerially deal with the immigration problem. Mass media undergird the managerial solution: focusing on it, they avoid taking sides on law-political or law-ethical issues like racism. Simultaneously they draw through publicity the added value of allegedly displaying shortcomings in governance and thus influence changes within the political system. David Garland and Jonathan Simon have already more than 15 years ago showed how the mechanics of punitivism work through establishing a “culture of control” and “governing through crime”. On top of that, the explosion of terrorism contributed to crucial equations: not only the limits between criminal and asylum seeker were blurred, also those between alien and terrorist became extremely porous (which unfortunately often proves true). Actuarial criminal justice features thus as the utmost the so called “Western democracies” can offer in the face of endangered public security. Thereby, the enormous harms and suffering of vulnerable people, who are tested, massively detained and “administered” as bare life, are overlooked as irrelevant. Actuarial justice is uncovered here as the flipside of populist punitivism, both working towards invigorating statehood and nation-based citizenship (Bosworth & Guild, 2008: *passim*). The racist outcome of this is then simultaneously enhanced and silenced, in that “society” gets acquainted with discrimination. As Bosworth and Guild correctly say:

“Familiar, too, is the discriminatory impact of immigration measures, for, as in the crime complex, those migrants subject to the most stringent controls have invariably been the poorer, the less skilled, the darker skinned” (ibid, at p. 711).

The experiences of foreigners in the West, who have been subjected to such administrative treatment, tell us that in fact it is not the case that harsh administration lets criminal law retreat; it is rather the *whole penal field that is being expanded*. Detention and deportation are not mere additions to a prison sentence; they are felt subjectively and are indeed the real penal sentence. So, the goal is how to “get the foreigners out”. Very illuminating has been in this regard the EU Prisoner Transfer Agreement (Framework Decision 2008/909/JHA), which countries like the US or Britain took as inspiration for signing bilateral

agreements aiming at returning aliens to countries of the global south, in order that they serve their sentence there (Bosworth, Franko, & Pickering, 2017: pp. 36-41). As Bosworth, Franko and Pickering notice:

“Administrative practices such as detention and deportation not only are *experienced* as punishment by those subjected to them [...], but also are *intended* as such. In so doing, they change the role and social purpose of penalty [...] Deportation is not auxiliary to the ‘main’ part of the process, the penal sentence; quite the opposite [...] Deportation, in other words, is not just a vital addition to a prison sentence, but can even be used as a substitute for a criminal conviction” (ibid, at pp. 39-40, emphasis in the original).

We have thus to do with an interplay among territory, penal treatment, sovereignty issues and geopolitics which has two consequences regarding criminal law: first, it transforms rehabilitation and social reintegration techniques into *bans of abjects*, as well as inwardly oriented policies (reserved for insiders) into outwardly oriented policies (when foreign non-citizens have to be ousted). Secondly, what matters seems to be not the offence that much, but rather *who the transgressor is*. We are faced here with a transformation of the criminal law of the deed into a *criminal law of the doer*. Electronic mass media are a helpful partner here; especially regarding ethno-religiously founded extremism and terrorism, they are enhancing again what mostly has been considered as beginning to fade, namely the lay punitivist stance towards people perceived as “existential enemies”. As it is correctly pointed out, the need to enhance nationhood and statehood is for the Western “democracies” so big, that hostility to the “other” supersedes obstacles like inclusiveness, parsimony and welfare orientation of the polity; the latter are reserved only to the insiders (Bosworth, Franko, & Pickering, 2017: 41 et seq.). One can trace here a general transformation of the liberal polity towards the formation of an “ethno-folk” body political, purported to silence class conflict and the openness and agonistic nature of democratic political process but not avoiding the reaction of marginalized subaltern, full of violence and hatred (Papacharalambous, 2015: pp. 237-240).

Especially what the immigration-related crimes reveal is the primacy given to regulatory offences. Failure to produce documents, deception of authorities as to asylum petitions etc. are victimless crimes through which utilitarian purposes are served in an unprincipled pragmatic manner, alien to the characteristics of genuine criminal law, which is thus rendered ancillary to administrative purposes, wholesale “prevention” policies and “symbolic” functions. Here also the media contributed significantly to move the legislator (in the UK and elsewhere) to “bring immigration under control” (Aliverti, 2012: passim and especially at 420 et seq.). As Aliverti points out:

“The decision to prosecute a particular ‘immigration wrong’ largely depends on the suitability of criminal prosecution for the purpose of immigration controls. The actual enforcement of these offences is bound by

practical considerations, mainly the impossibility of immediate removal” (ibid, at p. 424).

It comes thus out that the *practice* of dealing with immigration via the penal law system is all the more becoming an autonomous region for denizens, where the rights-safeguarding caveats of fairness, non-discrimination or proportionality (normally benefitting all citizens) are hardly respected (cf. the evocation of these caveats in favor of denizens too, in: Ashworth & Zedner, 2014: 227 et seq., especially at pp. 248-249). This practice is supported and consolidated through the media in their function of amplifying deviance, producing moral panics and impacting on respective lay and judicial attitudes (on this function of the media see generally Jones, 2013: pp. 52-70).

### 3. Shall “Cultural Defences” Be Accepted as a Solution?

But there is also the reverse side of the criminal law treatment of aliens, something the media do not occupy themselves with. It concerns the compulsive nature of aliens’ criminality, the fact, that is, that this criminality, examples of which are mainly misogynism, ethno-religious hatred against mainstreamers and insiders and superstition, is strongly culturally based (see e.g. Phillips, 2003: pp. 510-513). One speaks here about “*cultural offenses*”, i.e., according to Jeroen Van Broeck, acts by members of cultural minorities considered as crimes by the legal system of the dominant culture but nonetheless condoned, accepted or even endorsed within the minority culture (Van Broeck, 2001: passim; see also Phillips, 2003: p. 512, 520). The crucial question is then whereas this situation should lead or not to the acceptance of a separate set of exculpatory grounds for criminal conduct. It is submitted that the answer should be in the negative for the reasons exposed further on.

If one focuses on acculturation there is no place of a distinct doctrine of cultural defences, to begin with. In its absolute consequence this type of thinking ushers, however, in a form of “ethnocide”. Being for a long time under a foreign cultural pattern does not mean absorption of the native culture into the dominant one, especially when the cultural identity of the immigrant or the “dominated” is the only “wealth” one has. Setting time limits for the acceptance of a cultural defence is a normative judgment that might not be adequate in real life (Van Broeck, 2001: pp. 12-13 and footnote 41). That socio-economic factors do influence cultural identities is crucial. When social support is offered only within a minoritarian form of life, members of this minority feel compelled to follow respective patterns, even if they do not agree with them; they do not have a free choice. This shows that although cultural identities are flexible and not reified substances, they may become inflexible under such circumstances (Van Broeck, 2001: pp. 14-15). The question is in how far such acts deserve an excuse due to the impaired subjective imputation status of the doer, i.e. in how far a cultural defence is or should be available. Liberalist approaches affirm this. But there are also serious concerns against such solutions.

The offence for which a defence is vindicated must have been committed according to the cultural norms of the defendant: no defence is available due to the simple fact that the defendant belongs to a minority condoning in general such behavior (Van Broeck, 2001: pp. 16-17). This accordance might though prove very difficult to be met in many cases (Van Broeck, 2001: pp. 22-23). Experts' opinions at court (statements of anthropologists e.g.) are of great importance here (Van Broeck, 2001: p. 26). Further, the scope of the term "culture" should not be over-widened. Culture does not contain mere "sub-cultures", i.e. patterns of behavior, according to which the goals set by the dominant culture are sought through deviant modes of acting without thought being substituted through goals of another culture: mafia is not a different culture, that is. Considering things otherwise leads to the notion of culture being extremely widened and thus to the notion of cultural defence being conflated and eroded (Van Broeck, 2001: pp. 26-28).

Besides, the effects of cultural defence, if the latter is accepted, are not the same in all cases but varying enough. Whether formally to be included into defences based on traditional doctrine such as provocation, duress, insanity and the like, or not, cultural defences mean, when seen substantially, a crucial loss of accountability of the doer due to the compulsion exerted on him/her by the non-dominant culture. This loss is though not one-dimensional. It may be total or partial, impacting imputability or influencing only sentencing. Therefore, a case by case analysis at court is absolutely necessary. Crucial in such analysis is the "relevance" of a cultural defence, which is to be measured according to the degree of influence minoritarian cultural patterns have concretely exerted on the conduct under trial (Van Broeck, 2001: pp. 28-30).

The problem with the admissibility of such defences goes however still deeper. It is critically submitted that through them legal universalism gets undermined. Despite the significance of the parameter "culture" when criminal law is conceived of as a contextualized regulative system, the introduction of cultural defences is not self-obvious, especially when the system is openly militating for a certain aspect of normativity, e.g. promotion and protection of women's rights. Acceptance of admissibility of culturally based defences would then render the whole system self-contradictory (cf. Lacey, 2011: passim and at pp. 306-308). Further, claims of cultural defences might be opportunistic and, as to their content, usher in condoning and sustaining patriarchy and male power; collaterally, a kind of cultural-progressivist essentialism is also cultivated, whereby non-Western cultural patterns are considered as inferior. Important is what this essentialism makes invisible, i.e. the fact that the defences are accepted because of the similarity of the respective pleas to the stereotypes of the dominant culture itself. A "provoked" Western husband who kills his adulterous Western wife is not very different from a pious Muslim committing an analogous murder and not very different from a White racist murderer of his wife or girlfriend due to her having an affair with, say, a black man. The similarity of judicial treatment of these two

types of cases, that i.e. the loss of control of the male doer because of the “immorality” of the female victim is considered as possible defence, shows that above differences of culture there is a common element in the conducts tried: the provocative sexuality of women, a stereotype which might be put aside only if a dutiful, “wifely” female person is helplessly victimized (Phillips, 2003: pp. 513-517, 524-525, 527-528). In such a framework of interpretation of the judicial attitudes it is only very conclusive if one sees cultural defences as mere accentuations of a common misogynist pattern of perception, where the defendant belongs to a minoritarian cultural community (Phillips, 2003: p. 528). As Phillips very accurately says:

“[C]ultural evidence only works when it enables judges and juries to fit the defendant’s actions into a pattern already familiar through mainstream culture: that in the end, it is the sameness not the difference that matters. Invocations of culture are themselves pretty clearly gendered [...] It is when ‘culture’ echoes gender norms in the wider society, or gender practices in the law as a whole, that it is most likely to be recognised as an excuse” (ibid, at p. 529).

The topic is vast and has many vistas. Sometimes things display a more perplexed situation. A relatively recent overview of the Canadian jurisdiction shows e.g. that beside the abovementioned gendered outcome other trends are present as well: sometimes, on the one hand, women’s equality emerges out of the rejection of taking culture under consideration, a rejection inspired by liberal arguments; sometimes, on the other, taking culture under consideration ushers not in gendered biases but in a prioritization of a “colonialist” mindset before patriarchy (Dick, 2011: passim and especially at pp. 531 et seq.).

My preference would be that principally cultural defences not be allowed. Diversity may not trump minimal values structuring elementary social bonds. Insofar, I would propose, along the lines of an argument proposed by Kent Greenawalt, the alternative of exhausting all existing legal remedies such as mistakes of law, duress, provocation, when is deemed “reasonable” etc. What remains could be also dealt with as mitigating factor within sentencing (Greenawalt, 2008: passim and at 321).

Indeed: there is no reason whatsoever to consider “culture” as only exculpating: evidence that a tradition condones or obliges to kill might overcome the defendant’s claim the death had been caused accidentally and help establish proof of a murderous purpose (Greenawalt, 2008: p. 304, 306); or: an act of killing committed due to the doer’s belief that it constitutes an act of self-defence against murderous witchcraft carried out against him/her by the victim, can never be considered as justified if the doer’s mistake is totally “unreasonable” according to the notion of reality, which is according to the law is exclusively the one followed by the dominant culture (Greenawalt, 2008: pp. 310-311). Further, claims of duress or ignorance of the law (very often the case with refugees),

might be admissible, but they do not constitute a specifically autonomous and new kind of defence; they are examples of already valid defences in the law (Greenawalt, 2008: pp. 311-314). Here is also the practical problem of “judging” itself: how can it be justified that “culture” has priority to be given attention aiming at leniency, whereas other causes of compulsion (like parental abuse, growing up in a gang, predisposition to violence etc.) have not (which remains as a dilemma, even if a difference according to the above said between cultures and gangs is accepted)? Up to how far the interrogation of the court has to reach as to the definition of the contours and the content of a minority culture, of what “counts” as such a culture? How are to be judged cases where some members of the minority culture obey the cultural “rules”, obligations or permissions, whereas others do not, i.e. why the defendant has to be judged according to what he/she obeyed to and not to what he/she could have denied or overcome? (Greenawalt, 2008: pp. 314-317). Latter point shows that “cultural defences” are undermining the non-ambiguity of the reasons for excuse: does the killing of the adulterous wife out of religious passion mean lack of capacity/fair opportunity to conform to the law, an exceptional deviation from a supposedly “good character” of the accused, or rather a blatant disregard of such opportunities and the expression of the real character of the murderer? (cf. as to these axes concerning excuses see indicatively Wilson, 2014: pp. 195-196).

It is, of course, true that generally religious minorities are favorably treated by the law. Greenawalt thinks that an eventual extension of this treatment also to nonreligious minorities is not recommendable when fundamental rights of possible victims might be endangered, (such as of women growing up within such a nonreligious culture), the protection of which can reasonably be presented as lying with a compelling public interest. He finally restricts a possible extension of this sort only to law branches other than the criminal law (Greenawalt, 2008: pp. 319-320). However, one may go one step further and suggest the other way around, i.e. that also religious minorities be subjected to law features as they are in force, instead of being permitted to indulge in privileges allowing them to be exempted from legal obligations. Compensating an Adventist who did not work in Saturdays, allowing Amish families to withdraw their children from school and the like, might still not matter for the criminal law (see on these examples Greenawalt, 2008: pp. 318-319), a father letting his child dying in order to avoid blood transmission or forcing her daughter to undergo “circumcision” or get married when she is under-aged, do matter, even when dictated by the “rules” of a religious group. “Compelling public interest” could here help of course but this is not that much sure in the face of the vagueness of legal interpretation. As I have elsewhere already submitted (see Papacharalambous, 2016: passim and especially at pp.194-198), re-privatizing churches and religions so that their members have no particular say concerning penal legislation it is a much clearer and more honest solution: it conforms with the churches/state separation, constitutive to secularized republicanism and relaxes

the judge from interpretive burdens caused by the intrusion of extra-legal notions into his/her work.

This does not run contrary to an argument brought recently forth by Erin Kelly, suggesting that criminal wrong and moral blame be distinguished and criminal law takes under due consideration hardships the wrongdoer has faced with the result that he/she could not comply with the law. Kelly submits that the criminal law system should thus display leniency where an expectation for lawful conduct cannot reasonably be met and empathy and compassion are in place instead of reducing criminal conduct to ascription of its blameworthiness (Kelly, 2018: Chapters 1-5). The rejection of cultural defences does not run contrary to this assessment of things insofar as the argument points to something different, more fundamental and indeed crucial: the *utmost lack of legitimacy of a polity deemed democratic*, but one which in reality is stripped of social rights, devastated by neoliberal economics ruining the unprivileged and structurally marginalizing wide social strata. By incarcerating and stigmatizing the already through racism and class-based exclusion deprived, such polity *without social justice* merely multiplies the social evil it produces. This is so, because then no invocation of abstract legal norms combined with moral rigor can be a disincentive to someone who by committing a crime the sole thing which can lose will be only the sufferings of a totally miserable life (Kelly, 2018: Chapter 6). If a polity of “civic justice”, as Kelly names it, i.e. a polity without distributive injustice, socioeconomic inequality and racism, is to replace the current state of affairs, then such polity can very well live without recourse to “cultural defences”, because it will have solved a fundamental issue reaching, as Kelly correctly says, beyond the limited logic of any criminal law system (see Kelly, 2018: 178 et seq., especially at p. 185).

#### 4. Conclusory Remarks

Social disorders caused by massive and uncontrolled immigration are dealt with globally through the “cimmigration” model, which is symptomatic of a lack of governance in “Western democracies”. Even at the domestic level the trend is resilient and appears in the form of prioritization of exclusion-expulsion, which is presented as “criminal law”. The factual expansion of punitivity is undergirded through the formation of public perceptions of immigration through mass media. Trying to come to terms with the problem through installing “cultural defences” within the criminal system is, however, inappropriate in so far, as, despite sporadic benefits for the accused aliens it may produce, it harms normative cohesion of criminal law, it reproduces rather patriarchal prejudice and remains redundant where proven traditional exculpatory grounds can more or less still deliver, “Cimmigration” thus uncovers that the problem lies elsewhere: the lack of a socially just polity and of a legal edifice in accordance with such a policy.

#### Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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