JUDICIAL COLONISATION: THE IMPACT OF JUDICIAL CULTURAL BACKGROUND AND THE TREATMENT OF SELF-DEFENCE CLAIMS BY VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE

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In criminal law, the "reasonable person" test is presented and widely accepted as an objective standard yet its application by judges has failed to incorporate cultural considerations for defendants. This paper examines the judicial application of the defence of self-defence in three cases: R v Wang*,* Chhay v R*, and* R v Zhou*. These cases demonstrate how judicial socio-economic status, cultural competency and public perception impact on the application of the self-defence defence to East and Southeast Asian defendants. This paper explores the need for judicial cultural competency in developing the common law of New Zealand. This has ramifications for the fulfilment of New Zealand's international obligations under the International Covenant on Civil and Political Rights. The paper concludes with recommendations for a more culturally attuned legal profession and judiciary.*

Dans l'absolu, on conçoit aisément que ce qu'une personne considèrera comme un acte "raisonnable" pourra à l'inverse apparaitre "déraisonnable" pour un tiers. Dans ces circonstances, pour le juriste de la common law, le recours au critère dit 'de la personne raisonnable' apparait comme une grille d'analyse objective de la nature d'un acte ou d'une situation donnée. Ce critère a vocation à s'appliquer, dans de nombreux domaines du droit. Le droit pénal néo-zélandais n'échappe pas à la règle et ce plus particulièrement lorsque les victimes de violence familiale justifient la commission d'un homicide par la notion de légitime défense prévue a l'article 48

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*du Crimes Act 1961. Si la mise en œuvre de ce critère nécessite pour le juge de ne pas faire intervenir ses préférences personnelles dans la prise de décision, l'auteur prenant appui sur trois décisions de justice (*R v Wang*,* Chhay v R *et* R v Zhou*) s'attache à démontrer les limites de l''exercice notamment lorsque l'environnement culturel peut expliquer le contexte de la commission d'un acte répréhensible ou non au regard du droit pénal néo-zélandais.*

Pour l'auteur, ces trois décisions démontrent qu'en Nouvelle-Zélande le statut socio-économique des magistrats, leur connaissance d'un tissu culturel particulier ou encore le sentiment général du public, influent sur la mise en oeuvre du critère dit 'de la personne raisonnable' lorsque les accusés sont d'origine de l'Asie de l'Est et du Sud-Est.

L'auteur propose aux lecteurs quelques pistes de réflexions pour que les juges néo-zélandais intègrent dans la mise en œuvre du critère dit 'de la personne raisonnable' , la composante culturelle d'un acte ou d'une situation données, ce qui de surcroit permettrait à la Nouvelle-Zélande de se conformer aux dispositions du Pacte international relatif aux droits civils et politiques (International Covenant on Civil and Political Rights) du 16 décembre 1966.

I INTRODUCTION

Judges are influenced by their upbringing and cultural backgrounds when approaching complex cases in criminal law. Most judges in New Zealand are Pākehā males[1] while victims of abusive relationships are often non-Pākehā women, and those who kill are often of an ethnic minority background.[2] This results in double-layered systemic oppression for ethnic minorities and women. It is also problematic as judges utilise "English" common law when applying "objective" tests.

Judicial colonisation is the term used to characterise the issues discussed in this paper. It describes the courts applying English common law norms and expectations to ethnic groups in culturally inappropriate ways. This can be an issue when assessing claims of self-defence under s 48 of the Crimes Act 1961 which allows some judicial discretion. Failing to give appropriate weight to alternative cultural perspectives potentially denies the right to a fair trial, and impacts on New Zealand's

1 The Office of the Chief Justice "Annual Report 1 Jan 2020 to 31 December 2021" <www.courtsofnz.govt.nz/assets/7-Publications/2-Reports/20220304-Annual-Report.pdf> at 14–16.

2 Ministry of Justice "New Zealand Crime and Victims Survey 2018/19" <www.justice.govt.nz/assets/NZCVS-Y2-core-report-v1.1-for-release.pdf> at 3–5.

duty to uphold the rule of law and honour its obligations under the International Covenant on Civil and Political Rights.[3]

"Battered Woman Syndrome" has traditionally been used to describe a set of dynamics in an abusive relationship. However, its reference to being a mental health phenomenon is problematic considering abusive relationships are caused by the actions of abusive partners.[4] Accordingly, in this paper, the Battered Relationships Concept (BRC) is used instead. BRC describes defendants who live in relationships dominated by long-term cycles of violence, threats, loving contrition and unleashed aggression, and who ultimately take their safety into their own hands by attacking their abuser in order to escape.[5]

This paper explores three cases: *R v Wang, Chhay v R* and *R v Zhou,* where wives defended charges for killing, or attempting to kill, their abusive husbands. The argument advanced here is that the courts displayed a lack of cultural competence in interpreting self-defence – in New Zealand under s 48 of the Crimes Act – by preferring a test of imminence over inevitability. The judges drew on their own experiences when they applied the "reasonable person" test to the defendants and utilised a distinctly English common law view of 'reasonable', despite the defendants being of East and Southeast Asian ethnicity. This was a form of judicial colonisation. Applying the "reasonable person" test without discussion of the cultural circumstances of these three women resulted in the objective test being applied improperly.[6]

II JUDICIAL SOCIO-ECONOMIC BACKGROUND

It is important to understand the role and influence of judges in dealing with defendants from minority ethnic backgrounds. Judicial interpretation of common law and statute is coloured by the judge's view of the world in reaching an outcome,

3 Such as the obligations under the International Covenant on Civil and Political Rights (ICCPR) 1976, arts 2(1) and 6(1) to respect and ensure all individuals have their rights recognised without distinction of any kind and have the right to life.

4 Law Commission Some Criminal Defences with Particular Reference to Battered Defendants (NZLC, R73, 2001) at [12]–[13].

5 Bess Rothenberg "'We Don't Have Time for Social Change' Cultural Compromise and the Battered Woman Syndrome" (2003) 17 Gender and Society 771 at 776–777. I note that while battered persons may suffer the same elements as BRC, ethnic women are likely to be further disadvantaged by not being connected to support networks that may be able to assist; this may be due to language barriers and other circumstances. This distinguishes them from a Pākehā woman who may know how to access and use – or their friends and family who may be familiar with – support groups and organisations who can assist. This may be due to language barriers and other circumstances.

6 See *Peter Hugh McGregor Ellis v The King* [2022] NZSC 114 at [123]-[125] per Glazebrook J. Her Honour notes the necessity of modifying court methodologies to evidence for each defendant as a matter of accessibility of justice.

positively or negatively. Yet, cases often miss the lived experiences of minority groups when a judicial discretion is applied without cultural competency. There are two relevant matters of concern: 'judicial activism' and impartiality.

Despite the ability of the judiciary to craft the New Zealand common law, it has also been described as 'most reluctant' to do so.[7] Judges are traditionally reluctant to be thought of as activists, however when the judiciary decides to lead from the front, its influence is clear.[8]

There can be morally difficult outcomes as judges may often operate in a monocultural bubble. The view of judges being neutral is misconceived. The judicial role requires impartiality and independence, not neutrality.[9] Yet, judges are not fool proof.

For example, in *R v Brown*, the Lords disagreed on what was "moral" in disallowing the defence of consent in relation to sadomasochistic sexual acts between men.[10] The majority in Lord Templeman's judgment held "pleasure from inflicting pain is evil" and therefore the defence of consent was not available.[11]

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7 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 11. See H Woolf, J Jowell and C Donnelly (eds) *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) for the effect of transnational judicial conversations. *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 for judicial approaches to inconsistency. See also *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 484 and *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 158 for judicial approaches to interpreting Parliamentary sovereignty (rather than simply applying it).

8 Its influence is seen best in the judicial shift from treating te Tiriti as a "simple nullity" to spearheading Treaty principles and active partnership. For example, in the criminal justice system, Te Ao Mārama was initiated to ensure anyone could seek justice, feel heard and understood. Chief Judge Taumaunu aimed to develop a solutions-based court within the criminal jurisdiction to highlight kaupapa Māori approaches and to focus on the underlying causes of crime. These initiatives are examples of judicial activism in response to the need to address the over-representation of Māori in the criminal justice system. (See *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC); *New Zealand Māori Council v Attorney-General (Lands case)* [1987] 1 NZLR 641, (1987) 6 NZAR 353; David Williams *Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland University Press, Auckland, 2013) at 167–168; Heemi Taumaunu "Transformative Te Ao Mārama Model Announced for District Court" (11 Nov 2020) District Courts www.districtcourts.govt.nz; Heemi Taumaunu, Chief District Court Judge "Te Ao Mārama Model" (Norris Ward McKinnon Annual Lecture 2020, University of Waikato, Hamilton, 11 Nov 2020)).

9 JAG Griffith *The Politics of the Judiciary* (4th ed, Fontana Press, Glasgow, 1991) at 30–32.

10 *R v Brown* [1994] 1 AC 212; [1993] 2 All ER 75 (HL).

11 *R v Brown* [1994] 1 AC 212; [1993] 2 All ER 75 (HL) at 84 per Lord Templeton.

Conversely, Lord Mustill did not believe moral repugnance was enough to disallow a defence of consent.[12]

The case suggests how a judge's approach to interpretation is coloured by their views of how law *should* be applied, suggesting it is not an "objective" exercise, but rather led by judges who try to reach their view of a "just outcome". This inevitably introduces a judge's lived experiences and circumstances into their adjudicatory function.

The academic literature suggests three factors influence a judge: socio-economic background, cultural experiences and public perception.

The first element that judges draw their perspectives from is their upbringing and personal experiences. Winkelmann CJ and academic discussion in comparable jurisdictions agree: the legal profession and judiciary disproportionately come from "affluent families, high decile schools, and a lack of broader legal experience."[13] This results in systemic privilege being given to certain individuals who are then selected to join the Bench.[14]

Elitism and detachment from the "ordinary" person means courts "operationalised systemic advantages for certain people."[15] By bringing this specific background to the Bench, judges bring a "skewed" approach to the world in adjudicating disputes.[16]

In the United Kingdom the Commission for Judicial Appointments noted in 2005 that future judicial appointments would likely be more diverse as candidates – men and women – from the black, Asian, and minority ethnic (BAME) communities fed through the legal profession.[17] Griffith's 1991 study found the perception of judges

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12 *R v Brown* [1994] 1 AC 212; [1993] 2 All ER 75 (HL) at 116–117 per Lord Mustill.

13 Marcus Schulzke and Amanda Cortney Caroll "Culture and the Court: The Judiciary as an Arbiter of Cultural Disputes in the USA" (2014) 28 Cultural Studies 1078 at 1089–1091. See also Helen Winkelmann, Chief Justice of New Zealand "What right do we have? Securing Judicial Legitimacy in Changing Times" (The Dame Silvia Cartwright Address, Northern Club, Auckland, 17 Oct 2019) and Mike White "Diversity Badly Lacking among New Zealand's Judges" (4 October 2020) Stuff <www.stuff.co.nz/national/crime/>.

14 Judge Lummis recently acknowledged her white privilege and the need to have real exposure to other cultures and their experiences, despite not being from a wealthy background herself. See Jenni McManus "Transitioning to the Bench: Two Judges' Stories" (2021) 22 LawNews ADLS 6 at 6–7.

15 Mark S Hurwitz and Drew Noble Lanier "Judicial diversity in federal courts: a historical and empirical exploration" (2012) 96 Judicature 76 at 77–79.

16 Mark S Hurwitz and Drew Noble Lanier "Judicial diversity in federal courts: a historical and empirical exploration" (2012) 96 Judicature 76 at 77–79.

17 Dermot Feenan "Women Judges: Gendering Judging, Justifying Diversity" (2008) 35 Journal of Law and Society 490 at 517–519. See also Cheryl Thomas "Judicial Diversity in the United

being from "the most privileged in Britain from elite backgrounds" has not shifted.[18] Lieven noted in 2017 the progress of senior judicial appointments remained "stagnant" with structural barriers for BAME who were "less privileged", "did not have access to elite opportunities" and because "diversity was seen as incompatible" with merit based appointments.[19]

The Australian situation is analogous to that of the United Kingdom.[20] Between 1903-2018, the judicial makeup was "male, white, Christian, from upper-middle class backgrounds",[21] and "educationally and ethnically homogeneous".[22] This led to criticisms of the Australian judiciary as not adequately representing the community it served.[23]

These findings suggest the judiciary in other jurisdictions is still an 'elite old boys' club'. As Lieven noted, it would be like having a Supreme Court composed of 12 property lawyers – it would be poorly equipped to deal with criminal matters. The same could be said about the wisdom of judicial judgments which did not reflect the experiences of the public.[24]

Thus, judicial diversity appears to be a common need across many jurisdictions.

III JUDICIAL CULTURAL COMPETENCY

Cultural experience also influences a judge's perspective of the law.

Kingdom and Other Jurisdictions" (Nov 2005) Commission for Judicial Appointments <www.ucl.ac.uk/>.

18 JAG Griffith *The Politics of the Judiciary* (4th ed, Fontana Press, Glasgow, 1991) at 30–35. See also C Neal Tate "Paths to the Bench in Britain" (1975) 28 Western Political Quarterly 108, and DN Pritt *The Autobiography of DN PRITT: From Right to Left* (Larence and Wishart, London, 1965) at 142.

19 Nathalie Lieven "Increasing Judicial Diversity" (April 2017) Justice <justice.org.uk/> at [1.17]–[1.20].

20 Brian Opeskin "Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary" in Gabrielle Appleby and Andrew Lynch *The Judge, The Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, Cambridge, 2021).

21 Eddy Neumann *The High Court of Australia: A Collective Portrait, 1903–1973* (2nd ed, University of Sydney Press, Sydney, 1973) at 105–106.

22 Andrew Goldsmith "A Profile of the Federal Judiciary" in Brian Opeskin and Fiona Wheeler *The Australian Federal Judicial System* (Melbourne University Press, Melbourne, 2000) at 397.

23 Francesca Bartlett and Heather Douglas "Benchmarking a Supreme Court and Federal Court Judge in Australia" (2018) 8 Oñati Socio-Legal Series 1355 at 1358.

24 Nathalie Lieven "Increasing Judicial Diversity" (April 2017) Justice <justice.org.uk/> at [2.6].

The courts have cautiously become more attuned to tikanga and to te ao Māori despite being criticised for paying 'lip-service' to the concepts.[25] For example, the *Lands* case handed down the good faith principles for the Māori-Crown relationship and is the foundation of modern te Tiriti jurisprudence.[26] This was a positive step for New Zealand's common law and it demonstrates the effect a court can have in being more inclusive by accepting alternative views of the law.

Cultural competency issues arise for other minority groups who also make up a sizable proportion of the population, including those from Asia. There is a systemic failure by the courts to tackle Asian cultural views of law – this can be seen by the limited cultural discussion about Asian crime and case law. East and Southeast Asian cultural views are unique perspectives that must be considered to understand the whole person when looking at criminal culpability. This is especially important when Asian New Zealanders are expected to be 26 percent of the population by 2043.[27] In light of their sizable population and the need to uphold the rule of law, the courts must evolve to better acknowledge and give effect to New Zealand's bicultural history and multicultural reality.[28]

In the battered relationship context for instance, English common law attitudes towards family responsibilities and the internalising of personal issues do not align with East and Southeast Asian attitudes. This fact complicates the application of law in relation to Asian New Zealand families.[29]

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25 Jacinta Ruru "A Failing Modern Jurisprudence" in Mark Hickford and Carwyn Jones *Indigenous Peoples and the State* (Routledge, London, 2018) at 131. See Carwyn Jones "Māori and State Visions of Law and Peace" in the same book at 23.

26 *New Zealand Maori Council v Attorney-General (Lands case)* [1987] 1 NZLR 641 at 661 referring to the Treaty of Waitangi Act 1975. See Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 51, and Natalie Coates "Future Contexts for Treaty Interpretation" in Mark Hickford and Carwyn Jones *Indigenous Peoples and the State* (Routledge, London, 2018).

27 Hamish Slack "Population projected to become more ethnically diverse" (28 May 2021) StatsNZ <www.stats.govt.nz> stating 770,600 people as of 2018.

28 Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity,* Te Taumata Tuatahi (Wai 262, 2011) at 16. See also Joe Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1.

29 Kwok Chan *Chinese Identities, Ethnicity and Cosmopolitanism* (Routledge New York, London, 2015) at 13–16. See also Jie Zhong and others "Shame, Personality and Social Anxiety Symptoms in Chinese and American Nonclinical Samples" (2008) 25 Depression and Anxiety 449 at 449–460.

The clash between different cultural values can be seen in the "reasonable person" test.[30] Scholars have suggested this "reasonable person" seeks not to harm others and acts lawfully.[31] This is unhelpful. Asking what a reasonable person in the shoes of the defendant would have done is too simplistic. Is this a person from an English or Asian upbringing? Who is or is not battered? Do values exist concerning keeping familial disputes internal, or finding support externally? Attempting to classify a "reasonable" person reveals more qualifications. Addressing them requires a Bench to show cultural understanding beyond its experience of privilege and of strict statutory or case law interpretations. A more diverse Bench would be better placed to deal with issues of specific cultural importance within the criminal law.[32]

The most important skill a culturally competent judge would bring is an understanding of "things parties know, but cannot articulate or tell".[33] Judge Sellars acknowledged this stating her unique upbringing as a Māori, European and Vietnamese person meant she could bring a nuanced understanding to her role as a judge.[34] Recently, judicial workshops have turned towards learning about Asian minority groups, but more work is needed.

American scholars have noted that while many cases are decided on factual and legal merit, a small number of "very hard" cases are decided using the personal views of judges.[35] These types of cases often include racial and other intersectional overlaps with law. In these circumstances, a judge who is a person of colour may be better equipped to bring a nuanced understanding to the criminal process from their own experience. This is as opposed to a Pākehā judge who would likely overlook cultural considerations in determining a question of fact or law.[36]

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30 Jeremy Horder "Review: Can the Law do Without the Reasonable Person?" (2005) 55 University of Toronto LJ 253 at 264–265.

31 Mayo Moran Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard (Oxford University Press, Oxford, 2003) at 131–135.

32 George Morrison "Judicial Appointments in New Zealand: An incremental Approach to Reform" (LLB(Hons) Dissertation, Victoria University of Wellington, 2017). In other areas, see *Z v F* HC Auckland CIV-2010-404-001424, 10 December 2010. This family law case dealt with traditional Chinese views of marriage and its lack of conformity to English views of de facto relationships.

33 Rachel J Cahill-O'Callaghan "Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity (2014) 35 Legal Studies 1.

34 Jenni McManus "Transitioning to the Bench: Two Judges' Stories" (2021) 22 LawNews ADLS 6 at 7.

35 Harry Edwards "Race and the Judiciary" (2002) 20 Yale Law & Policy Review 325 at 325.

36 Harry Edwards "Race and the Judiciary" (2002) 20 Yale Law & Policy Review 325 at 326.

A more culturally competent bench means the promotion of justice that is empathetic to the many ethnic communities and allows for a diversity of legal thought in the developing of precedent.[37] These factors point to the importance of courts being diverse at the intersection of societal biases and power.[38]

IV ROLE OF PUBLIC PERCEPTION IN JUDICIAL WORK

The third area judges draw their perspectives from is public perception of their work. Most importantly, for justice to be "seen and felt" requires the citizenry to see justice operationalised through the courts.[39] This suggests that public perception of the judiciary's being procedurally fair is more important than the substantive judgments.[40]

In assessing whether the courts are seen to be "working", scholars have considered a range of factors. They include ensuring cases are adjudicated fairly with motives being brought out into the light, parties being treated ethically and with respect for their unique circumstances,[41] and that there are reasonable opportunities to present their case and be heard adequately.[42]

Discussion of "unique circumstances" and "being heard adequately" or "adjudicated fairly" all suggest the need to ensure defendants' cultural circumstances are appropriately considered. If minority populations of Aotearoa feel their circumstances are not being understood then there is a failure to include them in the criminal justice system. Crime occurs in any community and taking more effective and understanding responses to crime is a benefit for all. These steps include incorporating community ideas of justice and fairness into the law and including cultural circumstances that may be relevant to criminal conduct.[43] This means that

37 Harry Edwards "Race and the Judiciary" (2002) 20 Yale Law & Policy Review 325 at 328–330.

38 Christina L Boyd and Adam G Rutkowski "Judicial Behaviour in Disability Cases: Do Judge Sex and Race Matter?" (2020) 8 Politics, Groups and Identities 834.

39 Tom R Tyler "What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 Law & Society Review 103.

40 EA Lind and Tom R Tyler *The Social Psychology of Procedural Justice* (Plenum, New York, 1988).

41 Tom R Tyler and R Folder "Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters" (1980) 1 Basic and Applied Social Psychology 281. Also see RE Lane *Procedural Justice: How One is Treated vs What One Gets* (Unpublished, Department of Political Science, Yale University, Connecticut, 1986).

42 RJ Bies and DL Shapiro "Procedural Fairness Judgments: The Influence of Causal Accounts" (1987) 1 Social Justice Review 199.

43 AN Norris and Joseph Billings "Colorblind ideology, mass incarceration, and controlling racial images" (2016) 15 Journal of Ethnicity in Criminal Justice 78.

the judiciary must be more empathetic and understanding of the different cultural perspectives that apply in order to maintain the public perception that justice is being fairly applied.

For example, discussion in the United Kingdom notes that extrajudicial comments that are "tone-deaf" often lead to a public perception of elitist detachment. Judge Argyle questioned whether immigration would allow for "law and order to exist in the United Kingdom";[44] Judge Cassel sentenced a husband to probation for indecently assaulting his child because his wife lacked a "sexual appetite" while pregnant, causing "considerable problems for a healthy young husband".[45] Both examples would cause angst for people of immigrant backgrounds or victims of sexual assault, leading them to feel disenfranchised.

Legal commentary in New Zealand also supports a need to uphold a positive public perception of the court's work. Doogue J (while Chief District Court Judge) stated that achieving transformative change for defendants in criminal law requires that vulnerable ethnic communities have confidence in the court.[46] Winkelmann CJ reached the same conclusion stating there was a genuine problem for the superior courts if there was only one judge of Asian descent. She noted that while New Zealand has done well on the gender split in the courts, ethnicity representation is poor with 76 percent of the District Court Judges being European with only two Asians on the Bench.[47] Fairness in the law means incorporating cultural thinking, understanding and attitudes from minority groups to ensure they are and feel understood.[48]

To be successful as a dispenser of justice and to have legitimacy and authority as the adjudicatory branch of Government, courts require community buy-in. The common law evolves slowly, but it is problematic if it disenfranchises population groups who are affected by the law. New Zealand courts have increased their gender

44 JAG Griffith *The Politics of the Judiciary* (4th ed, Fontana Press, Glasgow, 1991) at 37–38.

45 JAG Griffith *The Politics of the Judiciary* (4th ed, Fontana Press, Glasgow, 1991) at 38.

46 Jan-Marie Doogue "Diversity Central to Public Confidence in the Court" (2018) 924 LawTalk 78 <www.districtcourts.govt.nz/reports-publications-and-statistics/>.

47 Helen Winkelmann, Chief Justice of New Zealand "What right do we have? Securing Judicial Legitimacy in Changing Times" (The Dame Silvia Cartwright Address, Northern Club, Auckland, 17 Oct 2019). See also Mike White "Diversity Badly Lacking among New Zealand's Judges" (4 October 2020) Stuff <www.stuff.co.nz/national/crime/>.

48 "Diversity on the Bench" [2020] NZLJ 311 <advance.lexis.com>.

representation, but not nearly to the same degree in its ethnic makeup.[49] The late Ruth Bader Ginsberg J quipped there would be enough women on the [US Supreme] Court when there were nine[50] – but that would not constitute a 'diverse' bench.

Three high profile self-defence cases demonstrate the structural harm that can be caused by courts that lack cultural competency because of elite socio-economic views and ignorance of public perception. The cases illustrate the peril the defendants faced in having judges who were not open to or not sufficiently culturally aware to apply the law fairly to their circumstances.

V R V WANG[51]

In *Wang*, the Court of Appeal demonstrated a lack of cultural understanding of Wang's experiences with her abusive husband.

A Legal Context – s 48

Wang concerned s 48 of the Crimes Act and whether applying self-defence as a defence requires a subjective or objective approach. The provision reads:

Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Section 48 involves a three step inquiry. Firstly, what were the circumstances the defendant believed themself to be in? Second, in those circumstances, were they acting to defend themself (or another)? Third, given their belief, was the force used reasonable? Therefore, the key question is what is "reasonable"?

Traditionally, common law applied an "imminence" test. This meant requiring the threat against the defendant to be "imminent" so that they were reacting to defend themselves.[52] Professional and academic disquiet with this approach led to calls to displace "imminency" with "inevitability", so that a defendant could use self-defence if they acted to defend themselves from inevitable, even if not imminent, danger.[53]

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49 Mai Chen "Progress and transformation: diversity in the judiciary" (23 Jun 2022) New Zealand Law Society <www.lawsociety.org.nz/news/publications/lawtalk/lawtalk-issue-950/progress-and-transformation-diversity-in-the-judiciary/>.

50 "Ruth Bader Ginsberg: Her view from the bench" (9 Oct 2016) CBS News <www.cbsnews.com/news/ruth-bader-ginsburg-her-view-from-the-bench/>.

51 *R v Wang* [1990] 2 NZLR 529 (CA).

52 *R v Wang* [1990] 2 NZLR 529 (CA) at 536.

53 Brenda Midson "*R v Wang* Feminist Judgment" in Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two Stranded Rope* (Bloomsbury Publishing, Portland, 2017) at 504.

B The Facts and the Result

Wang was convicted of killing her husband, Li, by stabbing him and then suffocating him with a pillow while he was drunkenly asleep and tied to their bed. Immediately prior to this incident, Li had made threats against Wang's relatives in Hong Kong. Over their relationship, Li was physically, financially and psychologically abusive to Wang.

At the trial, Dr Ding gave psychiatric evidence that, at the time of the killing, Wang was suffering from a major depressive illness, and in a battered person relationship. Dr Ding noted that Wang's difficult pregnancy, gallbladder disease and "rapidly deteriorating marriage" meant she believed Li's threats were going to be actioned and she had to do something.[54] In his view, Wang was totally preoccupied with survival and her only recourse was to kill her husband before he killed her.[55] The Court did not allow Wang to argue self-defence because there was no imminent threat.

Wang was found guilty of manslaughter and sentenced to five years imprisonment. She appealed her five year sentence on the grounds that self-defence should have been put to the jury. The Court of Appeal dismissed her appeal.

C Section 48 Imminency

The Court of Appeal applied an imminency test to determine reasonableness and failed to adequately consider Wang's cultural circumstances. Wang argued s 48 applied when a defendant believes themself to be inevitably threatened, not just when physical force is being imminently applied.[56] This approach found support in *R v Ranger* where the Court commented that a jury could entertain self-defence for "pre-emptive strikes" if a defendant found themself in peril.[57]

The Court in *Wang* disagreed with *Ranger*, holding that because there was no imminent danger from Li, killing him was not a "reasonable" course of action.[58] Instead, the Court applied the traditional imminency approach, with no exceptions for defendants who are in battered person relationships.[59] Li was intoxicated, asleep and tied up, and could not carry out his threat to kill Wang or her family; therefore,

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54 *R v Wang* [1990] 2 NZLR 529 (CA) at 532.

55 *R v Wang* [1990] 2 NZLR 529 (CA) at 533.

56 *R v Terewi* [1985] 1 CRNZ 623 (CA) discussion in *R v Wang* [1990] 2 NZLR 529 (CA) at 535.

57 *R v Ranger* [1988] 4 CRNZ 6 (CA) per Cooke P.

58 *R v Wang* [1990] 2 NZLR 529 (CA) at 537 per Bisson J.

59 *State v Stewart* 763 P 2d 572; 243 Kan 639 (1988) (Kansas:SC) at 577–579 as discussed in *Wang*.

Wang had other courses of action available to her, such as to call friends and family, police or other support networks.

For these reasons, the Court of Appeal agreed that the defence could not be put to the jury because they believed a jury could not possibly find self-defence was an available defence for Wang for killing her husband.[60]

D Section 48: The Inevitability Alternative

The Court did not adequately consider Wang's circumstances in coming to its conclusion, neither in applying the law nor in understanding Wang as a person. Opinions in other common law jurisdictions do not unanimously support an imminency requirement.[61] The dissent in *State v Stewart* noted:[62]

> [W]ith the battered spouse there can be, under certain circumstances, an unlawful killing of a passive victim that does not preclude the defense of perfect self-defense. Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense. Such a standard, in our view, would ignore the realities of the condition.

Pragmatically, asking a battered defendant to wait until an attack is imminent is a potential death sentence as there is often a disparity of physical strength in family violence. The Law Commission has, on two occasions, recommended that "inevitability" replace "imminence" as imminence did not adequately consider the cumulative nature of ongoing family violence.[63] While there may not be an "imminent" threat, there is a "continuing threat" from abusers in the situation to which the BRC relates.[64] This revolves around coercive control where victims such as Wang are constantly second guessing the mood and actions of their abuser. This

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60 *R v Wang* [1990] 2 NZLR 529 (CA) at 538–539, discussing *R v Tavete* [1988] 1 NZLR 428 (CA).

61 See also Alyssa Charles-Green "Law Translation: A Self-Defence Case Study" (2019) 25 CLJP/JDCP at 181–182 and 191 for comment on the comparative use of imminency in New Zealand and other jurisdictions.

62 *State v Stewart* 763 P 2d 572; 243 Kan 639 (1988) (Kansas:SC) at 592 per Herd J.

63 Law Commission *Victims of Family Violence: Who Commit Homicide* (NZLC IP39, 2015) at [2.52] and [5.14]. See Law Commission Battered Defendants: Victims of Domestic Violence Who Offend (NZLC PP41, 2000).

64 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, Annual Report, June 2014) at 38.

leads them to become emotionally exhausted at constantly "running" from violence.[65]

Feminist legal theory also supports recognising "continuing threats" as equal to an imminent threat. Despite 'imminence' being the precedent test, the test is open to being replaced by 'inevitability' in considering the cultural realities of these defendants. For example, Midson argued that in *Wang*, there was room to interpret s 48 considering Wang's reacting to the "continuing threat" posed by Li.[66] As Wang believed that her situation required defensive force proportional to threats to her and her sister's life, the jury could have entertained self-defence if Li's actions were viewed as a chain of threats against Wang.[67]

The Law Commission investigated alternatives to an imminency or inevitability test for s 48, such as the defence of tyrannicide.[68] However, it ultimately settled on recommending that if a defendant, like Wang, had no other non-violent alternative, then imminency should be replaced by inevitability in assessing reasonableness for s 48.[69]

E Cultural Considerations

The Court failed to consider three key points in understanding Wang's view that impacted on their reasoning in applying imminence over inevitability.

1 Circumstances

Bisson J's comment that Wang had "other options" available to her is problematic.[70] The Court suggested Wang should have reached out to support networks or police in the lead-up to and during the event instead of killing Li. However, this flows from an English presumption of "speaking out" rather than an appreciation of the Eastern Asian view of "internalising family issues".

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65 Angelica Guz and Marilyn McMahon "Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self Defence in Australia" (2011) 13 Flinders Law Journal 79.

66 Brenda Midson "*R v Wang* Feminist Judgment" in Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two Stranded Rope* (Bloomsbury Publishing, Portland, 2017) at 504.

67 At 506.

68 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC, R73, 2001) at [77]. A full explanation of tyrannicide is in Jane Cohen "Regimes of Private Tyranny: What do they Mean to Morality and for Criminal Law" (1996) 57 Uni of Pitt LR 757.

69 Law Commission *Victims of Family Violence Who Commit Homicide* (NZLC IP39, 2015) at 14–15, and 71.

70 *R v Wang* [1990] 2 NZLR 529 (CA) at 536–537.

Wang was a diligent mother "committed to family loyalty" including to honouring her family name.[71] Chinese families, no matter their disputes, have a cultural disposition to presenting a "united front" to outsiders out of fear of shame of being labelled "failures" and of presenting a poor reflection of their own parental upbringing.[72] This meant that while Wang was in a loveless and abusive marriage, she had to be obedient and loyal to her husband so as to protect her parents and family from shame.[73]

As Dr Ding stated, Chinese tradition requires internal disputes to be kept internal, and that would have deeply impacted on Wang's mental health.[74] This can be seen in Wang's sister, who lived with them, rarely witnessing any "abuse" Li inflicted on Wang.[75] Wang herself admitted in her police interview to bottling up her emotions saying "I had to kill him, there was no other way … I [needed to feel] human again."[76] This demonstrates the suppression of her emotions over years of marriage to her tormentor.

Other options were also closed to Wang. She had previously tried to escape Li by travelling to Japan but Li had tracked her down and abused her relentlessly until she remarried him.[77] For Wang, this would have instilled a helplessness that even moving countries could not relieve. The police in 1989 would also not have been helpful because they were known to be culturally insensitive, lacked translation skills or understanding of how to deal with family violence adequately.[78]

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71 *R v Wang* [1990] 2 NZLR 529 (CA) at 540.

72 Kwok Chan *Chinese Identities, Ethnicity and Cosmopolitanism* (Routledge New York, London, 2015) at 13–16. This concept of shame is similar to the tikanga concept of whākamā, see Zhong and others "Shame, Personality and Social Anxiety Symptoms in Chinese and American Nonclinical Samples" (2008) 25 Depression and Anxiety 449 at 449–460.

73 *R v Wang* [1990] 2 NZLR 529 (CA) at 539.

74 *R v Wang* [1990] 2 NZLR 529 (CA) at 529.

75 Lexie Kirkconnell-Kawana and Alarna Sharratt "Commentary on *R v Wang*: Finding a Plausible and Credible Narrative of Self Defence" in Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two Stranded Rope* (Bloomsbury Publishing, Portland, 2017) at 499.

76 *R v Wang* [1990] 2 NZLR 529 (CA) at 531.

77 Lexie Kirkconnell-Kawana and Alarna Sharratt "Commentary on *R v Wang*: Finding a Plausible and Credible Narrative of Self Defence" in Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two Stranded Rope* (Bloomsbury Publishing, Portland, 2017) at 499.

78 Lexie Kirkconnell-Kawana and Alarna Sharratt "Commentary on *R v Wang*: Finding a Plausible and Credible Narrative of Self Defence" in Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two Stranded Rope* (Bloomsbury Publishing, Portland, 2017) at 500.

For these reasons, Bisson J's comments were tone deaf in relation to Wang's cultural circumstances. For her there were no other options when she was socially isolated from friends and family, and at the 'whims' of her abuser. In the absence of this cultural appreciation, the Court applied s 48 to Wang's detriment.

2 Financial Reliance

Wang was also financially reliant on Li to care for herself and their child. Li weaponised that reliance to control her by seeking to blackmail her family in Hong Kong.[79] This meant that any risks she took in contacting support networks could have led to Li's financially depriving her of support for her child, herself and family.

This was particularly heavy for Wang considering that her friends recommended that she "endure" Li's abuse.[80]

3 English Ability

Wang did not speak English. This limited her ability to make friends, contact support networks or explain her circumstances to police. The Court gave minimal consideration to this.

Wang was an abuse victim in a violent battered person relationship, an immigrant Chinese person with limited language abilities, and was a woman living in New Zealand with no access to legal support services, while suffering "severe depressive illnesses".[81] As a result, she was forced to rely heavily on Li for her needs – from reading letters to grocery shopping – giving him dominant physical, financial and social power in the relationship.

In summary, Wang's inability to contact others for help meant that when she was constantly threatened with physical violence from Li, she would have felt helpless, psychologically trapped and thought no one "cared". Her only option, in her eyes, was to kill Li.

VI CHHAY V R[82]

Wang is not an isolated case. *Chhay* is a factually analogous case in Australia where the courts followed a similar approach to New Zealand.

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79 *R v Wang* [1990] 2 NZLR 529 (CA) at 533.

80 *R v Wang* (HC Christchurch T40/88 Notes of Evidence, 3 March 1989) at 22–26.

81 Lexie Kirkconnell-Kawana and Alarna Sharratt "Commentary on R v Wang: Finding a Plausible and Credible Narrative of Self Defence" in Elisabeth McDonald and others *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two Stranded Rope* (Bloomsbury Publishing, Portland, 2017) at 499.

82 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA).

A The Facts and Result

The Chhays were Khmer refugees from the Pol Pot regime. Mr Chhay had a history of abusing Ms Chhay beginning in Cambodia and continuing in Sydney. The incident occurred when Mr Chhay was distressed over the family's finances and accused the defendant of not being "industrious", and threatening divorce. Ms Chhay was reminded of her lack of skills or income and inability to feed herself and children. He then slept in the lounge where Ms Chhay struck his head with a meat cleaver and slit his throat.

When police were called, Ms Chhay first claimed a prowler had broken into the flat and attacked her husband. She later confessed to killing her husband and of attempting to conceal the weapon. She also claimed she was of "good character" and that Mr Chhay was a heavy drinker; toxicology reports indicated he had no alcohol in his body. She was later found to have changed her story a number of times to police.

Ms Chhay was initially imprisoned for 12 years for murder but the New South Wales Court of Appeal quashed her conviction due to issues at trial and ordered a retrial.[83]

B Imminency and Inevitability

At first instance, the common law test of imminency in assessing reasonableness was raised.[84] As in *Wang*, the Court of Appeal found it was "not reasonable" for Ms Chhay to argue self-defence when Mr Chhay was in no position to carry out any threats while he slept in the lounge and she had alternative options.[85] Dr Barclay, Ms Chhay's psychiatrist, stated she was a battered person who suffered constant humiliation and mistreatment by her husband, eventually leading to her losing control at Mr Chhay's violent threats and actions. Otherwise, he found Ms Chhay to be "quiet, calm, and non-violent."[86] As in *Wang*, it was submitted that inevitability was a more appropriate test for assessing self-defence than imminency.

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83 The result of any retrial is not known.

84 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10–24. The Court considered the history of the common law defence of provocation and its imminency elements in assessing the application of s 23 of the Crimes Act 1900 (NSW).

85 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 23.

86 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 4.

C Cultural Considerations

1 Circumstances

The Court of Appeal viewed Ms Chhay as having alternative actions available instead of killing her husband, such as reaching out for government support. However, Ms Chhay felt trapped with no support networks because the social context of Sydney at the time was racist and problematic for a woman of colour who was also a refugee with limited English.[87]

In Khmer culture, a husband hitting his wife was seen as the latter's fault as no man would "hit his wife for no good reason".[88] A witness had seen their fights at the refugee camps in Cambodia where Mr Chhay had "bashed" Ms Chhay on many occasions. He had threatened to kill her but at all times Ms Chhay accepted the beatings out of cultural norms.[89] Ms Chhay's sister corroborated this, stating that women were expected to tolerate abusive husbands if it kept the family together and retained the family's honour.[90] Other people at the camp also did not intervene out of deference to Mr Chhay and internal familial disputes being best dealt with internally.[91] Ms Chhay lived in perpetual fear of her husband and, like other abuse victims, lived on 'egg shells' throughout their marriage – a huge emotional burden.[92] The defendant also had to remain loyal to her family unit according to her Khmer culture.[93] For example, Ms Chhay admitted she did not inform police of her beatings because she "loved her children" and did not want to bring shame to them.[94]

Ms Chhay carried severe psychological burdens. Firstly, she carried the emotional scars of surviving the genocide in Cambodia. Secondly, she lost her first baby due to Mr Chhay refusing to give her money to pay for medical treatment,

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87 Human Rights and Equal Opportunity Commission "Racist Violence: Report of the National Inquiry into Racist Violence in Australia" (1991) HREOC at 140.

88 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10. For a description of social circumstances of Sydney see J Ledgerwood "Changing Khmer Conceptions of Gender: Women, Stories, and the Social Order" (Cornell University Press, New York, 1990) at 63, 147 and 278.

89 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10 per Yem's testimony.

90 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10.

91 J Ledgerwood "Changing Khmer Conceptions of Gender: Women, Stories, and the Social Order" (Cornell University Press, New York, 1990) at 63, 147 and 278.

92 K Dang and C Alcorso Better on Your Own: A Survey of Domestic Violence Victims Within the Vietnamese, Khmer, and Lao Communities (NSW Vietnamese Women's Association, Lidcombe, 1990) at 12.

93 Christine K Ho "An Analysis of Domestic Violence in Asian American Communities" (1990) 9 Women & Therapy 129 at 134.

94 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 3–4.

instead using it on alcohol and entertainment.[95] Thirdly, she was forbidden to seek any medical attention for her other three children on threat of beatings. At one point, she attempted to join a church, but on her return home she was severely beaten.[96]

Ms Chhay would have had to overcome a racist Australian community where language barriers, cultural differences and the trauma of survivor's guilt would have weighed on her. For her, there was a general misunderstanding that family violence was also "normal" in Australia, as it was in Cambodia.[97] Police, at the time, were notorious for not keeping records of ethnic communities, with a poor response rate to complaints of family violence. For Ms Chhay, a Khmer refugee with limited English and a woman, this meant the system was working against her need for support.[98]

Would a reasonable Khmer person in Ms Chhay's shoes have seen reaching out to others for help as an alternative action? More likely, she honestly believed that killing her husband was her only option in response to his threats and violence. While Mr Chhay was not "imminently" endangering her, his actions cumulatively had the effect of a continuous threat that coercively controlled her. This led inevitably to a plea of self-defence.

2 Financial Reliance

Ms Chhay also worried about her and her children's day-to-day wellbeing due to her lack of income, inability to drive and the other day-to-day assistance she needed if she were to leave. The night of the incident was when Mr Chhay stated Ms Chhay had no utility to society, no money to feed herself or her children and would likely be sent back to Cambodia if she left him.[99] For her, hearing her vulnerability laid out explicitly was probably humiliating, especially in the presence of her brother who was there but said nothing.

To escape was not a real option for Ms Chhay. Her inability to even seek medical attention for her first child likely compounded her belief that no one was coming to help her or her children, even in a life or death scenario.

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95 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 9–10.

96 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10.

97 J Kang *Gender Issues in Settlement: Access to Services* (Bureau of Immigration Research: Second National Immigration Outlook Conference, Australia, 1992) at 344.

98 Human Rights and Equal Opportunity Commission "Racist Violence: Report of the National Inquiry into Racist Violence in Australia" (1991) HREOC at 140

99 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10.

3 English Ability

The Court placed heavy weight on her credibility. By her having given different accounts of the event to police, they were understandably sceptical of Ms Chhay.[100] The Crown argued that she lied to avoid guilt, but an alternative view is that she was disadvantaged by her lack of English ability as well as by her upbringing to be deeply fearful of the authorities who would have killed her in Cambodia for complaining.[101]

Ms Chhay's survival mechanisms probably took over when questioned by police, and she said whatever she thought she needed to survive from her time in Cambodia.[102] In her mind, this was likely out of fear of being harmed by Australian police too. While this would have been an outlandish submission in an Australian courtroom, it should be acknowledged that lying in her circumstance was a survival tool for many Khmer to escape trouble and harm from the authorities.[103] While the result may not have been different, having a culturally competent judge would have ensured Ms Chhay's circumstances were heard adequately.

VII R V JAI FONG ZHOU[104]

Zhou suggests English ability is a key distinguishing point for successfully arguing the BRC in relation to self-defence.

A The Facts and Result

Zhou was charged with the attempted murder of her abusive husband, Tam. She argued self-defence and the BRC in the High Court and was acquitted. In obtaining this verdict, Zhou suffered difficulties similar to those suffered by Ms Chhay and Wang.

The night of the incident, Zhou drugged Tam into a deep sleep. While asleep, Zhou bound and chloroformed him to keep him "out". When this failed to sedate Tam, she struck him with a cleaver causing serious wounds requiring urgent medical

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100 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 5–6 and 25.

101 J Kang *Gender Issues in Settlement: Access to Services* (Bureau of Immigration Research: Second National Immigration Outlook Conference, Australia, 1992) at 344. See also Wilfred Burchett *The China-Cambodia-Vietnam Triangle* (Vanguard Books, London, 1981) at 97 for the contextual experiences of Khmer people living in fear of being executed by authorities for questioning, complaining or even mourning the disappearance of their loved ones.

102 Julia Tolmie "Pacific–Asian immigrant and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Sydney Law Review 472 at 472–475.

103 P Rozee and G Van Voemel "The Psychological Effects of War Trauma and Abuse on Older Cambodian Refugee Women" (1989) 9 Women and Therapy 23 at 34.

104 *R v Jai Fong Zhou* HC Auckland T 7-93, 8 October 1993.

treatment. Zhou then tried to conceal the evidence of her drugging him. The question was whether Zhou had murderous intent in striking Tam in light of the defence of self-defence.

The jury returned a not guilty verdict.

B Imminency and Inevitability

The Crown argued imminency as the requirement for reasonableness in allowing self-defence. In essence, counsel submitted that Tam was incapacitated, tied to a chair, drugged and thus unable to perform any life-threatening actions. Zhou had alternative courses of action available such as seeking divorce (two months into the marriage) and seeking advice for leaving Tam and getting a lawyer.[105] The Crown concluded that where the BRC usually "immobilises" the victim of family violence, Zhou was in fact active in spreading damaging rumours about Tam, and therefore she should not have self-defence available to her as she was not a victim of a battered relationship.[106]

Yet, self-defence and the BRC were discussed with some cultural competency. Anderson J adopted an approach closer to inevitability than imminence noting the defendant's perception of the circumstances was key to assessing reasonableness. His Honour noted that while the BRC was not a "defence" per se, justice meant appreciating the complete circumstances of the defendant and their actions. This meant discussion of the battered partner's perspective, their options and unique circumstances. However, he also directed the jury to accept that some women will remain in abusive relationships for reasons that do not necessarily make sense to the jurors – an acceptance that English standards may not have been applicable to Zhou.[107]

These directives may seem minimal, but they speak to the nuance behind cultural competency and the BRC. By asking the jury to acknowledge their own cultural perspectives of what a "reasonable" woman would have done, the effect was to turn the jurors' minds to appreciate Zhou's perspective. This likely supported a move towards inevitability in seeing the coercive control Tam had over her as the "threat" that she responded to, rather than trying specifically to find a point in time of an attack she defended against.

However, there were still cultural considerations that required more focus.

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105 *R v Jai Fong Zhou* HC Auckland T 7-93, 8 October 1993 at 11.

106 *R v Jai Fong Zhou* HC Auckland T 7-93, 8 October 1993 at 13.

107 *R v Jai Fong Zhou* HC Auckland T 7-93, 8 October 1993 at 6–10.

C Cultural Considerations

1 Circumstances

Zhou's options for speaking out were limited and she was reduced to trying to find more drastic and desperate options for seeking help.

A more persuasive view of Zhou's actions in spreading rumours and wanting to leave her husband the way she did could be understood culturally. Zhou suffered significant violence from Tam. This manifested itself publicly constantly with destroyed property and injuries, with threats continuing until Zhou conceded to his every demand.[108] Like Ms Chhay and Wang, Zhou faced cultural and language constraints against revealing her abuse to her friends, family or support networks.[109] Accordingly, she felt isolated because complaining about her predicament would mean she would be seen as a failed wife, which would shame and dishonour her family.[110]

2 Financial Reliance

Zhou did not understand the rights she had while raising her child with no income. This meant she relied heavily on her husband for financial and social support.

However, due to her perseverance she was able to find an alternative apartment to rent, someone to assist her navigating the social welfare system for support and to hold a part-time job.[111] She then tried to divorce Tam, despite the cultural shame, but needed to satisfy the statutory separation time requirement. However, due to her sister supporting Tam, he was able to consistently track her down, and make the divorce requirements impossible to fulfil.[112] Therefore, no matter where she went, Tam reminded her he could track and kill her anywhere because "New Zealand was a small place."[113]

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108 *R v Jai Fong Zhou* HC Auckland T 7-93, 8 October 1993 at 13–16.

109 Julia Tolmie "Pacific-Asian immigration and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Sydney Law Review 472 at 502–503.

110 Christine K Ho "An Analysis of Domestic Violence in Asian American Communities" (1990) 9 Women & Therapy 129 at 134.

111 Julia Tolmie "Pacific-Asian immigration and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Sydney Law Review 472 at 503–507.

112 Julia Tolmie "Pacific-Asian immigration and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Sydney Law Review 472 at 503–505.

113 *R v Jai Fong Zhou* HC Auckland T 7-93, 8 October 1993 at 12.

3 English Ability

Zhou is distinctly different from Wang and Ms Chhay due to her ability to speak limited English. But, due to Tam's English speaking ability being better than Zhou's, the Police preferred Tam's account that there were no issues. Of the six call-outs to police, police came only three times with limited action taken.[114] For any person this would have been psychologically and emotionally destructive but she was committed to surviving.

Instead, Zhou engaged a solicitor, doctor and her landlord, doing her best to explain herself to someone who spoke fluent English and was able to corroborate her story. This meant, the next time police were called, the solicitor spoke to the officers and that eventually led to Tam's arrest. As a result, Zhou was able to present her version of events to the Court without credibility issues; this made her story more persuasive for the jury and Court than Ms Chhay's whose limited English was a detriment to her case.[115]

VIII A CULTURALLY COMPETENT JUDGE APPROACH

Culture, gender and abusive relationships all intersected for these three women and were relevant in assessing their culpability. Having a culturally competent judiciary would not necessarily mean a different outcome, it may simply change the approach and lens a judge may apply, making the criminal justice process more inclusive and equitable.

A Cultural Circumstances

These cases demonstrate how the courts and contemporary scholarship can apply different weights to factors or reach different outcomes based on their approaches to cultural circumstances.

In considering that East and Southeast Asian cultures keep their internal familial disputes 'hidden' from others, a culturally competent judge would have relied less on the 'alternative options' view being open to the defendants.

For example, the fact Wang did not utilise "support networks"[116] outside her family is not unreasonable behaviour because doing so would have alienated her

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114 Julia Tolmie "Pacific-Asian immigration and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Sydney Law Review 472 at 503–505.

115 Julia Tolmie "Pacific-Asian immigration and Refugee Women Who Kill their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19 Sydney Law Review 472 at 505–506.

116 *R v Wang* [1990] 2 NZLR 529 (CA) at 531.

from her community for bringing shame on her household.[117] Similarly, Ms Chhay being a Khmer refugee carried the generational burden of having to be a mother and protector of her family's honour while coping with a horrific past, accompanied by family violence within a Khmer culture of suppressing and dismissing mental health issues.[118]

B Convergent Harms

A culturally competent judge would have taken a more holistic approach in assessing each defendant.

The fact that Wang and Ms Chhay exclusively relied on their abusive husbands to survive meant there were few practical options available to them to respond to the behaviour, even if they wanted to flee.[119] For example, if Ms Chhay had attempted to flee, she would not have been able to get far without financial assistance in travelling costs or accommodation and food for herself and young children. Her options were curtailed by lack of financial freedom.[120]

Furthermore, Ms Chhay demonstrated the compounding effect of being a vulnerable woman in fraught circumstances and a refugee with no English ability. That she was of Asian descent in a community that was racist meant her options were further limited by an, at best, apathetic Australian community.[121]

C Substantive Justice

A culturally competent judge would have considered the necessary application of inevitability over imminence for two reasons.

First, the preference should be for inevitability as a fairer test in approaching the objective limb of s 48. Realistically, s 48 – and its New South Wales counterpart, s 418 of the Crimes Act 1900 (NSW) – works with imminency only when two parties are of similar physical strength, such as in a bar brawl between two men. When

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117 Law Commission *Victims of Family Violence: Who Commit Homicide* (NZLC IP39, 2015) at 14–15, and 71.

118 K Dang and C Alcorso Better on Your Own: A Survey of Domestic Violence Victims Within the Vietnamese, Khmer, and Lao Communities (NSW Vietnamese Women's Association, Lidcombe, 1990) at 12.

119 *R v Wang* [1990] 2 NZLR 529 (CA) at 533. See also *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10.

120 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10 and 25.

121 J Kang *Gender Issues in Settlement: Access to Services* (Bureau of Immigration Research: Second National Immigration Outlook Conference, Australia, 1992) at 344. See also Human Rights and Equal Opportunity Commission "Racist Violence: Report of the National Inquiry into Racist Violence in Australia" (1991) HREOC at 140–145.

parties are not of near equal ability, any additional 'strength' the weaker party could muster (such as a weapon) is seen as "unreasonable" when a threat is not imminent.

Expecting three battered persons, who were physically weaker than their abusers, to wait for an imminent attack would have "ignored the reality of battered relationships" and would likely have resulted in their death.[122] Therefore, from a substantive justice view, it is not fair to expect people in vulnerable situations to have to wait for an imminent attack if doing so may mean their death.

Second, there should be recognition of self-defence in respect of the cumulative harm of abusers, and not a focus on a single defining moment to which s 48 could apply. Women in battered relationships are often entrapped as a result of cumulative acts over time that range from physical violence to "promises to change".[123]

If the court focuses on a 'single defining moment', the necessary appreciation of the defendant moving from 'normal' to being a 'broken shell' of their former self is ignored – that is the issue in a battered person relationship.[124] For example, because the court of first instance focused only on the night of Ms Chhay's actions, it was not reasonable for her to have killed her husband. But if (as the New South Wales Court of Appeal did) the focus was placed on the cumulative nature of Mr Chhay's constant physical and psychological abuse, then that night would be the 'straw that broke the camel's back' and provide a more accurate picture of Ms Chhay in assessing the availability of self-defence.[125]

Therefore, these cases demonstrate the impact a culturally competent judge could have in presiding over cases. A nuanced approach would mean adopting a more appropriate common law test, being more understanding in writing judgments (regardless of outcome) and making minor changes in framing that would have material impacts to the fair adjudication of these women and other defendants in similar positions.

D Intersectional Harm

The culturally competent judge approaches discussed above suggest how easy it is for a court to misinterpret a defendant's behaviour when it does not engage with the associated cultural material.

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122 *State v Stewart* 763 P 2d 572; 243 Kan 639 (1988) (Kansas:SC) at 538 per Herd J.

123 Evan Stark Coercive Control: How Men Entrap Women in Personal Life (Oxford University Press, Oxford, 2007) at 94.

124 Evan Stark Coercive Control: How Men Entrap Women in Personal Life (Oxford University Press, Oxford, 2007) at 95–98.

125 *Chhay v R* (1994) 72 A Crim R 1 (NSWCA) at 10 and 23.

These cases illustrate three points. First, different perspectives on which common law tests apply, such as imminency or inevitability. Second, the real danger of characterising the defendant as untruthful or not credible when their particular cultural context is not appreciated. Third, a defendant with adequate English ability combined with some judicial cultural understanding can make a decisive process difference to a case that is otherwise factually analogous to the others.

IX BEYOND CRIMINAL LAW

Judicial cultural competency also has ICCPR and Bill of Rights ramifications. New Zealand ratified the ICCPR, committing to uphold many of its articles.[126] There are two points related to culture and law.

Firstly, to better uphold both sets of obligations, the judiciary must be culturally competent for the diverse communities of Aotearoa. The ICCPR requires the courts to guard against discrimination and to uphold every person's right to life.[127] Second, it then follows that defendants in battered person relationships should have their circumstances considered including the actions taken to defend themselves. In doing so, fair trial rights would be satisfied under the Bill of Rights Act.[128]

For example, the courts failed to consider Wang's cultural circumstances, meaning her rights under the ICCPR may have been breached when the Court failed to consider inevitability and to allow self-defence to go to the jury. Should the Court not have considered Wang as a victim of family violence with a right to defend herself against a brutally abusive husband who treated her as a tool? In terms of the Bill of Rights Act, requiring that Wang have a "fair trial" must also mean that the Court be culturally competent. Instead, the courts assessed Wang's actions against a "reasonable person" from a Pākehā New Zealand perspective and indicated that a person in her shoes had "alternative courses of action."[129]

A culturally competent judge would be able to mitigate this by ensuring for members of vulnerable communities that there is a greater understanding of their circumstances in accordance with the Bangalore Principles that the courts dispense law with respect for culture.[130]

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126 Ministry of Justice "International Covenant on Civil & Political Rights" (19 August 2020) Justice <www.justice.govt.nz/justice-sector-policy/>.

127 International Covenant on Civil and Political Rights (ICCPR) 1976, arts 2(1) and 6(1).

128 New Zealand Bill of Rights Act 1990, ss 8, 19 and 25.

129 *R v Wang* [1990] 2 NZLR 529 (CA) at 538.

130 UN Office on Drugs and Crime and the Judicial Group on Strengthening Judicial Integrity "The Bangalore Principles" (26 November 2002) at [1.1]-[1.6] and [5.1]–[5.5].

If the purpose of law is to ensure justice is dispensed fairly then it is unreasonable to rely solely on an English-based reasonable person standard.

X RECOMMENDATIONS

The following recommendations may serve as a starting point for addressing the matter of cultural competency in the law.[131]

A Education

Cultural competency should begin with the study and practice of law. Here, the role of the Council of Legal Education is crucial in ensuring that cultural competency becomes an integral part of legal education. It has begun to do this by requiring te ao Māori and tikanga to be taught in all core law degree courses.[132]

More work can be done in making the current and future legal community appreciate more the benefits of utilising and applying 'tikanga' of other cultures.[133] Operational changes are also needed to give effect to understanding our multicultural community.

Practically, even if the Bench were culturally competent, they cannot 'create' judgments out of submissions not put before them. Thus, a dual approach to cultural competency is required. The court and lawyers must ensure that the law is applied and interpreted consistently and allow appropriate adjustments to be made as part of the ambulatory common law.

For example, s 48 requires consideration of the "circumstances as [the defendant] believes them to be…". Culturally competent counsel would be aware of necessarily including evidence of cultural factors which impelled the defendant to take fatal pre-emptive action as the only means of escaping inevitable serious injury or death at the hands of their abusive partners. The absence of such cultural evidence is a serious hindrance to a culturally competent court as such matters are not among those of which judicial notice can be taken. On the other hand, failure by a court to take account of such evidence in considering the availability of self-defence would be a ground of appeal or judicial review.

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131 Recently, the case of *Deng v Zheng* [2022] NZSC 76 is a welcome development. This case explored the use of Chinese cultural customs in a corporate setting, but the obiter statements by William Young J pave the way for culture to be applied more in any legal setting.

132 Diana Clement "Tikanga becomes compulsory for law students" (14 May 2021) ADLS <adls.org.nz>.

133 Jacinta Ruru "Bicultural, bilingual, bijural: a plan for a new model of legal education in Aotearoa" (21 October 2020) The Spinoff <thespinoff.co.nz>.

The Institute of Judicial Studies do hold judicial workshops that emphasise the different ethnic groups that make up New Zealand. However, these workshops are band-aids to a more systemic problem. To be truly effective, judges require frequent wraparound workshops that contextualise people. This could only be given by members of the relevant communities, which current annual workshops do not currently give. However, while more can be done to improve these workshops, they currently give the Bench some grasp of the considerations that apply to parties who appear before them.

B Use of Pūkenga

Pūkenga are cultural advisors in tikanga. Recently they have sat with judges in interpreting tikanga arguments from counsel and translate te reo Māori witness statements as necessary. In essence, they offer additional cultural guidance in te ao Māori to the court. This is set within Te Ao Mārama and the goal of developing partnerships with local iwi, engagement with justice with local communities and addressing the complex needs of parties.[134] As Williams J noted:[135]

[Pūkenga] draw on the best of both worlds with a judge sitting with two or more experts adjudicating, facilitating and mediating through issues … [enabling] the Court to apply and develop a separate system of law - a mix of tikanga informed by Māori today, and the common law which has stood the test of time.

Broadening these advisors to include experts from a variety of cultural backgrounds would supplement the Bench's approach to cultural disputes. That would assist by being a 'sounding board' for judges in informing the court of the cultural ramifications of submissions. This would have greatly supported Wang, Ms Chhay and Zhou in explaining their circumstances to the court.[136]

There may be a danger in having one advisor representing an entire ethnic group because there are often different understandings and circumstances within ethnic cultures. This could be mitigated by ensuring the relevant communities are involved in the selection of these advisors, rather than just the courts. Despite this concern, it

134 Heemi Taumaunu "Update on Te Ao Mārama" (18 Feb 2021) New Zealand Law Society <www.lawsociety.org.nz/>.

135 Joe Williams "The Māori Land Court: A Separate Legal System?" (2001) 4 New Zealand Centre for Public Law 1 at 11.

136 For further context and a modern example, see *Peter Hugh McGregor Ellis v The King* [2022] NZSC 114 at [123]-[125] per Glazebrook J. Her Honour notes the necessity of modifying court methodologies to evidence for each defendant as a matter of accessibility of justice. This may include utilising cultural advisors where appropriate and being alert to the needs of individual cases.

would be a positive first step towards making the courts more culturally aware and in explaining cultural elements that feed into the issues of law.

C Section 27 Submissions

The reports under s 27 of the Sentencing Act 2002 are used to assist the court by revealing relevant cultural factors in determining sentences. This allows the defendant to request the court to hear from any persons who could speak to their personal cultural background.[137]

At the sentencing stage, an expanded use of s 27 cultural reports is necessary, especially as they are disproportionately used for some communities but not others. Currently, they are utilised primarily for Māori defendants, but not to a significant degree for members of other communities such as for New Zealand Asians like Wang or Zhou.[138] There are currently no limitations on the use of s 27 for other groups, but s 27 has not been used extensively by counsel, nor requested by the court under s 27(5). Therefore, more frequent use of the section could assist more defendants in incorporating their unique cultural circumstances.

Despite the use of s 27 not being ideal due to its occurring after a verdict is reached, it would highlight mitigating factors that could reduce sentences, especially when culture plays a key role in the defendant's actions. Furthermore, over time, it would serve to educate legal practitioners as to relevant cultural issues, and that could affect earlier stages of the criminal process.

D Ethnic Bench Appointments

The answer does not lie in making judicial appointments based on ethnicity, because ethnicity alone does not ensure cultural competence. However, all judges whatever their background need to be exposed to a variety of cultural views and reflect the communities of New Zealand.[139] Accordingly, while appointments based primarily on ethnicity should not be adopted, ethnicity and community representation should be seen as factors of merit in a judicial selection process.

Having a diverse judiciary has two benefits. First, it ensures communities feel justice is being done evenly by understanding that their approaches are considered –

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137 Sentencing Act 2002, s 27(1)–(5).

138 Oliver Fredrickson "Systemic Deprivation Discounts and Section 27 Reports: Progress but not Perfect" (September 2020) Māori Law Review <maorilawreview.co.nz/>.

139 Crown Law Office "Judicial Protocol" <www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf> at 3–4. See also Terence Arnold "Judicial Appointments" (Address to the New Zealand Bar Association Conference, 21 August 2003) and Chris Finlayson *Yes, Minister* (Allen & Unwin, Auckland, 2022) at 141.

that would lead to more confidence in the legal system. Second, it ensures that the judiciary remains grounded in its approach to interpreting the law.

XI CONCLUSION

This paper illustrates the difference cultural competency can make in the process and form of judicial work – even if it would not change the ultimate outcome. Unconscious bias through socio-economic and cultural experiences feeds into how a judge formulates certain logical pathways that lead to reasoned conclusions while missing important nuances in interpreting and applying the law of self-defence.

A multi-faceted approach to addressing cultural shortcomings in the legal system will equip future generations of legal practitioners with the tools to be culturally attuned to the communities the law serves. This can only lead to improved outcomes for all, especially as New Zealand becomes a more diverse country.

Looking forward, the New Zealand legal system, built on judicial colonisation and ethnic inequities, must transform itself to better serve all minority communities if the legitimacy of the justice system and the rule of law is to be upheld.