

From an Anthropocentric Criminal Law to an Anthropomorphic Criminal law: by the Way of the “Cultural Defense”*

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ABSTRACT

Is it possible any sort of “cultural defense” in the criminal law? In the contemporary legal systems, to not punish someone because of the characteristics of the accused (and not because of the analysis of the conduct realized) – as it is typical in the cultural defense does not comply with the principles that constitute the fundamental right to punish criminals. We will look to treat this question in light of two perspectives. First, we supply the scientific plausibility of the idea of culturally oriented crimes. Then we discuss the existence and validity of an adequate legal mechanism utilizing culture of the agent as a way of defense.

Keywords: Cultural defense. Criminal Law. Blameworthiness. Legal excuse. Anthropology. Law. Culture.

1. INTRODUCTION – LEGAL CHALLENGES OF A MULTICULTURAL SOCIETY.

In modern society, it seems that norms regulate – increasingly all social behaviors. The law seems as if it is being forced into aspects of human life, almost as if society should resign and become trapped in a cage of an omnipresent and penetrating legal dimension. Our society became a *law-saturated society* (RODOTÀ, 2012, p. 78), a society full of excessive norms and rules.

The complex society, projected by Friedrich von Hayek (1978), today, more than ever, shows its importance. Various models of society overlap one another, and this does not change. On the contrary, the process gets more evident when the complexity acquires cultural and legal contours. The people have their own unique biological attributes. Migration led many people to establish themselves in different societies from their original one, sometimes even choosing distant and wildly different societies. Societies became, thus, multicultural.

A multicultural society is, with certainty, appreciable, but we cannot fool ourselves: multicultural society is not a society where the vast and diverse culture coexist close to one another in a regime of equality. Frequently, the minority cultures coexist within the dominant culture, without being recognized or accepted. When the multicultural society reflects itself in

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the law, all becomes more complex. It is in this environment that the cultural crime is born; the dominant culture does not accept certain habits of the minority, which has consequences within the system of the laws (BERNARDI, 2006), where “consequence” cannot be understood as a modification of the law, but rather as the mere presentation of the problem of compatibility with altering the valid law.

The starting point is that the enormous migratory fluxes of the last decades forced different cultures to coexist. In this situation, one assumes (RENTELN, 2004, 2005) that the legal multicultural paradigm cannot prevail. The legislator, civil and criminal, no longer can ask the adherence of everyone to a unique code of conduct, because it must be aware of the recognition of different cultural habits. In this situation, a legal problem is presented when a fact considered criminally relevant in the host culture is, on the contrary, approved of in the culture of a certain minority group. Think, for example, of polygamy, of the practice of feminine genital mutilations, of marriages between blood relatives. In the civil area of law, one must consider the modulation of repayment of damages with respect to how the victim’s culture perceives the damage. Especially in matters of criminal law, such reflections of anthropology of the law, led to the discussion about the existence – or not – of a cultural defense, an excuse for the crime taking into consideration aspects of culture of the agent. The discussion revolves around the possible legal mechanisms capable of adapting to cultural context.

Now the basis of the “cultural defense” has been established in the introductory sense, it is necessary to concentrate our attention, in the following section, on the concept of culture.

2. FOR A CONCEPT OF CULTURE

The importance of a homogeneous definition of culture seems evident, as the cultural identity is, in fact, the focus of culturally oriented and motivated crimes. However, the world “culture” is a highly complex concept. It is not enough to say that culture is something that a citizen acquires as a member of any society, that each culture has equal dignity, and that the cultures are not isolated monads, but, instead, integrate with each other (DE MAGLIE, 2010). These are elements that effectively contribute to the definition of the concept of culture, but still do not capture its essence. Each person integrated in the same culture could comprehend it in a different manner, and the interaction between cultures could be very well be devoid of the conflicts that constitute the basis for the culturally oriented crime.

In anthropological science, culture is not only the patrimony of the knowledge that each person has, but also the complex of values, traditions, creeds, and mental habits that denote

each social community (SACCO, 1007, p. 13). Besides that, according to anthropological science, cultures are affected by the inherent nature of things. All that is real is dominated by diversity, and this is valid for the material reality as well as the cultural reality (SACCO, 2007, p. 43). In fact, diversity comes from variation. We cannot mourn this. Diversity can implicate incompatibility, even in conflict, but it is the price that must be paid.

In any society, except those of the most embryonic and primitive forms, it is common for diverse cultures to coexist. It is difficult to understand how a culture will react when it gains knowledge of the existence of another. It is unlikely that the operators of both communities compare their cultures and consider them uniform, enriching with the elements of the other. It is more likely that the comparison between the two different cultures will create contention focused on the survival of only one of the two cultures. That is why “deculturization” is considered the destiny of people (SACCO, 2007, p. 59). One of the cultures will become dominant, and, unsurprisingly, those within that culture begin to consider their rights to be superior. This leads to a sense of ethical superiority that creates a duty of intervention: “it is not legal to allow ethical deviations in our own *habitat*, or even in a distant habitat” (SACCO, 2007, p. 69).

I will try to agglutinate the conclusions at which I have arrived.

The definition of culture is complex and has very subjective characteristics: consider the oriental culture opposed to the occidental culture, the rural cultural opposed to the industrial culture, and all the nuances that could color these categories. When examining culturally oriented crimes, it is customary to say that “culture” is understood to mean a nation or people that occupy a certain territory. However, this definition is simplistic; if it was that way, we could not even speak of culturally oriented crimes. At least, as it pertains to the spacious scope of legal validity, we are on the way to normalization. The problem is that the law is no different from the other social and cultural phenomenon (since culture and law interlink): language, knowledge, rule of life, and other products of the material and intellectual human activity that constitutes a group culture. Nevertheless, among the indicated elements, language and law are special. If two people eat different food or use different treatments to cure diseases, the pluralism of the solutions does not bother the society (SACCO, 2007, p. 43). On the other hand, the members of the same society cannot understand each other using different languages. Similarly, any legal norm, to have validity, must be shared.

In fact, the community does not speak only one language, but this is contrary to the objective of the language, which is communication. Additionally, human beings do not observe just one law, but this is contrary to the objective of the law, which is to

guarantee an equal and predictable mechanism of conflict resolution to different people. The uniformity will be lost if the provided solutions to two identical situations are multiples. (SACCO, 2007, p. 42).

3. CULTURE AND LAW

I arrived at a crucial point of this reflection that will help escape the difficulty of conceptualizing or defining culture. It is important to define culture, but we cannot forget that we are in the legal scope and that the law transposes the culture of a determined social context. Between culture and law, there is an established bilateral relationship where each is influenced by the other. The law – as we already saw – constitutes one of the elements that compose that group of norms that have been defined as culture. However, when this relation of reciprocity becomes norm, the interpreter can only note in which form and level that a determined cultural element that became law transposes facts that constitutes elements of other diverse cultures. Therefore, the law is the result of dominant culture, though this is not to be interpreted as negative; it does not refer to cultural colonialism, but rather a necessary homogeneity to create the expressed principles in and for the law. At the beginning, as a fount of law resides in the will of the citizens, the new rule is found in the general consent. However, it cannot be denied that the unification of the law has its costs. A national code reflects the opinions of the jurists of the country and is inspired by the rooted jurisprudence. It is open to solutions claimed by general and reiterated social questions. Frequently, there will not be anything unpredictable or socially aggressive, but it is clear that a code that has aims to generate uniformity will necessarily suffocate certain rules and replace them with others. This is the reality of the law.

I need to advance a little more. I already highlighted that the concept of culture is very complex, as is a multicultural society. With regards to the latter – and independent of the correct definition of culture – its most significant aspect is the coexistence of diverse cultures in a same social and geographical context. In these cases, conditions are created so that anthropologists denominate “legal pluralism”, indicating that concurrence of the law of the codes, which is used in the Tribunals, and the law that is used and managed by a certain singular or minority group.¹ However, for jurists, things do not run the same way. When there are situations of cultural divergence, each state order is faced with the following alternatives: the dominant culture assimilates the minority culture (model of French assimilation) or the dominant culture does

¹ Within the same anthropology, the concept of legal pluralism presents different nuances. We can talk about pluralism when the State creates different rules to the citizens according to religion, the cultural origin. Also, there is pluralism when the same citizen has to attempt to obey different and contrasting norms. There is also legal radical pluralism, according to which the law is everything people think of, that is, the law would be an opinion and an aspiration, but not a norm. (SACCO, 2007, p. 83).

not open any relevant space to the visibility of multiple cultures.

The question becomes more complex if we consider that there is a shift between the law and the knowledge of the law. The knowledge of the law is the knowledge of real data. The legislator writes, the interpreter reads and writes, the judge considers and judges, and the citizen complies or deviates. There are, in any system, norms that are followed unconsciously ("cryptic" norms). Unconscious norms have a very important role in interpretation; they affect different levels of the applied law and the written norm (SACCO, 2007, p. 24). All of this comes together to rob the culture of the agent of any value, in some circumstances. As we already saw, culture and law cannot be considered disconnected concepts. Anthropological reflection will tell us how much to vest in human culture (in the singular) and in human cultures (in the plural).

It is logically possible to observe the multiplicity of cultures and assert that they are driven to aspire to unity or how much is marked the unity of the cultures and that the remaining variety is desired (SACCO, 2007, p. 41). Beyond the trust of the study of the anthropology as a foundation of each answer, it is important to see the profound connection between the culture and the law. But which culture? The first answer is the dominant culture, as it is the culture that establishes the principles that deserve protection through the creation of the law. Things can happen that are crimes according to the dominant culture but are totally licit in the defendant's culture. That is what we consider culturally oriented crimes. This is the issue at hand in the following sections: is it possible any sort of "cultural defense" in the criminal law?

We will look to treat this question in light of two perspectives. First, we have to supply the scientific plausibility of the idea of culturally oriented crimes. Only then can we discuss the existence and validity of an adequate legal mechanism utilizing culture of the agent as a way of defense.

4. FOR A CONCEPT OF CULTURAL DEFENSE

Before we continue with my reflection, I think it would be useful to examine the arguments around the idea of cultural defense. In the first place, there is a legal interest in avoiding the errors caused by a wrongful interpretation of the real facts; the culture could influence the behavior, depending on how one reads the elements of the object of his evaluation. Besides that, the right to culture is recognized in the international law of human rights: article 27 of the International Pact about civil and political rights of 1966 (CAPORTORI, 1992, p. 102).

One who already expresses favor of the cultural defense is Renteln, who asserts that it

should always be taken into consideration. Renteln argues that, in all processes, efforts should be made to prove the cultural background of the members of minorities historically present in a certain territory and also of groups of new migrants. Nonetheless, Renteln makes a very important warning: admission into the processes of culture proof of origin does not necessarily mean it could be used to gain a favorable result for the defendant. The cultural defense does not mean that the differences must always be respected above other rights and values; the culture is a right and has to be balanced with other rights of equal importance. Renteln recognizes the difficulties for the legislator to make room to the cultural defense (VAN BROECK, 2001, p. 52; DE MAGLIE, 2006, p. 219). The legislator could establish exceptions, but this can be criticized, because the effective guarantee of the minority cultures would be subordinated by the will of the dominant culture. In reality, that's what seems to always happen; the right to culture exists as a product of the expressed will of the majority. Renteln worries that some cultural minorities could get protections and others wouldn't, violating the principle of the equality. Besides that, the derogations could only be made for cultural practices already known, which leaves out unconscious, or unknown, cultural practices.

In the previous sections, I observed that culturally oriented crime bases its meaning in the most ample and complex concept of culture. I also noted that, by definition, that crime motivated by cultural reasons is carried out by those belonging to a certain social minority group. This is because the dominant cultural group is what decided upon which principles became law. In the following sections I will begin to examine criminal cases of the United States, in which the crime committed was considered culturally oriented. I will begin with the cases that were considered culturally oriented crimes in the United States because said category of crime was born in that context. Many are the examples in the literature and it is worthwhile to analyze some of these significant cases to bolster our reflection. Each case is different, in the sense that culture has a different role in each and the judicial decision can be quite different.

We will see that in some of the examined cases the cultural defense was fully accepted, in others it was recognized to settle the case, and in other cases the cultural defense was not taken under consideration in any form. I will try to comment on each case, speculating about how it could have been decided in a country of civil law, like Italy or Brazil. I will examine the existing legal mechanisms in civil law, trying to find useful elements to verify if the cultural defense can have relevance by way of the existing legal institutes or if it would be useful in an appropriate norm.

5. THE CULTURAL DEFENSE IN THE JURISDICTION OF THE UNITED STATES.

The United States is a multicultural society by definition and has been an important stage for discussion regarding the problems of living in a society consisting of a plurality of different cultures. In the United States, one of the first approaches to the problem of the recognition is addressed in article 27 of the International Pact about civil and political rights of New York of 1966, which details “the right to the cultural differences”, meaning that it would be the right of the members of the cultural minorities to behave according to their cultural and ethnic identity. This also addresses the issue of the delineation of the limits of the protection offered by cultural diversity. After all, if there is no doubt about the existence of the right to cultural diversity, the major challenge is in establishing a balance between said right and the other fundamental rights protected by criminal law.

Before examining the most famous and significant cases, I would like to point that the cultural defense, though it has been first formally theorized fairly recently, has been present since cultures began to interweave. Since 1800 there has been news of situations where the defense asked that the culture of the defendant be taken into consideration. In the year 1888, four “*Native Americans*”, carried out a death sentence, handed down by the tribal council, after a doctor (from the same tribal) was accused of not curing twenty people properly (MAGUIGAN, 1995, p. 63), not preventing them dying from poisoning. At that time, the judges considered that the fact that the agents were Native Americans and determined that the traditions and superstitions of the tribes justified a conviction for manslaughter and not murder.²

Nevertheless, despite the idea of cultural defense gaining force in the United States, to this day there is not one legal norm in North American criminal law that recognizes cultural defense. In the absence of law, the doctrine distinguishes between cultural evidence and true culture defense. The true cultural defense is when the defendant can invoke, as his defense, the cultural traditions and creed of his ethnicity of origin. More common is the use of the cultural

² “Murder is the killing of any person with malice aforethought, either express or implied by law. Malice, in this definition, is used in a technical sense to include not only anger, hatred, and revenge, but also every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons but is instead intended to denote an action flowing from any wicked and corrupt motive, a thing done *ex dolo malo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. Therefore malice is implied from any deliberate or cruel act against another, however sudden....Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offence; or involuntary, as when the death of another is caused by some unlawful act unaccompanied by any intention to take life.” (MOENSSENS, BACIGAL, ASHDOWN, HENCH, **Criminal Law - Cases and Comments**, VIII ed., New York, 2008, p. 415)

defense. This takes us to the value of proof of cultural connotation through the demonstration of some habits of a certain culture that could have relevance in court. For example, if it was demonstrated that, in a certain culture, adultery is considered a heinous crime, the crime committed by a husband in a state of violent emotion because he found out about the adultery of his wife could permit the cultural defense, even if it was perceived as insanity, because of the lack of legal provision of the institute.

5.1 STATE VS. KARGAR (1993); STATE VS. KRASNIQUI (1898-1992)

In the case of *State vs. Kargar* of 1993, Mr. Kargar, an Afghan resident in the United States, was charged with grave sexual abuse of his 18-month-old son. One of the neighbors claimed to have seen more than once him kissing the son's penis. Kargar admitted to the conduct, however, he alleged that, in his country or origin, that conduct was totally licit and that it represented a demonstration of unconditional love, because by kissing all the parts of his own son, the father demonstrated all of his unconditional love. The conduct would not have, therefore, any sexual connotation.

It is not the case here to analyze, in depth, the American judicial precedent. I only want to observe that, after a conviction, the defendant was acquitted because it was concluded that the conduct did not cause relevant loss to the victim. The argument used was accepted on the grounds that if, according with the culture of the defendant, there was no sexual connotation, he did not deserve to be punished.

In the case of *State vs. Krasniqui* (1898-1992), Krasniqui is an Albanian immigrant taken to the court for sexually abusing his four-year-old daughter. During a martial arts competition, in which his son participated, Krasniqui was seen touching repeatedly the genitals of his daughter, which led to the police called. During the process, Krasniqui invoked the testimony of a cultural anthropologist who explained that, in Albania, to touch one's children on their private parts does not implicate any sexual connotation, and that defendant did not realize that said conduct could be disturbing to the other participants of the sporting event. Though the accused resided in the United States for more than thirty years, the cultural anthropologist explained that his and his family's assimilation into American culture and society was very limited and that the habits of the original culture prevailed. Krasniqui was acquitted and the judges concluded that the case was the result of a cultural misunderstanding of an ethnic and religious nature (PASQUERELLA, s.d., p. 28). However, in the civil court, Krasniqui was relieved of custody and the children were sent to a different North American family to be raised by them. Great controversy was established, because, in criminal court, the

cultural origin was taken under consideration, but, in civil court, the children were taken out their familiar environment (the Muslim tradition) to be raised by a Catholic North American family.

In both examined cases, things would not have been much different in a civil law system. Both Kargar and Krasniqui would have been considered acquitted due to lack of intent. It would not have to be treated as a matter of cultural defense, but rather an absence of the subjective element of intent.

5.2 PEOPLE VS. METALLIDES (1974)

In the case of *People vs. Metallides* of 1974,³ an immigrant of Greek origin, Metallides, killed a friend after he found out that said friend had raped his daughter. The defense showed that in Metallides' culture of origin, the concept of honor implicated vengeance for the grave disrespect suffered was quite normal. The cultural element was considered by the American judges, based on the temporary insanity defense, and the defendant was acquitted.

If we analyze the same case in the scope of a civil law system, the evocation of the cultural defense would not make any sense. Anyone could have a violent reaction finding out that a friend raped his daughter, but nothing would justify the acquittal. In countries such as Italy, in which the legislation states that emotional and passionate states cannot be relevant to the capacity of a person to understand what is right, such a defense would not work.

5.3 PEOPLE VS. KIMURA (1975); PEOPLE V. CHEN (1987)

In 1975, Fumiko Kimura,⁴ a woman of Japanese descent residing in California, found out that her husband had a mistress, jumped into the ocean with her two children of four and six years old. The boys died, while the mother was saved by a rescue team. She was charged with murder. Mrs. Kimura's defense was based on the fact that she had practiced '*oyako-shinju*', a type of murder-suicide of parents and children, which comes from the idea that the children are an extension of the parents and should not live in an interrupted family, in which they would suffer from the disintegration of family unity. The Japanese community of Los Angeles obtained 25.000 signatures to petition for the woman to be acquitted, because the

³ *People v. Metallides*, No. 73-5270, Florida Circuit Court, 1974; Renteln, **The Cultural Defense**, cit., p. 25.

⁴ *People v. Kimura*, No. A-09113 (L.A. Sup. Ct. 1985). Ex pluribus, RENTEL. **The Cultural Defense**, cit., p. 25; COLEMAN, Lambelet. Individualizing Justice through Multiculturalism: the Liberal's Dilemma. **Columbia Law Rev.**, vol. 96, 1996, p. 1109; WOO, The *People v. Fumiko Kimura: But Which People?* **International Journal of the Sociology of the Law**, 1989, p. 415. In the Italian doctrine: DE MAGLIE. **Società multiculturalmente**, cit., p. 217.

oyako-shinju was an honorable practice that would have to be judged by clemency. Probably thanks to the influence of the manifestations of the Japanese community, Kimura was offered a bargain of pleading to manslaughter, which she accepted. The deal was offered on the basis that she had suffered from insanity brought on by her husband's infidelity. The sentence was one year in prison and five years of probation. This sentence was much discussed, because the clemency looked like it came from the sentiment of pity to a betrayed woman, and not from the recognition of the culture of origin. In fact, it is unlikely that, in any civil law system, the accused would receive such low penance, even considering the mitigating circumstances.⁵

It was in the case of *People v. Chen* of 1987⁶ that the cultural aspect seemed to have held more weight than pity for the betrayed spouse. In this case, Dong Lu Chen killed his wife after she confessed her adultery. He defended himself by saying that, in his Chinese culture, the murder of an adulterous wife restores the honor of the husband and that of his parents. However, in China, when adultery happens, the community is present, coming to a measure of mediation between the families to avoid murder. In the United States, the cultural isolation of Chen and the absence of a community of compatriots led to a tragic event. In the trial, an expert in Chinese culture was admitted as a witness who confirmed the thesis of Chen, influencing the sentence of five years of probation. According to the civil law system this end would sound like profoundly unjust, while no precedent was cited, the culture of origins of the accused had more fundamental relevance.

5.4. PEOPLE VS. PODDAR (1969-1974)

Poddar⁷ was an Indian from the caste of the “untouchables”, the “harijan”. Studying at Berkeley, he found a girl and began spending time with her. One New Year's Eve, he kissed her and fell in love with her, but found out later that she had no interest in dating him. Poddar then fell into a deep depression and began therapy in which he expressed a desire to kill the girl. The psychiatrist considered Poddar highly dangerous and warned the Berkeley police, but that did not prevent Poddar from killing the girl with a knife. The defense of Poddar invoked

⁵ Very similar case to the “*People vs. W*”, of 1988.

⁶ *People v. Chen*, No. 7774/87 (N.Y. Supr. Court 1989); COLEMAN, Lambelet. **Individualizing...**, cit., p. 1108; CHIU, **The Cultural Defense**, cit., p. 1053; RENTELN. **The Cultural Defense**, cit., p. 34; GOLDSTEIN, Cultural Conflicts: Should the American Criminal Justice System formally Recognise a “Cultural Defense”? **Dickinson Law Review**, 1994, p. 152.

⁷ *People v. Poddar*. 103 **Cal Rptr** 84 (1972); RETELN. **The Cultural Defense**, cit., p. 31; BUCKNER-FIRESTONE, Where the Public Peril Begins: 25 Years after Tarasoff. **The Journal of Legal Medicine**, 2002, 21, p. 2.; SORIO, I reati culturalmente motivati: la cultural defense in alcune sentenze statunitensi. **Stato, Chiese e pluralismo confessionale**, Novembre 2008, p.11.

mental insanity and tried to assert that in his culture of origin, the relationship between men and women was very different the one experienced in North America, especially being an “untouchable”. In Indian culture, a kiss constitutes a commitment and when the girl expressed her lack of interest in a more serious relationship, the reaction of Poddar would have been exacerbated by his Indian culture. Of course that it was also recognized as emotional fragility on the part of Poddar, since a refusal would be considered graver for an Indian of the untouchable caste than from an average American. In this case, the recognition of cultural background was essential to the diminished sentence. I cannot insist with certainty that the culture of origin of the accused would have had the same influence on the judgment of the case in a system of civil law. In truth, I believe that the mentioned element of cultural reasoning would be read in a different manner, aggravating the sentence.

6. CRITICAL ANALYSIS OF THE CULTURAL DEFENSE.

After concluding the analysis of various cases in which the cultural defense is argued, we can try to reach an initial conclusion: the culturally motivated crime can be understood in many different ways, making it difficult to reach a definition and a common solution. In truth, the relativism inherent to the concept of culturally motivated crime makes it difficult to legitimize, not only on the legal level, but also on the social level. This is our first limit. There are many others.

Until now I considered a culturally oriented crime to be one committed by a member of a cultural minority group. However, if we were to legitimate the cultural defense, we would have to admit that— in the dominant culture —there are behaviors, illegal by code of law, that are considered licit or even desirable by the dominant culture. The defense is invalid until we arrive at the conclusion that the culture of the defendant always serves as a justification of his behaviour (RENTELN, 2004). It would be likely that to assert that the culture defense had relevance every time would cause a conflict between the culture of the defendant and the culture that created the criminal law. By this logic of accepting all cultural defenses, each person would have a separate set of criminal laws and there would be no need to share values to form a society of safety and peace. This sounds unacceptable, because it ignores the function of criminal law. Culture is not a microcosm of closed and immutable values; it is fluid and dynamic.

Recognizing the cultural defense means encouraging the construction of stereotypes and cultural prejudices (frequently revolving around questions of gender, race/ethnic and socio-economic class) with caricatures, inaccurate and immune to any ethical refrain or legal action. It cannot be denied that, beyond that, people could still deviate from their cultural models. Once

more, the risk would be to attribute legal relevance to an interior and personal culture of the defendant. In sum, admittance of the cultural defense would be like admitting that in judgment about criminal responsibility of the defendant, non-legal rules and standards should be applied in addition to state criminal law. Thus, law would serve no purpose.

Under a different critical perspective, we could ask: Would culture be a fundamental right? If the answer is positive, how would balance with other fundamental be managed? International norms establish the right to culture, so such a right does exist. But is it fundamental? Generally, there are distinctions between human rights and fundamental rights. Human rights belong to each person because of the person. Fundamental rights, on the contrary, are included within the equality of value of all the personal differences, including culture. The culture, then, it is not a human right. It is a fundamental right, and, because of this, it deserves protection. With respect to balance with other rights, the right to culture cannot be exercised in a way that hurts other modalities of rights, especially the immutable immunities of each person. Thus, fundamental rights not prioritized before the more ample rights that touch the human person in her life or integrity.

In Anglo-Saxon legal culture – where the problem is stronger and a different path of the causes of exclusion of diminishing culpability was tried. They came up with a cause of exclusion of culpability. The problem is that there must be a distinction between cognitive cultural defense and volitive cultural defense. The cognitive cultural defense intervenes when the culture of the defendant prevents him from understanding that his conduct constitutes a crime. On the contrary, the volitive cultural defense involves cases in which the defendant knows that his conduct, in his host country, is a crime, but acts anyway, because he feels obligated by his culture of origin.

Could an eventual cause of exclusion of culpability be valid for two situations? If the cognitive cultural defense seems ampler, the volitive would seek to give relevance to the motivation that caused the crime. However, in theory, the majority of the civil law systems would not accept a cause of exclusion of culpability that is so vague, nor would they give to the motive a relevance that generally it does not have.

I will try, then, a different approach to the question. I will try to apply an exclusion of responsibility in the discriminant. A hypothesis could be that this would be a regular exercise of the right to culture. However, to apply this cause of justification, it is necessary to recognize rights in the order that they prevail above others. Thus, in doing so, we fall in a vicious cycle: the right is an expression of the dominant culture, and we cannot recognize as rights the values

that belong to different cultures, even though, according to those other cultures, said values constitute rights. This is inherent to the concept that law is cultural. Thus, it would be very difficult to utilize a discrimination to justify a motivated fact by a different cultural sensibility.

I will try to continue down this path to verify if other institutes, different from those of the discriminants, can be applied to legitimize cultural differences. I begin with the insanity defense. To use the insanity defense to avoid the culpability by a culturally oriented crime would be unacceptable from the point of view of the dominant culture. Besides, it would have the meaning to despise the culture of origin of the defendant. And this would contradict the very meaning of the cultural defense.

What about the importance of criminal law? In all systems of civil law, the principle of *da ignorantia legis non excusat* has validity. Ignorance of the law cannot be used as an excuse. I examined the idea of the absence of intent. First, as intent implicates the will to commit an act, the fact that a crime is perfectly valid within the defendant's culture of origin is of no relevance. I will try to take an example that comes from the Italian system. In Italy, there is a society within the dominant society. This minority society consists of the culture of the nomadic people of Bulgaria, which is called the "Roma". To the Roma, to steal from the Non-Roma is not a crime. In fact, it is considered good and is encouraged. However, by the criminal Italian code, the Roma that steals, commits a crime of theft, and Roma culture is considered irrelevant. The intent is verified.

In general, it is not justifiable to assert relevance of the culture means there is an absence of intent. However, there are specific cases in which the intent is not concretely verified. In the case of the Afghan man, since kissing the penis of his son was done to demonstrate his love, it would imply absence of intent. To practice sexual acts, one must ponder which culture's sexual standards are being applied. The first answer is to use the dominant culture, since it created the rights in question in that given social context. However, intent is related to representation and the will to carry out acts that have sexual connotation. In this case, the intent is not clear. The defendant did not think there was any sexual connotation, thus he did not have intent. In a case such as this, the culture of origin coincides with the principles of the system of the dominant culture.

There is factual and contemporary evidence about how acceptance of the culture defense can bring problems of more difficult solution. In Bolivia, some communities have been utilizing a form of popular justice, with the pretense of support and normative concessions of the official law. This form of justice could consist of lynching or beating a convicted felon,

without the due process. These people wrongly based their decision on the Community Justice, approved by the Constitution of Bolivia of 2009. The idea that a Constitution legitimates popular justice makes it possible for contemporary law to coexist with the justice system of ancient tribes. The Bolivian legislation permits that a community decide how to judge and punish those responsible for contravention, according to the traditions of the elders, but criminal exile and beatings are the only permitted forms of popular justice allowed. Lynching is forbidden. The crimes of blood cannot be judged by the Community Justice. However, lately, it has been noticed that the rules of the Bolivian Constitution are not taken seriously, regarding exceptions and limits, so that the thefts and sexual violence are punished with lynching. There were cases of people being burned alive (MORTE..., 2015)⁸ that were decided with a process carried out by the tribal community. This does not correspond to the image of the law crafted by centuries of civilization. To accept a cultural defense is to accept cultural ideas that still have not progressed through the process of the adoption of provisions of constitutional guarantees, the implementation of rational criminal legislation, and humanitarianism. The conclusion seems harsh, but I think it is the only possible way to maintain the guarantees of a democratic form of justice.

In sum, except in highly specific cases, the cultural defense cannot be legitimized in a criminal law system. Regardless of motivation, a crime is a crime. Another consideration is to modification of the sentence according to the cultural motivation. The culture of a person is a part of construction of a person and it can be evaluated among the motives that took to the crime and conditions of the life of the defendant. In this sense, culture could be relevant to the construction of an appropriate sentence. The culture of origin of each person profoundly influences the values and the convictions of each person and affects said person's perception and interpretation of reality. However, in no case should culture become the legal basis of vindication of any conduct harmful to the life, physical integrity, or freedom of others. Criminal law enforcement should be based on facts, not on person's character.

7. CONCLUSION – THE CULTURAL DEFENSE AS A “NON-RIGHT”.

I analyzed, in its essential characteristics, the cultural defense, where the importance of the criminal fact is gauged through the lens of the defendant's characteristics. Well, it is indisputable that people are the focus of the law, as well as of society, but what I want to

⁸ MORTE anunciada. Bonecos em ruas significam sentença popular contra suspeitos de crime; justiça é comum entre indígenas. **Folha de São Paulo**, São Paulo, Brasil, 25/01/2015. [ANNOUNCED Death – dolls in streets of Bolivia mean popular sentence against suspects of crime, justice is common amongst Indians]

question is the possibility of moulding the law to shift its basis from the general person, to the person that committed the crime. In the contemporary legal systems, to not punish someone because of the characteristics of the accused (and not because of the analysis of the conduct realized) – as it is typical in the cultural defense – does not comply with the principles that constitute the fundamental right to punish criminals.

I arrived, thus, to an important conclusion: in the cultural defense there is a substitution of a generic vision of the men (anthropomorphic) by another, whose peculiarities I brought to light (anthropocentric). What happens is that when we play cards, it is needing to know the rules of the game. This is similar. Criminal law has its own rules and none of them is necessarily better than the other. Because of this, at first, a law that takes under consideration the typical specifics of the defendant (cultural, social, ideological...) could be considered even better than a law that ignores it. Each person has their own characteristics that differentiate them from others. There are many characteristics that constitute a human being. Which one of those should be taken under consideration by the law? All of them or just a few? And what would be the criteria of selection? The answer would need to impose other rules. In sum: another law. However, to do all of this, we must have the certainty that the new law will be better than current law. It cannot be equal; it has to be better.

To know if the new law is better than the present valid one, we must consider that, to give legitimacy to cultural defense, it would mean considering a behavior licit each time a conflict occurs between the culture of the agent and culture of those who produce the valid law. In this case, each one would create its own law and this would result in that everyone would operate under different law.

Considering all of the pieces, the conclusion is that the cultural defense is a form of non-law and represents the dissolution of criminal law. Thus, the choice is not between an equal law and a better law, but rather a choice between law and non-law. The choice is clear.

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