

The cultural defense : possible correlations and applications within the framework of women's rights

Maria Beatrice BERNA

Titu Maiorescu University, PhD. candidate (ROMANIA)
berna.beatrice@yahoo.com

Abstract:

In the present paper, we aim to reveal in a non-exhaustive manner the peculiarities of the cultural-juridical institution that is circumscribed to the American system of justice : the cultural defense. By applying the deductive method of reaserch, we will proceed to presenting the conceptualization patterns of the cultural defense so that finally, we will undertake the case-law analysis of the cultural defense and of the impact that it has upon women's rights. The essential idea that we will upheld throughout our paper consists in the suis generis character of the cultural defense – a suis generis character that becomes notable even in the hypothesis of applying the cultural defense in the field of women's rights. We deem that, the possible legal recognition of the cultural defense represents a manifestation of legal pluralism and of substantial equality – the latter being based upon the right of the individual to being different. In the same token, we deem that, the formalization of the cultural defense as a mitigating factor of the punishment constitutes a legal instrument that will ensure the equilibrium between the right to identityof the cultural communities – as a collective right and the individual rights of women that are circumscribed within the more extensive sphere of human rights.

Keywords : *the cultural defense, women's rights, community rights, universalism, relativism.*

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Argumentum And Conceptual Delimitations

Cultural defense is a concept that links together the most important aspects of the individual existence : culture and the legal official norm. Although the concept of human rights has imposed itself within the conscience of humanity, the protection of the individual continues to remain a concept whose content is difficult to penetrate taking into consideration that, the respect for cultural diversity is a prerogative that is unanimously recognized as pertaining to the realm of human rights. Within this context appears the theoretical aspect that we have nominated as the human rights' dilemma : if the right to culture is enshrined within the more extensive category of human rights, then is it legitimate the liberty of cultural communities of applying the practices that limit/violate other categories of rights? The previously announced dilemma is circumscribed to the cleavage between human rights' universalism and cultural

relativism. The universalism of human rights attests the immutable, absolute nature of human rights – offering preeminence to the latter regardless of the context in which human rights are invoked meanwhile, cultural relativism has its starting point within the idea according to which every community enjoys an assembly of cultural rules that must be obeyed for the purpose of maintaining the identity of the respective community in its external relations.

In the field of women's rights, the cultural defense is applicable because, taking into consideration the patriarchal character of regional cultures, women's subordination as a consequence of applying cultural communitarian practices is bound to happen. In this situation, there is a contradiction between women's rights –conceptualized within the individualist pattern advanced by the concept of human rights and the collective perspective upon the right to community-identity. In a subsequent section of our paper, we will demonstrate the manner in which the cultural practices of the minority communities have legitimized the violent/criminal action of men against women. In the given circumstance, men will be the beneficiaries of the cultural defense clause as they will argue that, extreme violent actions against women have been committed in compliance with the cultural norms of the membership community by virtue of confirming their adherence to the respective community. In the Kimura case, the cultural defense clause will be legitimized against women but, the context of applying the cultural defense will be different : the woman who is betrayed by her husband is bound, according to cultural norms, to practice suicide in order to remove the dishonour produced by the husband that is reflected upon the entire family; likewise, the betrayed woman must murder the children that have resulted from the marriage for the purpose of protecting them from the pain caused by losing their mother.

As we will argue in a distinct section of our paper, the hypothesis of invoking the cultural defense clause by women is different by comparison to the hypothesis of invoking the same defense by men because the violent acts committed by women are usually directed against themselves. In extenso, the violent acts directed against children are legitimized by the cultural norm of compassion and protection because the mother aims, by murdering her children, to spare them from a life deprived of maternal

love. By comparison, the violent acts committed by men by virtue of the cultural defense are legitimized by means of the argument of re-establishing male authority.

The cultural defense is a concept that is difficult to define. First, the cultural defense does not rejoice a *suis generis* regulation in the American system of law – where it is originated. In this sense, the cultural defense is exposed as a mitigating factor that may be taken into consideration by the Courts of Justice when pronouncing the final decision. Thus, the cultural defense is an analytical element that is highlighted within jurisprudence, sustaining the unlawful conduct of the subject by resorting to the individual's adherence to the cultural norms of the membership community. The influence that the cultural factor brings upon the subject by determining him to adopt an unlawful conduct may be analysed, from our point of view, by means of two interrelated coordinates : (1) *forum externum* – the pression imposed by society upon the individual by creating cultural norms; (2) *forum internum* – the individual' s acknowledgement of the cultural norms imposed by society. In connection to the previously mentioned issue, we formulate the problem of the quality of the individual's conscience in committing the illegal act. Concretely, it is just to ask ourselves if the conscience of the individual engaged in performing the illegal act is authentic or not respectively, if the individual who perpetrates the unlawful action acts according to an authentic conscience (his own conscience) or according to a false conscience (attributed as a consequence of the cultural norms formulated by the membership community).

In light of the above mentioned ideas, we underline the difficulty of creating a genuine theory of cultural defense. Regarding this aspect, the doctrine [1] has tried to overcome the difficulties in theorizing the cultural defense clause by resorting to the juridical situation that is encountered by the immigrant who wants to abide in a different country with a different culture. Hence, the clause of cultural defense has the status of a para-judicial instrument presented by the immigrant that is a member of the minority culture in front of the judge so that the latter would take into consideration the cultural evidence sustained by the immigrant with the purpose of reducing the punishment that the immigrant is liable of. In other words, the cultural defense represents the explanation of the illegal act that is formulated by the immigrant who is member of the minority culture. The respective explanation is based on cultural evidence that is

peculiar within the membership community and is identified as cultural practices, attitudes or acts –accepted within the respective community. According to the cultural defense clause, the individual is the product of his culture- thus, the cultural coordinates of the membership community are so strong that they pre-determine the individual to act within a certain pattern which, according to the membership community, is accepted and desirable. Although the immigrant pertaining to a cultural minority accepts the official rules of law advanced by the residency State, he is more attached to the cultural norm –the result being the committing of acts that are against legal norms accepted by the majority culture. Thus, the cultural defense is a *suis generis* institution of juridical-cultural nature that implies the interaction between the cultural norm (that is specific for the minority culture) and the legal norm (that is specific to the majority culture).

It is just to affirm that, the cultural defense is a jurisprudential argument used in favour of the individual who is not initiated in the dominant legal culture so that he may plead for cultural determinism –as a mitigating/exonerating circumstance. In the case evoked by the cultural defense, the cultural determinism collides with the principle of the complusoriness of acknowledging the law, surpassing the latter by arguing the impossibility of prohibiting the individual to commit the illegal act because his conscience is moulded by some cultural rigours that are derived from the membership community.

Cultural determinism represents, from our point of view, the foundation of the cultural defense that characterizes the individual's conduct according to the following reasoning : the individual manifests adherence towards the cultural norm imposed by the membership community because it is assimilated, throughout its existence and it is finally, interiorized. Although the individual recognizes the official regulation that is imposed by the dominant community, the latter is formally observed by the individual and serves only to moulding the individual's social conduct, without having any influence upon his conscience. The most relevant doctrinal opinion in the matter of the cultural defense institution is sustained by Alison Dundes Renteln [2] who is in favour of the cultural defense in view of the need for improving the act of justice. In this sense, if the judge must correctly solve all the relevant factual and juridical aspects of the case, it is necessary to take into consideration the cultural circumstances that have determined the individual to adopt a certain conduct.

At first glance, the cultural circumstances may be qualified as simple factual aspects that may interest the case. Nevertheless, a profound analysis leads us to the conclusion according to which within minority communities (exempli gratia Asian or African communities), cultural norms configure the individual's conscience and, subsequently, regulate the individual conduct like a genuine rule of law. Taking into account these premises, we may affirm that, the thesis upheld by Alison Dundes Renteln may be construed in the following manner : for the equitable rendering of justice, the judge must analyse the cultural circumstances that have shaped the individual conduct and must establish, for each cultural norm, the quality of factual or juridical element. In this manner, by understanding the intimate reasons that have led the individual to committing a certain unlawful act, the judge may correctly and completely solve the case in question.

Renteln utilises the enculturation argument in order to legitimize the utilisation of the cultural defense clause at the jurisprudential clause. [3] The idea that we have underlined in terms of customizing the individual's conscience by means of culture is expressed by Renteln under the enculturation process according to which, the standard conduct of the normal/reasonable man must be established in a peculiar manner, by considering the representation that the individuals have upon existential things/phenomenons when applying the peculiar cultural lenses. In other words, the enculturation process entails that the individual is the result of the membership culture because he adjusts to some cultural norms throughout all his life, thus the respective cultural norms are interiorized. Renteln argues that, in the hypothesis in which the judge does not take into consideration the cultural defense (that is mostly used by the members of the cultural minorities), the decision of the judge will be biased, denying the elements of cultural diversity and promoting an ethnocentric perspective.

Finally, in the present section bestowed to arguing the choice of the theme and the clarification of concepts, we will highlight some determinations referring to culture – as the main concept of the cultural defense theory. We deem that, the main difficulty that limits the practical applicability of the cultural defense clause resides in the difficulty of defining culture. The latter lays within the hybrid content of culture that may present some moral, ethical, religious aspects; these content elements are (should have) be

perceived in a dynamic-evolving manner like the legal norm. Nevertheless, the religious dimension is, amongst the cultural elements, the only element that is resistant to change, being defining for the identity of a given cultural community. From our point of view, the static aspects of culture determine the impossibility of placing the individual – member of a minority cultural community next to the standards of the majority culture – hereby the difficulty of inserting the cultural defense within the legal system as an autonomous institution. Acknowledging the limit of the impossibility of defining culture *stricto sensu*, the cultural defense clause may be analysed by means of academical debates like a theoretical-artificial construct that has a limited applicability. The invocation of the cultural defense at the jurisprudential level as it is realized within the American legal system, is a circumstantial fact because it depends on the manner of constructing the defense of the individual and on the power of assessment of the judge in absence of the legal norm that would give guidelines in the matter. As observed in doctrinary studies [4], the difficulty of conceptualizing culture and the clause of cultural defense – as a similar institution- determines the distorted applicability because, in countless cases, the cultural defense was invoked as a mitigating factor that is similar to provocation or self defense.

The Possibility Of Formalizing The Cultural Defense And The Implications Upon Women's Rights

The discussion concerning the formalization of the cultural defense is, as could be anticipated, of ambivalent nature. In his work [5], Sikora analyses the positive and negative aspects of formalizing the cultural defense, reaching the conclusion according to which is beneficial the admission of the cultural defense as a mitigating factor and not as an exonerating factor. The arguments presented by the author in favour of formalizing the cultural defense clause may be resumed in the following manner : (1) the application of the principle of equity and individualizing justice; (2) the punishment applied in the case of admitting the cultural defense maintains its purpose of discouraging a certain illegal conduct; (3) the cultural defense will allow a better analyse of the cause and a fair individualisation of punishment; (4) the admission of the cultural defense clause removes the unforeseen for the solution of the cause so that it may allow all immigrants belonging to a minority culture to utilize the cultural evidentiary for

justifying the illegal conduct. Concerning the first argument, we feel that the legal regulation of the cultural defense constitutes a relevant solution for ensuring a equitable and fair individualisation of justice. In the spirit of the thesis sustained by Renteln, the equity of the jurisprudential treatment of a cause lays within the assessment, by a judge, of all the relevant aspects of the cause and, in the hypothesis in which the individual belongs to a minority culture, the cultural factor must be assessed in a mandatory manner.

On the contrary, it was exposed the opinion to which we do not resonate, according to which tolerating the cultural evidentiary sustained by the immigrants belonging to cultural minority equates to the violation of the equality principle applied to respecting the right to life and the right to freedom.[6] The cited opinion sustains that, the legal official recognition of the cultural defense imposes a discriminatory situation between the citizens pertaining to the legal majority culture and the immigrants belonging to the minority culture because the cultural defense is accepted only for the latter. We do not subscribe to this opinion because we feel that the problem of equality is equivocally formulated : the acceptance of the cultural defense in favour of the immigrants belonging to the minority culture is, from our point of view, a confirmation of the principle of equality before the law and not a denial of the respective principle. Equality means the acceptance and the celebration of the differences between individuals and not the attempt to standardizing them. Thus, it is logical the solution of guaranteeing the cultural defense exclusively in favor of minorities because the citizens belonging to the majority culture do not need it. Of course, the acceptance of the cultural defense as a juridical institution destined to cultural minorities is equitable only if the cultural defense is regulated as a mitigating factor of liability and not as an exonerating factor. The latter solution is, in our opinion, the only one able to produce equity because the individuals of the minority culture enjoy a just assessment of the case but, at the same time, it is not admitted the preeminence of the minority culture upon the majority culture so that the aggressors (although it is proven that have actioned by means of the cultural norms of the membership community) are sanctioned proportionally with their guilt.

The arguments presented in doctrinal studies in favor of regulating the cultural defense as a mitigating circumstance of the punishment are interrelated. It is clear that, the regulation of the cultural defense clause as a mitigating factor endorses the educative purpose of the punishment. Likewise, the admission of the cultural defense as a mitigating factor guarantees the equality principle in two senses: (1) on one hand, the judge may understand completely and correctly the circumstances of the act produced by the individual belonging to the minority culture thus ensuring the substantial equality between immigrants and non-immigrants; (2) on the other hand, the application of the cultural defense as a mitigating factor ensures, as we have already mentioned, the equality between individuals limiting the unforeseen in the assessment of the cause by the judge. The latter may be obliged to take into consideration the cultural proofs presented by the individual in the case of officially regulating the cultural defense.

In the negative sense, the study undertaken by Sikora presents the arguments against the cultural defense : (1) the promotion of the stereotypes specific to some cultures and thus implicitly determining discrimination; (2) the positioning of women and children in an inferior status; (3) the difficulty in regulating in detail the cultural defense; (4) determining the balkanization of the justice system. We deem that, from all the arguments contrary to the legal recognition of the cultural defense, the argument regarding the difficulty of regulating in detail the cultural defense has the highest degree of relevancy. Indeed, there is a difficulty in establishing the specific coordinates to the regulation of the cultural defense because the definition of culture is per se a problematic aspect. In the same vein, the regulation of the cultural defense entails the existence of a trial; the notion of culture – delimits the elements that the individual may invoke within the cultural defense. We do not consider the other presented arguments as relevant. The cultural defense does not implicitly determine cultural stereotypes because the cultural practices of cultural minorities are, in general, recognized by the dominant culture and the affirmation of the latter by means of the cultural defense does not contribute to the creation of cultural stereotypes. Regarding the manner in which the cultural defense affects women and children we admit that, the cultural defense allows the use of culture against women's and children's rights (the Chen and the Kimura cases) but, this use is not unilateral because there is also the possibility of invoking the

cultural defense in favor of women (the Friedman case). In regard to the balcanization of the justice system, the cultural defense will not impose in favor of the immigrants a different system of justice that will allow the impunity concerning facts that are committed in relation to their cultural belonging. On the contrary, the cultural defense as a mitigating factor will maintain untouched and in unity the national juridical system but it will not give an adequate customizing in favor of individuals who belong to national minorities.

The relationship between cultural defense and women's rights is a peculiar one : during time, cultural communities have upheld the violations of women's rights by virtue of culture and the collective rights of cultural communities were put in opposition to the individual rights of women, - the first having preeminence. As we have underlined in the lines above, there is the hypothesis according to which men are able to use the cultural defense against women arguing facts as passion or honour crimes by virtue of cultural provisions hence excusing the anger state in which was found the man when committing the crime. Nevertheless, we underline that, in the hypothesis in which we would deny the right of immigrants to use the cultural defense as a mitigating factor on the grounds of gender this would lead to a discriminatory situation that disadvantages men while favouring women. Furthermore, the denial of the cultural defense on the grounds that it may lead to using it, by some men, in order to justify crimes against women is the equivalent, from our point of view, with the cleavage between two types of individual rights : men's rights to use the cultural defense and women's rights to be protected against the cultural practices that endanger their essential prerogative like the right to life or the right to physical and psychical integrity.

It is difficult to achieve a segregation between the two types of rights as long as both are individual rights and both have an essential relevance for the sphere of human rights. The sole criterion of delimitation is, in our opinion, the possibility for those two rights to be guaranteed for each of the two genders. Exempli gratia, the right of the immigrant to resort to the cultural defense is guaranteed independently from gender – being an instrument that can be used for both women and men. Women's right to be free from cultural practices that violate their prerogatives is, generally intended for women exclusively because, during time, mostly women were subjected to the violation

of their fundamental human rights in the name of cultural dispositions. Taking into consideration the previously presented arguments, we feel that, women's rights of being free from cultural practices that affect their fundamental rights must have preeminence upon the cultural defense. Nevertheless, the definitive renouncement of cultural practices that are against women's rights constitutes an objective that cannot be achieved otherwise than in a gradual manner, though never completely. As we have previously mentioned, the application of the cultural defense must not lead to the exoneration of the perpetrator but only to the mitigation of the punishment –thus obtaining, in our opinion, a fine equilibrium between the recognition and the protection of women's rights as human rights and the application of the cultural defense. In the subsequent section of our paper we will analyse the manner in which the cultural defense is applied in the matter of women's rights.

The Case-law Analysis Of The Cultural Defense And Its Implications Upon Women's Rights

In the Deng-Lu Chen case, the issue of cultural defense reveals two important aspects : (1) ensuring the equality in rights of individuals in performing justice; (2) the violation of women's rights by virtue of cultural norms. In fact, the Chen case refers to an Asian couple of immigrants that was established in the United States of America, leading their public existence according to the norms of the legal dominant culture (the American legal culture) and their private existence in accordance to Asian cultural norms. The latter establish the subordination of women in the private sphere by imposing the male authority. The male authority is exerted upon the entire family and upon all aspects of the existence. In this sense, the doctrine underlines gender roles within the Asian communities as follows : the man is the person who decides the cultural norms that are to be applied and imposes, by means of these, the female subordination, meanwhile women are silenced and their rights and obligations are mainly established by reference to the personal sphere. In the mentioned cause, the defendant Chen has killed his wife after discovering her infidelity. Chen's lawyer has argued in front of the Court of Justice the cultural defense according to which, female infidelity must be punished by the male authority because, as a consequence of the female infidelity, the man is humiliated and his authority is disparaged within society.

The Court of Justice has accepted the cultural defense advanced by Chen's lawyer and the latter justifies the aggressiveness of his client in committing the murder (hammering the victim's cerebral area) by resorting to the individual's lack of actional and mental freedom. In the Chen case, the Court of Justice has assessed culture as a mitigating factor as a consequence of applying the cultural defense. The doctrine [8] has shown that there is no coherence within the cultural defense endorsed by Chen's lawyer so that the defendant has stated in the plea of proving his innocence that the state of psychical torment that he felt when discovering his wife's infidelity was determined by the cultural norms that undermine the male authority in case of female infidelity; at the same time, Chen argued that, when he has committed the action he has reasonable acted in compliance to the cultural practices applied by the membership community.

Under these conditions, the doctrinal opinion previously cited reveals that, Chen's cultural defense comprises two perspectives : (1) the rational perspective (the cultural defense sustains that the state in which the individual was found when committing the murder has determined him to act absent reason) and (2) the volitional perspective (the cultural defense sustains that the individual has reason when committing the act but he chose to solve the problem in accordance to the cultural norms of the membership community. The American Court of Justice has allowed the cultural defense, mentioning that Chen is the product of his culture but it was not his culture that determined him to act, nevertheless it has facilitated the criminal action. Hence, it is just to retain the cultural argument as a mitigating factor and not as a absolving element.

In the Kimura case, the situation is presented in a different manner than in the Chen case because in this particular case are presented the consequences of male infidelity and the female reaction dictated by cultural norms. The factual situation of the case is presented likewise: a Japanese immigrant to the United States of America discovers her husband's infidelity and actions according to the cultural norm oya-ko-shinju that requested the betrayed woman to practice suicide in order to rehabilitate the honour of the family and to produce the death of the children so that they do not suffer from the absence of maternal love. The Japanese cultural norms maintain women in the private sphere; within the family realm, the woman has the obligation to maintain the harmony and to satisfy the needs of its members. Kimura has attempted to perform the

oya-ko-shinju ritual with the purpose of complying to cultural norms, by attempting to murder her two children and to drown herself in the Pacific Ocean. The consequence of her actions consisted in the death of her two children, Kimura being charged for this murder. The defense lawyer has upheld the cultural argument oya-ko-shinju and the Court of Justice accepted it, as in the Chen case, as a mitigating factor but not as an exonerating factor.

Specialized studies [9] sustain that the leniency demonstrated by the Court in the Kimura case results from the convergence between the Japanese cultural values and the American cultural values. In both cultures, women who are mothers are perceived as protectors and caretakers of their children and the hypothesis according to which a woman may kill her own children equals to a mental disease – thus, additionally to time in prison, Kimura was obliged to take counselling sessions. Likewise, it was argued that, by means of the leniency of the Court, in the Kimura case, was originated the idea of maternal sacrifice prescribed by the Japanese cultural norms - that is in accordance with American norms. Comparing the Kimura case to the Susan Smith case – the previously cited opinion underlines the fact that, in the Smith case, the Court did not grant mitigating circumstances to the defendant because the motif of the crime did not serve the fulfilment of the maternal vocation – that is to protect children and to prevent their upbringing in the absence of their mother (as in the Kimura case). On the contrary, the Smith case evokes the situation of a mother that murdered her children by immobilizing them in the car and crashing it in order to satisfy the desire of her boyfriend who was jealous of her two children. In the Kimura case, the woman mainly pursued her suicide with the purpose of rehabilitating the honour of the family and the murdering of the children was alternatively an act followed out of maternal love, out of the desire of not allowing her children to live without maternal love.

The cases Chen and Kimura present some peculiarities that cannot be denied : in the Chen case, the Asian cultural norms are invoked in favour of the male authority which has the right to act violent as a consequence to the wife's infidelity meanwhile, in the Kimura case, the cultural defense serve to protect the woman that is accused of the death of her two children. In the latter case, the criminal conduct of the woman towards her children is dictated by the cultural norms that pursue maintaining the family honour

and the prevention of the children from suffering. In the Chen cause, the cultural defense presents the consequences of the female conduct that is not subject to the male authority whereas in the Kimura case, the cultural defense presents the situation of a woman that is found in a cleavage between the love for her children and the achievement of the maternal role according to the cultural norms prescribed by the custom oya-ko-shinju.

Both cases are circumscribed to the criminal field and the cultural defense is used in both cases for mitigating the punishment for the crime. In the Friedman case, the cultural defense is used in a civil lawsuit, the purpose of the plaintiff being that of obtaining damages from the State of New York for the physical and psychological damages caused by the plaintiff's forced abandonment of the mountain cabin where she was stuck with her male friend. The plaintiff has argued her attitude of leaving, by improvised means, the cabin with the risk of suffering physical and/or psychological damages, out of respect for the cultural norms related to the religion practiced by the plaintiff as she belongs to the cult of ultra-orthodox Jews. In light of the Rabbi testimony, the Court has stated in favour of the plaintiff, accepting the cultural defense that prohibits women to remain in a closed space with a man because it would determine the social disparage of the respective women and of her family. Specialized literature [10] sustains that, the Court of Justice has taken into consideration both the cultural defense of the plaintiff and the aspects that refer to the negligence of the authorities of the State of New York in ensuring the maintenance of the ski cabin and in the preventing the possible physical and psychological damages that would cause shortcomings to the plaintiff. The doctrinal opinion that was previously cited is a subsidiary source that has influenced the Court of Justice, questioning the situation according to which the plaintiff would have won the case if the negligence of the New York authorities would not have been proven.

In the Kong Moua case, the defendant (belonging to the Hamong culture, immigrant to the United States of America) has kidnaped the victim Seng Xiong (also immigrant belonging to the Hamong culture) from her family home and brought the victim to his own house where he has raped the victim various times. The victim did not immediately report the rape, first she addressed the authorities for reporting the freedom deprivation so that, afterwards, she has confessed the rape to the authorities.

In his defense, Kong Moua has sustained the cultural argument demonstrating that, within his cultural community, forced marriages are practiced. According to this practice, the young man who wishes to marry a certain woman, will kidnap the latter and will forcibly consummate their union so that subsequently, the forced marriage would be upheld by society. Authorities have agreed to the cultural defense of the plaintiff correlating the cultural defense with the fact that, the victim and the aggressor knew each other and with the fact that, the victim did not immediately claim the rape. As a consequence of the cultural defense, the aggression committed by the defendant was not qualified as rape and as kidnaping but as false imprisonment – that is a misdemeanor. Although the Moua case is often invoked for illustrating the successful application of the cultural defense, we deem that the case is illustrative for observing the manner in which women's rights are violated under the pretext of cultural defense. From our point of view, in the Moua case, the cultural defense was applied as an exonerating factor and not as a mitigating factor of criminal liability. Corroborating the factual situation (the kidnaping and the sequestration of the victim) with possible physical and psychological trauma experienced as a consequence of the facts committed by the aggressor with the criminal liability of the perpetrator for a small deviation from the criminal norm, we seize a grievous inconsistency. The theory of the convergence of cultural values exposed within specialized studies does not apply, in our opinion, to this case. It is true that, the American case-law has demonstrated the leniency of the judges towards the defendants for rape crimes if the victim and the perpetrator are friends but, in the Moua case, the cultural norms invoked, consist in the express recognition, by the membership community of the immigrants, of the man's right to compel a woman to marriage by means of kidnaping and repeated rape. Or, it is clear that, in this hypothesis, the cultural convergence does not exist.

Conclusions

The cultural defense designates a controversial aspect – being an element that is invoked in the American case-law without finding its express regulation in any of the legal systems of the American States. The controversy connected to the cultural defense is both formal (as we have previously mentioned, the cultural defense is mentioned within case law although is not regulated) and substantial (being possible

that, through its application would be violated the individual rights of women). The cases that were analysed within the previous section of our paper advance an assembly of ideas : (1) the cultural defense is accepted within the American case-law system by virtue of the cultural pluralism and of ensuring equality between immigrants and non-immigrants for achieving a fair judgement; (2) per a contrario, the cultural defense is not accepted by virtue of cultural convergence. In other words, Asian or Jewish cultural norms exposed in the previously analysed cases do not have an identical correspondent in the American cultural norms; (3) the cultural defense is a democratic solution of any legal system as long as it is implemented as a mitigating factor and not as an exonerating factor; (4) although recognized as a mitigating factor, the cultural defense must have a limited application, under the condition of the proportionality between the facts committed and the possibility of re-establishing the rights of the victim/the violated social values; (5) the cultural defense has not exclusive applications against women's rights – in this sense, are eloquent the cases Kimura and Friedman.

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