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Cultural Defence and Culturally Motivated Crimes (Cultural Offences)

'Zwei Dinge erfüllen das Gemüt mit immer neuer und zunehmender Bewunderung und Ehrfurcht, je öfter und anhaltender sich das Nachdenken damit beschäftigt: Der bestirnte Himmel über mir, und das moralische Gesetz in mir.'[2]

1. INTRODUCTION

When researching the subject of *cultural offences* (*délits culturels*[3]) or the *cultural defence*, one is struck by the abundance of literature dealing with this topic. Apart from an immense amount of literature and articles, there seems to be an equally immense variety of approaches. An important distinction in approach is the difference between 1) continental writers who focus on the aspect of *cultural offences*, and 2) the common law countries (mostly literature from the United States) where authors tend to focus on the problem of the *cultural defence*. In addition, most articles do not explicitly define their subject but approach it in a pragmatic way. While this is probably a consequence of the very nature of the subject, this does not promote the construction of a general theory. Yet, this scientific 'confusion' is only the tip of the iceberg. The amount of disputes reaches enormous proportions when the subject of the opportunity of the recognition of a cultural defence is raised.

The primary aim of this article is to bring some structure into the debate and to contribute to a general theory concerning cultural offences and the cultural defence.

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1. University of Antwerp, Belgium.

2. I. Kant, *Kritik der praktischen Vernunft: Grundlegung zur Metaphysik der Sitten* (Wiesbaden 1974) (1785) p. 300.

3. 'Cultural delicts' and 'délits culturels' are the terms used by M.-C. Foblets, 'Cultural Delicts: The Repercussion of Cultural Conflicts on Delinquent Behaviour. Reflections on the Contribution of Legal Anthropology to a Contemporary Debate', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) p. 187 and 'Les délits culturels: de la répercussion des conflicts de culture sur la conduite délinquante. Réflexions sur l'apport de l'anthropologie du droit à un débat contemporain', 35 *Droit et Cultures* (1998) p. 195.

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By doing so, this theory will hopefully provide a useful basis for 'lawyers' as well as anthropologists.[4] The starting point of every scientific theory is a sound definition of its subject, in this case cultural offences and the cultural defence. As was mentioned, while some publications touch the subject of cultural offences or the cultural defence, most (there are exceptions) of them, nevertheless, remain vague when it comes to drawing the boundaries of those *cultural offences* or *culturally motivated crimes* or the use of a cultural defence. In most cases a taken-for-granted view is adopted, and in most cases this pragmatic approach is sufficient. Yet the lines to be drawn between culturally motivated crimes and 'ordinary' crimes committed by a member of a minority group are very vague. This vagueness risks endangering the very essence and identity of the concept, causing some misinterpretations which might lead to the negation of a problem that is relevant to social reality.

This article will thus be dedicated to defining the concept of cultural offences or culturally motivated crimes; this concept will be our starting-point. By studying the different aspects of this issue, we will foremost show the problems and discussions that can arise. This is not aimed at denying the concept, but to lay the foundations of a more solid theory. An important aspect of this theory is the linking of the continental and common law-approach to culturally motivated offences and the cultural defence.

The main point will consist in constructing a conceptual scheme that will enable anyone confronted with the problem of offences possibly caused or motivated by culture, to recognise these acts as such. While culture may play a role in all aspects of life, one is seldom confronted with an offence that is caused by a clash of cultural norms. Mostly, these cases offer a high degree of drama, and the search for a fair and balanced solution is not evident. When these cases are outlined in the literature, common-sense tells us there is something special about them. Nevertheless, this common-sense feeling needs to be put into concrete concepts, allowing one to apply some criteria in order to objectively recognise and understand a cultural offence.

Scientific reasons let alone, a correct demarcation of cultural offences or the cultural defence is also important to have some basis in the discussion about the opportunity of invoking cultural elements in a criminal case. Our aim is to provide a common ground on which the discussion can start and to give the right 'nuances' to the debate. Yet, the discussion as such is avoided in this article and no positions are taken considering the question whether or not the cultural factors underlying a delinquent's behaviour should be taken into account.

We have tried to use an 'illustrated' approach.[5] Many examples are being used and these are not to be seen as a limited list, nor as an absolute statement, but merely as illustrations of a point. As we will argue, when confronted with a crime or an offence which may be culturally motivated, one needs to take into account all the specific circumstances. The main goal here is to offer a structural tool by which cultural offences can be approached and understood. The specific solution will vary depending on

4. *Anthropology* and *anthropologist* will be used in the meaning of *social and cultural anthropology (-ist)*. Philosophical anthropology or physical anthropology is not taken into account and the 'ancient' meaning of anthropology as used in the old criminological schools is rejected.
5. Our examples will not be limited to what is accepted as criminal law in western societies, but will also be taken from other fields of conflictual legal norms.

numerous factors. At each occasion the specific incrimination and the specific cultural norms at hand have to be examined.

2. CULTURAL OFFENCES

After learning that her husband was unfaithful and had a mistress, Mrs. Fumiko Kimura tried to kill herself by drowning. She took her two children and waded into the Pacific Ocean. Mrs. Kimura was saved, but her children didn't survive. She was then charged with the murder of her two children, but she, and along with her a considerable part of the Japanese community in the United States, argued that it was appropriate, when committing suicide, to also kill one's children, as this is customary in Japanese society.[6]

A mother of African origin threw her baby into the water causing it to drown. The reason for this act was that the baby was an albino.[7]

Kong Moua and Xeng Xiong are Hmong (Laos). When Kong Moua wanted to marry Xeng Xiong, after performing the required courtship, he decided to take (kidnap) her to his cousin's house and consummate the marriage, thus performing the ritual *zij poj niam* or marriage by capture. The next day Kong Moua was arrested and charged with rape.[8]

Fifteen inhabitants of a village in Haryana (Northern India) were charged with murder. They had stoned and stabbed to death two young lovers who refused to end their relationship. The young man was called before a village counsel where

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6. About the Kimura case: C. Choi, 'Application of a Cultural Defense in Criminal Proceedings', 8 *Pacific Basin Law Journal* (1990) pp. 82–83; A. Dundes Renteln, 'Culture and Culpability: A Study of Contrasts', 22 *Beverly Hills Bar Association Journal* (1987–88) pp. 17–18; D. Lambelet Coleman, 'Individualizing Justice through Multiculturalism: The Liberals' Dilemma', 96 *Columbia Law Review* (1996) pp. 1109–1111; N.S. Kim, 'The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis', 27 *New Mexico Law Review* (1997) pp. 117–119; J.C. Lyman, 'Cultural Defense: Viable Doctrine or Wishful Thinking', 9 *Criminal Law Journal* (1986) pp. 91–93; P.J. Magnarella, 'Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial', 19 *Journal of Ethnic Studies* (1991) pp. 71–72; M.-M. Sheybani, 'Cultural Defense: One Person's Culture is Another's Crime', 9 *Loyola of Los Angeles International and Comparative Law Journal* (1987) pp. 751–770; W.I. Torry, 'Multicultural Jurisprudence and the Culture Defense', *Journal of Legal Pluralism and Unofficial Law* (1999) pp. 136–139 and D. Woo, 'The People vs. Fumiko Kimura: But which People?', 17 *International Journal of the Sociology of Law* (1989) pp. 403–428.

   About a similar cases: D. Chiu, 'The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism', 82 *California Law Review* (1994) pp. 1118–1119 (this case involved a man killing his three children for somewhat similar reasons. However, in this case there was not a mild judgement) and L. VOLPP, '(Mis)identifying Culture: Asian Women and the "Cultural Defense"', 17 *Harvards Women's Law Journal* (1994) pp. 84–91 (A chinese woman strangling her son).
7. Cited by M.-C. Foblets (1998), *loc. cit.*, p. 188.
8. *See* C. Choi, *loc. cit.*, pp. 83–84; A. Dundes Renteln, 22 *Beverly Hills Bar Association Journal* (1987–88), *loc. cit.*, pp. 18–19; D. Evans-Pritchard and A. Dundes Renteln, 'The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno California', 4 *Southern California Interdisciplinary Law Journal* (1994) pp. 1–48; D. Lambelet Coleman, *loc. cit.*, pp. 1105–1107; P.J. Magnarella, *loc. cit.*, pp. 69–70; S. Sherman, 'When Cultures Collide', 6 *California Lawyer* (1986) pp. 33–36; M.-M. Sheybani, *loc. cit.*, pp. 771–779 and M. Thompson, 'The Cultural Defense', 14 *Student Lawyer* (1985) pp. 25–27.

he was beaten to death with the approval of his family. After the execution, the two bodies were brought to a cremation area outside the village. When the police arrived, they only found the burned remains of the two victims.[9]

A Hindu was caught while throwing 'garbage' in a river in the Netherlands. According to Dutch regulations this was a form of pollution. The defendant argued that the 'garbage' was merely the burned leftovers (wood and flowers) of a ceremony to remember a dead person and that these, according to Hinducustom, needed to be thrown into a stream.[10]

These are some examples of cultural offences. Other known examples are female circumcision (excision),[11] murder or violence motivated by the protection of one's honour,[12] witchcraft and the burning of alleged witches.[13] Examples are not suffi-

9. *De Standaard* (Belgian newspaper), 1 April 1999 (translation, original text in Dutch).
10. F. Bovenkerk, 'Misdaad en de multi-etnische samenleving', 16 *Justitiële Verkenningen* (1990) n° 5, p. 19.
11. *See* about trials in France: M.-C. Foblets, 'De Parijse besnijdenis-processen: Franse rechters in het beschavingsoffensief', *Recht der Werkelijkheid* (1992) n° 2, pp. 107–119 and R. Verdier, 'Une exciseuse en Cour d'Assises. Le procès de Soko Aramata Keita', 21 *Droit et Cultures* (1990) pp. 184–187.

Some literature on this topic: A. Dundes Renteln, 'Is the Cultural Defense Detrimental to the Health of Children?', 7 *Law and Anthropology – International Yearbook for Legal Anthropology* (1994) pp. 31–35; V. Fortier, 'L'excision: quelle réponse pénale?', *Archives de Politique Criminelle* (1999) n° 21, pp. 41–54; H. Gerphagnon, 'La loi Anglaise sur l'excision du 16 juillet 1985', 21 *Droit et Cultures* (1991) pp. 188–192; J.M.T. Labuschagne, 'Circumcision and Female Genital Mutilation: a Human Rights and Anthropo-legal Evaluation', 13 *S.A. Publiekreg/Public Law* (1998) pp. 277–308 and D. Lambelet Coleman, 'The Seattle Compromise: Multicultural Sensitivity and Americanization', 47 *Duke Law Journal* (1998) pp. 717–783.

Comp. two cases of customary incisions on the face or tattoos: S. Poulter, 'Foreign Customs and the English Criminal Law', 24 *International and Comparative Law Quarterly* (1975) pp. 137–140.

For a view about relativism and human rights on this subject: M. Beukes, 'Cultural Relativism versus Universal Human Rights Discourse on Customary "Female Genital Mutilation": Approach with Caution', 22 *South African Yearbook of International Law/Suid-Afrikaanse Jaarboek vir Volkereg* (1997) pp. 85–94.

12. For example: H.T. Sie Dhian Ho, 'Akkulturatieproblematiek en strafrecht', *Proces* (1979) n° 5, pp. 137–140; F. Strijbosch, 'Culturele delicten in de Molukse gemeenschap', *Nederlands Juristenblad* (1991) p. 670; C. Van Eck, '"Hoe Zeynep het leven liet" Een geval van eerwraak bij een Turkse familie in Nederland', 39 *Tijdschrift voor Criminologie* (1997) pp. 217–234; R.H. Wormhoudt, 'De culturele achtergrond van Turkse justitiabelen en de strafrechtspleging', *Proces* (1986) n° 6, pp. 163–170; R.H. Wormhoudt, 'Culturele achtergronden: Strafuitsluitingsgronden?', *Proces* (1986) n° 12, pp. 329–336 and Y. Yesilgöz and L.M. Coenen, 'Opvattingen over eer en eerbescherming onder Turken', *Proces* (1992) n° 2, pp. 25–31.

The killing of adulterous spouses can be placed within this category. About this: C. Choi, *loc. cit.*, pp. 84–85; N.S. Kim, *loc. cit.*, pp. 119–121; P.J. Magnarella, *loc. cit.*, pp. 70–71; L. Volpp, *loc. cit.*, pp. 64–84; H. Wiersinga, 'Dossier in een verloren zaak', 23 *Delikt en Delinkwent* (1993) pp. 528–545 and X., 'The Cultural Defense in Criminal Law', 99 *Harvard Law Review* (1986) p. 1293.

13. For example: D.S. Clark, 'Witchcraft and Legal Pluralism: The Case of Celimo Miquirucama', 15 *Tulsa Law Journal* (1980) pp. 679–698; J. Evans, 'On brûle bien les socières. Les meurtres *muti* et leur répression', 10 *Politique Africaine* (1992) pp. 47–57; J.W. Jonck, 'Geloof in toorkuns as versagtende omstandigheid: S v Phokela A and Another 1995 1 PH H22', 22 *Tydskrif vir Regswetenskap* (1997) pp. 202–206; J.M.T. Labuschagne, 'Geloof in toorkuns: 'n morele dilemma vir die strafreg', 3 *South African Journal of Criminal Justice* (1990) pp. 246–266 and A. Minnaar and M. Wentzel, 'Taking on Culture. Witchpurging in Northern Province', 7 *Crime and Conflict* (1996) pp. 20–23.

cient, a definition is required. After giving a core definition, each component of that definition will be examined.

2.1. Definition

A cultural offence is *an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation*.[14]

Like any definition, this one contains a number of terms that in turn need to be explained in order to fully define and demarcate cultural offences. Such elements are minority and dominant culture, a legal system, a crime, a culture and a cultural group. Each element carries within it a certain number of questions; the answer to these questions will have an influence on the conceptualisation of cultural offences and their domain of application.

2.1.1. Dominant or minority culture

This distinction has nothing to do with a *quantitative* approach. Nor has it anything to do with the question 'who was there first?'. This distinction is closely related to what can be called the cultural and ideological background or basis of the 'legal system'.

A *dominant culture* is considered *the culture which provides the ideological basis of the penal law or the penal rule* on which the defendant is tried. The minority culture denotes the cultural background of the defendant's group that does not share the same cultural norms and values as the dominant culture with respect to certain issues. The cultural values that are incorporated in the 'legal system', and more specifically in its penal law, determine which culture can be seen as dominant.

Two remarks need to be made. First of all, the ideological basis of a legal rule has to be considered *incrimination per incrimination*. It might be possible that certain practices of a minority group are consistent with the principles of the dominant culture and the legal system, while others are not. Secondly, it might well be possible that the ideological basis of the legal system, or certain legal norms, of a certain country have to be found outside that country without there (initially) being a broad cultural basis for that rule within the state. This is the case when a country has legal norms that can be qualified as 'introduced law'. The complexity of this problem can be illustrated by some examples.

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14. This definition is a more elaborated version of the definition given by the Dutch legal anthropologist F. Strijbosch, *loc. cit.*, p. 666.

    A very accurate description of the essence of the problem was given in 'The Cultural Defense in the Criminal Law', 99 *Harvard Law Review* (1986) p. 1293: 'The values of individuals who are raised in minority cultures may at times conflict with the values of the majority culture. To the extent that the values of the majority are embodied in the criminal law, these individuals may face the dilemma of having to violate either their cultural values or the criminal law.'

One example from India concerns the dowry. A number of norms are aimed at ending this practice, be it with varying success.[15] The dowry is perceived as a major social problem by the Indian government. Since the first Dowry Prohibition Act in 1961, several legislative measures were aimed at extinguishing this practice through penal sanctions. Nevertheless the practice remains very much alive. From our point of view this is very interesting: the laws concerning the dowry passed by the Indian government seem to clash with the cultural practice of a considerable part of the Indian population (although there will be important demographic differences). This nevertheless shows that a clash of cultural norms does not only take place in case of immigration, or when legal norms are imposed by colonisers. A cultural gap between the ruling elite and a part of the population can just as well be the cause of this kind of legal clash of cultures.

Turkey provides another example. At the beginning of this century 'occidental' legal codes were introduced into Turkey by Atatürk. Some of the values incorporated in those codes did not have (or do not have) a cultural basis within Turkish society,[16] or at least a part of this society (especially the more rural areas). This can lead to a situation where the enacted legal rules remain 'dead letter' or are inconsistent with legal practice. Some of the cases where foreign legal rules were introduced, as was the case in Turkey, have seen a small elite that endorses certain values not shared by the larger part of the population. These values were then put into legal texts hoping this would change society (and as was the case in Turkey: aiming to shape it into a more occidental society). For instance: although the traditional Islamic law allows in certain circumstances for the family of a victim of a crime to take revenge, this is not allowed anymore by state law in Turkey. A part of the population of Turkey will conform to these regulations but others, often from rural parts of the country, will not.[17]

In some formerly colonised countries something different happened. The economic and cultural elite, endorsing the values of the former colonisers, tried to force these values onto 'native peoples'. Examples of this category can be found in the Americas.[18] On the other hand, in some African countries, after independence, the newly founded 'native-elite' sometimes endorsed the values of the former coloniser taking over his legal system and codes and applying them to the peoples living in the newly founded nation state, just as the coloniser did. In each of those cases, situations might arise where a person tried does not share the cultural values incorporated in the norms upheld by the state.

Imposing cultural norms through the introduction of legal rules is no privilege of western (colonial) powers. In this century there have been quite a few cases where

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15. *See* an Anthropological study about the dowry in India: V. Béneï, *La dot en Inde: Un fléau social? Socio-anthropologie du mariage au Maharashtra* (Paris 1996) 292 pp.
    On this issue: M. Spatz, 'A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives', 24 *Columbia Journal of Law and Social Problems* (1991) pp. 607–616.
16. Note that this generalisation does not imply that there is one uniform Turkish society or culture. This is not the place for a detailed study of the Turkish cultural landscape.
17. R.H. Wormhoudt, *Proces* (1986) n° 6, *loc. cit.*, p. 166.
18. F.e. D.S. Clark, *loc. cit.*, p. 683 on the Chocó (tribe of native Americans) in Colombia.
    On the balancing of cultural differences in criminal Law in New Guinea: R.S. O'Regan, 'Western Criminal Law in New Guinea', 7 *Australian and New Zealand Journal of Criminology* (1974) pp. 5–16.

codes based on Islamic principles have been introduced in countries despite the fact that there were, and are, living 'minority cultures' that do not share the same cultural background. Morocco[19] and Somalia are examples of countries with a number of minority groups and cultures.

These examples also show that, in order to reflect on *the legal and moral norms of a member of a minority group*, one does not have to look at *the official law of the country of origin* of this group. A study of the legal and moral rules of his of her *group* is needed. The case of an Egyptian man who killed his (alleged) adulterous wife illustrates this complexity. In Egypt, three sets of legal norms are applicable in case of adultery committed by a woman. When a woman is 'caught in the act' and her husband kills her and/or her lover, the husband will be prosecuted for murder but mitigating circumstances explicitly recognised by law will be taken into account. The way this problem is theoretically approached in Egyptian and Dutch law (this case happened in the Netherlands) is not fundamentally different. The wife herself would, for her adultery, be tried on the basis of Islamic law and could be sentenced to death. This nevertheless implies a decision of a judge and a heavy burden of proof. Besides this official Egyptian state law there is, however, customary law. In customary law this case would not be brought into the open but solved internally within the family. This does not always mean the wife will be killed. Besides family honour, other motives also play an important role in the handling of such cases.[20]

In this case the judge minimised the role of culture and stated that neither Egyptian state law nor Islamic law permitted the man to kill his wife for her adultery.[21] Without going into the details of this case, we believe that this argument is not sufficient to state that the cultural norms of the defendant are not fundamentally different from those of the state where he or she is prosecuted. Ignoring the customary law or practices means ignoring the most essential part of the cultural difference. Thus, one's cultural background cannot be limited to the legal system of his or her country of origin, as the judge did in this case. In Pakistan for example, a rule of unofficial law which is (at least) tolerated by the state, has led, according to Amnesty International, to situations detrimental for women.[22]

Thus, in order to decide whether or not someone is a member of a minority culture, one has to look at his or her cultural values and whether or not these clash with the norms of the legal system on the basis of which that person is tried. One can recognise two types of situation. The first is that of an immigrant tried according to the legal norms of the 'host-society' (for example: Kimura in the USA). The second situation is that of a 'native' whose trial is based on rules that are introduced or imposed

19. *See* F. Gorle, G. Bourgeois, H. Bocken and F. Reyntjens, *Rechtsvergelijking* (Brussels 1991) p. 441, nr. 759.
20. H. Wiersinga, 'Dossier van een verloren zaak', 23 *Delikt en Delinkwent* (1993) pp. 533–534.
21. H. Wiersinga, 'Dossier van een verloren zaak', 23 *Delikt en Delinkwent* (1993) pp. 535 and 542–543. Other elements such as the length of his stay in the Netherlands etc. were also taken into account.
22. See Amnesty International, *Pakistan. Honour Killings of Girls and Women*, report ASA 33/18/99 issued in september 1999. This report can be consulted at http://www.amnesty.org/ailib/aipub/1999/ASA/33301899.htm.
    Comp. the article by M. Spatz, *loc. cit.*, pp. 597–638.

on him by a government (for example someone being tried for witchcraft in South Africa or someone tried on the basis of the Dowry Prohibition Act in India).[23]

2.1.2. Culture/A cultural group

In order to qualify an act as a *cultural offence* one has to verify whether or not the norm or value, on which the defendant based his or her actions, springs from another culture and if the defendant is a member of that cultural group. A definition of a culture and a cultural group is thus needed. While a cultural group can be qualified as a group of individuals who share a common culture, the key element in this problem will be to point out different cultures. When 'culture' is defined, a whole range of other problems come into play. Culture is neither monolithic nor static, but is an ever evolving and very diversified reality.

2.1.2.1. A definition of culture

Defining culture is probably one of the most difficult tasks one can undertake in social and cultural anthropology. We have opted for a definition of culture that is rather broad and abstract. It defines culture as an *intersubjectif system of symbols which offers the human being an orientation toward the others, the material world, him- or herself and the non-human. This symbolic system has a cognitive as well as an evaluative function. It is handed over from one generation onto a next generation and subject to constant transformation. Even when it never achieves complete harmony, there is a certain logic and structure that binds the system together*.[24]

The term 'symbols' has to be understood in a very broad meaning. It points at everything that denotes something else. Law and moral values seem to be a part of the evaluative as well as the cognitive function of culture. Moral and legal norms, here used in their broadest meaning, are guides for *interpreting* actions of other persons, guiding us into *doing* the appropriate things and helping us to *judge* the actions of other people.[25] Legal and moral norms are a part of culture.

Although this statement is certainly correct, it solves only part of our problem. The basic idea of cultural offences is that they are actions caused by legal and moral norms that differ between cultural groups. This leaves another question open: when is one dealing with another culture?

In order to determine whether or not a person belongs to another culture, one cannot suffice by referring to his or her differing legal or moral norms only. Culture

23. Comp. D. Evans-Pritchard and A. Dundes Renteln, *loc. cit.*, p. 1. They recognise two types of situations which can cause culture conflicts: (1) a colonial setting and (2) immigration.
24. Translation of the definition proposed by E. ROOSENS, *Sociale en Culturele Antropologie. Een kritische belichting van enkele hoogtepunten* (Leuven 1997) pp. 32–33. This definition is based on a work that deals more in depth with the definition of culture: J. Tennekens, *Anthropology, Relativism and Method. An Inquiry into the Methodological Principles of a Science of Culture* (Assen, Van Gorcum) 228 pp.
25. Comp. M. Fisher, 'The Human Rights Implication of a Cultural Defense', 6 *Southern California Interdisciplinary Law Journal* (1997) pp. 668–669.

has a broader content than is traditionally given to the legal and moral domains by occidental philosophy or social sciences. It refers to a logic and a structure that 'rules' a person's entire life and feeling, his or her world. It not only concerns problems about what is good or bad, what is criminal or not. The essence of culture is that it is an *encompassing system* of thinking, doing and evaluating. It touches different domains of human life and has some overall logic, without being (completely) deterministic. Moral and legal norms are only one aspect of this culture.

One could argue that the fact that there are different legal and moral principles ruling certain behaviours in different groups, means one is dealing with different cultures. However, in doing this, one uses a circular reasoning: the definition of the term touches the essence of the object of the study, thus making this object void. In other words: by saying that one is dealing with different cultures when there is a different normative system at hand, the term 'cultural' and 'legal or moral' system overlaps completely. An implication of this reasoning would be that any criminal act by someone who is a member of a group that considers such an act as not being criminal would be a cultural offence. Such a conclusion is of course not acceptable. While a (partial) difference in legal and moral norms might be *an element* for deciding whether one is dealing with another culture it *cannot be the only element*. This problem will be mentioned later on when dealing with delinquent sub-cultures.[26]

While traditional anthropology provides quite a lot of literature on exotic and very different cultures, the line between cultures cannot be drawn that easily. Although there might be substantial differences between cultures, this does not exclude similarities. In addition, culture evolves and is influenced by a number of other factors. In case of cultural offences, migration can be such a factor. Through the process of migration and acculturation a culture can change and this does not always mean that cultures are becoming uniform, the opposite might as well be the case.[27] In these circumstances, deciding to which cultural group an offender, who is a second or third generation immigrant, belongs, can be a problem. Is he or she a member of the traditional culture of his or her parents, or can one argue that he or she is completely acculturated into the culture of the host-society? Or, which is a third possible solution, is this person influenced by, and a member of what one could call a 'migration culture', still sharing some values of his traditional culture but also integrating some of those of the host-society?[28] This is a question that has to be answered again and again after studying each individual case and looking at factors such as group-building and strength of group bonds, expressed values, expressed behaviour, … An accurate view on the immediate cultural environment of the offender is very important. The abstract and open character of the definition allows for such an approach that will take into account the relevant elements in each case. Of course, this approach does not give any easy and direct answers; it is an approach that leaves a lot of room for discussion.

While there is the need of delimitation and demarcation, this does not imply that

26. *See* point 2.2.3.
27. *See* point 2.1.2.3.
28. Comp. F. Bovenkerk and Y. Yesilgöz, 'Multiculturaliteit in de strafrechtspleging?', 26 *Tijdschrift voor beleid, politiek en maatschappij* (1999) p. 237.

cultures are perceived as rigid and solid. The definition is kept as vague as possible, to keep it a real 'working definition', to be used and applied in specific circumstances.

A stand in this debate will have an influence on the concept of *cultural offences*. When one uses a very loose definition of cultural groups, certain acts will be qualified more easily as *cultural offences*. The more easily one qualifies certain acts as cultural offences, the more cases there will be in which, possibly, a *cultural defence* can be raised. Yet, if this happens too often it is possible that the concept will lose credibility and will be regarded as just another excuse raised by a criminal. Although these definitions are fundamental, their content and their application cannot be seen as independent of one's opinion about the opportunity of a cultural defence and about 'where to draw the line'.

One of the strongest arguments against the use of the cultural defence, or, for that matter, against the recognition of a cultural offence, is based on the vagueness of the concept 'culture'. Some authors seem to dispute the usefulness of this concept because, according to them, cultures and cultural groups might well be impossible to identify.[29] While it is undoubtedly not easy to draw the lines between different cultural groups, this does not mean that the concept is devoid of any meaning. As with any concept, it will have to deal with boundary cases and problems of qualification. Admittedly, this is true for any (scientific) category and does not undermine the validity of the concept itself.

A more fundamental argument states that what is regarded as a specific culture is all too often based on prejudice. In many cases, cultural identities are imposed on minority groups by the dominant culture and serve to perpetuate prejudices and exclusion.[30] Again, this is very true, but it does not mean that the concept as such should be discarded. This means that in using this concept, one has to adopt a very careful and scientific methodology and expert evidence should be used, rather than prejudice and 'common knowledge'. It will be argued that, in order to recognise a cultural value pattern, a 'bottom-up approach' should be used, rather than a 'top-down approach'.[31] By looking at the offender's values, starting with the offender and his immediate environment, one avoids the risk of imposing an alleged and prejudiced culture on the offender's group.

2.1.2.2. Gender roles, age-stratums and culture: culture is not uniform

All members of a cultural group, although they share broadly the same set of values, are not expected to act in the same way. A culture is, of course, not absolutely uniform.

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29. For instance J. Sams, 'The Availability of the "Cultural Defense" as an Excuse for Criminal Behaviour', 16 *Georgia Journal of International and Comparative Law* (1986) pp. 345–348.
30. I.e. D. Chiu, *loc. cit.*, pp. 1098–1103. She argues that many advocates of the cultural defence make dangerous generalisations by approaching culture as a static thing. This '*operates to reify the artificial difference and distance between Asian Americans and white Americans*' (p. 1101). This trap can be avoided by using a flexible approach to culture as is proposed in this article. This does, however, not make the issue easier.
    F. Bovenkerk and Y. Yesilgöz point out similar problems (*loc. cit.*, pp. 233–234).
    Comp: N.S. Kim, *loc. cit.*, p. 113; L. Volpp, *loc. cit.*, p. 58.
31. *See* point 2.2.2.2.

Within each culture a range of social strata, based on age, gender, and other factors can exist. And along with each of these strata comes a certain behavioural pattern.

This means that, when dealing with cultural offences, that one does not have to ask the question whether or not *every member of that culture* should act the same way in the circumstances at hand. Rather, the question should be whether or not *the offender* should have reacted as he or she did. In other words: the behavioural pattern linked to the social position of the offender has to be taken into account.

For instance, in Turkish tradition one is supposed to defend one's honour. This task is not up to the women, it is even forbidden for them to do so and doing so may be seen as an insult. It is up to the man to take care of this problem and to defend the family honour.[32]

Van San's study on crime among boys from Curaçao living in the Netherlands shows a similar pattern. Although everyone agreed that violence could be used in self-defence or in defence of one's honour, it is up to the men to do so. Women should not rely on physical means to resolve their conflicts, they should resolve them verbally. Similarly, elderly men, who have built a status by being the head of the family and having responsibilities, will not resort to violence as easily as younger men who still have to make a 'name for themselves'.[33]

2.1.2.3. Changing culture: on the influence of migration and socio-economic factors on culture and the problem of acculturation

We have already mentioned that there are, in general, two types of situations which cause a clash of legal cultures. A first possibility is the imposition of an introduced legal system upon a minority group, for instance by a colonial ruler or a dominant group. Secondly, it is possible that people migrate for economic or political reasons and are confronted with a legal system that differs from their cultural values. In each of these cases the problem of *acculturation* arises, although more likely so in the second case than in the first. Acculturation is a difficult term to define in a precise way, but for the purpose of this article we can suffice by describing it as the process that takes place when one is confronted with another culture. In this process cultural values are rearranged and changed, in some cases cultural estrangement causes the traditional culture to be abandoned and replaced by the cultural values of the dominant group.[34] The traditional goal of dominant groups, was and sometimes still is, that minority groups take over their values and culture, and abandon their 'primitive' habits.[35] This way acculturation is often taken for granted. It is then said that a minority group will,

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32. R.H. Wormhoudt, *Proces* (1986) n° 6, *loc. cit.*, pp. 164–165.
    There can be important differences concerning the appreciation of the 'namus' (concept of honour that is linked with the sexual honour of the female members of a family) depending on socio-economic position, rural or urban provenance, religiosity, … of a person; Y. Yesilgöz and L.M. Coenen, *loc. cit.*, pp. 29–30.
33. M. Van San, *Steken en Stelen. Delinquent Gedrag van Curoçaose Jongens in Nederland* (1998) pp. 171–230.
34. Although it may also be possible that the dominant group takes over some values of the minority culture.
35. A goal very much pursued by, for example colonial powers and scientifically promoted through 'evolutionary theories'. Yet, these ideas are still very dominant when one is discussing the 'adaptation' or 'assimilation' of immigrants.

after some time, lose its traditional values and conform to the values of the dominant group or the host society. If one only focuses on this aspect of acculturation, there is little or no reason to elaborate a theory on cultural offences and a cultural defence. In this case cultural offences are only an effect of the transition, a sign of a not yet completed acculturation process. If total acculturation is the goal, (penal) law can be an instrument to accomplish that goal.[36] It goes without saying that such reasoning can, in its absolute consequences, lead to a form of 'ethnocide'.

While the traditional acculturation theory is not only on moral and ethical grounds unstable, it also seems to ignore a certain *social reality*. When acculturation is taken for granted, one tends to lose sight of those cultural institutions that seem to be very persistent.[37] Social reality shows that when confronted with a dominant group, a minority group does not always lose its traditional values.[38] Moreover, through a process of ethnicity-creation and reinforcement,[39] some values might well become more important than in the 'traditional culture'. So one cannot say that certain practices will disappear by themselves, or that a cultural defence can not be used by someone who has been living outside his or her home country for a considerable time.

This is of course, also due to the specific position minority groups have in the society

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36. Using D. Chiu's words: '*The force of the state's police power will exorcise the unfitting and un-American cultural practices, resulting in coercive assimilation*', D. Chiu, *loc. cit.*, p. 1106.

    Comp. S. Poulter, 'The Significance of Ethnic Minority Customs and Traditions in English Criminal Law', 16 *New Community* (1989) p. 121.

    In his article W.I. Torry argues that this idea of assimilation is predominant is most of the writings about the cultural defence (W.I. Torry, *loc. cit.*, pp. 130–136).

37. In many cases the cultural values that conflict with penal law seem to be the most fundamental (X, *l.c.* p. 1301) and, as such, very persistent.

38. For instance T. Hasselo (a probation officer) mentions that, when it concerns matters involving the honour of a person or a family, Turkish immigrants in the Netherlands will usually react in the same way as they would have reacted in Turkey. T. Hasselo, 'Sociaal Culturele Achtergronden van de Turken', *Proces* (1980) n° 7/8, pp. 139–147.

    About the Hmong D. Evans-Pritchard and A. Dundes Renteln, *loc. cit.*, pp. 6–7.

    Comp.: R.H. Wormhoudt, *Proces* (1986) n° 12, *loc. cit.*, p. 331.

39. This process can be best understood using Barth's theory on ethnicity. According to this theory, one can see that within an ethnic group certain values are lost because of acculturation, which is an ongoing process, but other values, so-called 'core values', are cherished and reinforced. As such, these values tend to serve as symbols for the identity of the minority group, they are the symbolic boundaries that are drawn in order to safeguard one's cultural and ethnic identity. The group will not loose those values. Those values and symbols can become even more outspoken than in the 'traditional culture'. Thus, in migration and as a shield against acculturation, some values might well be reinforced. See F. Barth (ed.), *Ethnic Groups and Boundaries: The Social Organisation of Cultural Difference* (Boston 1969); J. Leman (ed.), *The Dynamics of Emerging Ethnicities. Immigrant and Indigenous Ethnogenesis in Confrontation* (Berlin 1998) 179 pp. and E. Roosens, *Creating Ethnicity: The Process of Ethnogenesis* (London 1989) 168 pp.

    It is only in this way that, for instance, the debate about the wearing of scarfs by Islamic women can be understood. This piece of clothing serves not (only) as a symbol of the inferior position of women, but (also) as a symbol of the ethnic and cultural identity of the group. *See* C. Stallaert, 'Vrouwen, Islam en Nationalisme: enkele beschouwingen', in *Cultuur, Etniciteit en Migratie/Culture, Etnicity and Migration. Liber Amicorum Prof. Dr. E. Roosens* (Leuven 1999) pp. 51–65.

    Concerning crime, comp: P. de Beer, 'Nederlandse Studies naar de Criminaliteit van Etnische Minderheden', 4 *Migrantenstudies* (1988) p. 23 and W. De Haan, 'Allochtonen en Autochtonen. Gelijkheid en Verschil in Cultuur en Criminaliteit', 16 *Justitiële Verkenningen* (1990) n° 5, p. 42.

'ruled' by the dominant group. Being in a socially and economically inferior position (which is all too often the case for minority groups) makes individuals more dependent on their social group, as does discrimination, objectively or subjectively experienced. One needs to be fully accepted by that group, because often the social reality of the overall society is such that a person is not completely accepted by those 'in charge'. This dependence is further illustrated by the fact that a person who does not adopt the values of the group risks being '(socially) expelled'. The result is that the individual freedom to make certain choices is limited and certain cultural values remain 'compulsory'.

One can also understand that within minority groups, devoid of any real access to material wealth, concepts of honour and identity become all the more important as they are the only 'riches' a person or a group still possess.[40]

Thus, immigration or a long domination by another culture does not necessarily mean the loss of cultural values. While this might be the case, the opposite is also possible. This again has to be studied case per case. This means that one cannot, based on scientific reasons, set *ipso facto* a time limit on the use of the cultural defence.[41]

It is maybe in the light of this problem of acculturation and ethnicity-creation that the Kimuracase can be understood. This is however a *post factum* and theoretical interpretation, based on the written sources on the case. Other people are in a better position to judge the case, but this approach might shed some new light on it and serve as an example of the principles outlined above.

It is sometimes argued that the cultural defence would not be available in the Kimura case because Mrs. Kimura had lived for fourteen years in the United States.[42] However, the case of Kimura shows that time is not an absolute factor for acculturation. Mrs. Kimura was not integrated at all into the American society, she only had contact with other members of the Japanese community. Therefore, she was very dependent on their opinion for her self-esteem. During the trial, it became clear that to her, family life was very important, making the traditional values attached to it an important point of reference. Appreciation of this family life had to be done in Japanese terms and the judgements which were made by the Japanese community (this might be very

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40. On the position of Turkish immigrants in Holland: '*A man will tolerate less the dishonourable behaviour of his wife when he has to build his Seref* [a man's honour in Turkish culture] *on the sole fact that he is married. This is the case for unemployed men, or men with an underpaid job or doing menial work*.' (translation), C. Van Eck, *loc. cit.*, p. 229.

41. As argued by J. Sams, *loc. cit.*, p. 347; although she also argues that an individual approach is necessary because some immigrants adopt the cultural values of the host society quicker that others. Samuels notices that '*the length of time during which the defendant has been in the UK and his level of intelligence and understanding would be factors properly to be taken into account*'. A. Samuels, 'Legal Recognition and Protection of Minority Customs in a Plural Society in England', 10 *Anglo-American Law Review* (1981) p. 242.

    See also P.J. Magnarella, *loc. cit.*, p. 78 (mentions the problem).

    This does not mean that one cannot set a time limit on the use of the cultural defence. But doing so is clearly motivated by a value judgement. In doing so one implicitly makes a judgement as to the period of time in which an immigrant 'should' be assimilated.

42. J. Sams, *loc. cit.*, p. 347.

subjective) had an essential impact. From a psychological point of view, this could cause those elements to take on a predominant shape and might explain her 'over-reaction', or why she could only conceive the *Shinju*-solution, in the given situation. In her case, migration and the situation she was in because of that migration, might have caused the opposite effect of what the traditional acculturation theory claims have when cultures meet.

It may seem that an immigrant is assimilated or 'westernised' on the domain of material culture (car, clothes, etc.), but this does not mean that he or she is completely acculturated. In 1991 a Turkish woman was killed by her family because she was having an adulterous relationship with Zeynep.[43] When Mehmet, her brother in law, found out about Zeynep's behaviour this is what happened at Mehmet's work place (declaration of his boss):

> 'Mehmet told me people were talking about the adultery of his sister-in-law for months. I know Mehmet as a westernised Turk and I noticed how he made an issue of the case. Mehmet wanted the day off. When I told him this was not possible he ran away in tears. He was highly emotional. I had never seen him this way. I decided he could have a day off.' (translation)[44]

The cases of excision provide another example where immigration does not necessarily cause cultural values to alter or create a situation where individuals can abandon their cultural heritage. In the case of immigration, people are not necessarily absorbed by the host society, more often they are pushed into a socially inferior position and made totally dependant on their kin or fellow immigrants with whom they share the same cultural background. For women this situation is usually even more tragic as they are often confounded to their homes and only have contact with other women within their cultural group. This is the case for some Senegalese and Malinese women who enter France: they remain isolated from French society, speak almost no French, are not aware of French rules and culture and remain very dependant on their group.[45] As excisions are mostly performed by women, they are the ones being prosecuted on the most serious charges. All the same, they have no possibility whatsoever to refuse to conform to this custom. And even if they could do so, this means that they would be 'expelled' from their social group and lose every social support they have. The result is that the weakest persons in society are prosecuted for acts in which they had no free choice, even if they did not agree with them. This shows that the aspect of the specific socio-economic situation of the cultural group is also an important factor in judging the weight of cultural patterns.

Yet another problem can arise from a situation of migration. It is possible that family networks will disappear and with those networks a lot of possibilities of alternative conflict resolution will fade. In New York, a Chinese immigrant killed his wife after learning she was having an extramarital affair. At the trial it became clear that a wife's infidelity is of great shame to her husband, but through intervention of the

43. The case is far more complex, see C. Van Eck, *loc. cit.*, pp. 217–220.
44. C. Van Eck, *loc. cit.*, p. 223.
45. R. Verdier, *loc. cit.*, p. 186.

close-knit Chinese community these cases do not usually end with the death of the wife. In New York, that background was nevertheless not available.[46]

Underlying these complex issues is the fact that cultures are not essentials. Cultures cannot be reified. They are social realities that are a product of constant change, and constantly undergo change. Various factors can cause those changes. Immigration and in general contact with other cultures, but also socio-economic factors, are important sources of such changes. It would thus be wrong to use within this debate a concept of culture that is 'static, closed and essentialised'.[47]

2.1.3. An act that is condoned, accepted as normal behaviour in the given situation and approved or even endorsed and promoted

When judging certain actions and behaviour, this judgement can imply different gradations of 'approval' or 'disapproval'. While the criminal law of the dominant culture will *mostly* disapprove fiercely of the actions of the 'criminal', the group of this person may react to it in different ways. They may *condone* his actions: although not appreciated as 'good' it is accepted that, taking into account the specific circumstances, it may be acceptable behaviour and there is no, or only a minimal disapproval. The actions might be described as *normal behaviour in the given situation*, in which case there is an absence of disapproval, or the behaviour might be qualified as the necessary thing to do and *actively approved of* (not acting accordingly might be disapproved).

This opinion can differ between members of a community. People can have different opinions, but the 'general view' is decisive.

The *Kimura* case can once again serve as an illustration of how complex this situation is. The parent-child suicide – *oyako-shinju* –, as attempted by Mrs Kimura, is often seen as the perfect illustration of a cultural offence, but it does not provide a black and white picture. While the general public did not sympathise with Mrs Kimura's actions, a considerable part of the Japanese community nevertheless saw the act of Mrs Kimura as understandable in the given circumstances. As such, it can be argued that there is a cultural basis for her actions. In spite of this, it is sanctioned by Japanese Law. Even when the *Shinju* would have been committed in Japan, Mrs Kimura would have faced a trial. Even if a Japanese context Mrs Kimura's actions would thus have been considered a crime, the qualification and punishment would have been very different. Parent-child suicide is sanctioned as involuntary manslaughter and punished with a rather lenient sentence.[48] And, very significantly,

46. C. Choi, *loc. cit.*, pp. 84–85.
Comp. C. Van Eck, *loc. cit.*, pp. 230–231. She argues that strict social control makes it harder for woman to commit adultery in Turkey. If this should happen, the social network can intervene before it gets into the open and one's honour does not have to be purified publicly by using violence.
47. Comp. J. Feys, 'Etniciteit en Criminaliteitsonderzoek. Enkele bedenkingen bij de mogelijkheid van onderzoek naar de relatie tussen allochtonen en criminaliteit', *Panopticon* (1999) p. 519.
48. J. Sams, *loc. cit.*, p. 343 and M.-M. Sheybani, *loc. cit.*, p. 761.

'[I]n Japan, *Shinju* is given the same slight media attention as fatal traffic accidents are given in America'.[49]

Based on these facts, one can recognise 3 or 4 different levels of moral judgement. The first one is that of the American legal system, which considers the actions of Mrs Kimura as completely immoral. The opposite view is that of the *traditional* Japanese custom in which the actions of Mrs Kimura are seen as the appropriate thing to do, the best way out of a lost situation. It seems that the general appreciation of the *contemporary* Japanese society is one of inevitability. Indeed, *Shinju* is not approved of but seen as an inevitable part of life, just as fatal car accidents are in our society.[50] Japanese law does not approve of the practice of *Shinju*, but the disapproval is rather moderate. To that extent, Japanese law seems to share the idea that, although not good, *Shinju* is an inevitable part of society. Without going into the details and the nuances of the issue, this example nevertheless shows us that, when dealing with a cultural offence, the appreciation of the situation is likely to be very complex.

An absolute 'clash' of (legal) cultures is not always at hand. The essential guide is the *different appreciation* of the actions by, on one hand, the 'criminal' and his or her cultural group and, on the other hand, the legal culture of the dominant group. This difference in appreciation can be *absolute*, but it can also be *gradual*. Furthermore, this example shows us that there is also, within Japan, a gap between the official legal culture and the customary culture, although this difference is less dramatic.

In those cases where the clash of legal cultures is rather moderate or the issues at stake are not really fundamental, penal law sometimes recognises practices of a minority culture and de-penalises them. A famous example is the legalisation of religious slaughter practices in most European countries.[51] When issues are at stake which are fundamental for the dominant culture, sometimes specific incriminations are created, as is the case in some countries for excision.[52]

2.1.4. A situational act

In order to recognise an act as a cultural offence, it has to be 'performed' according to the cultural norms of the minority group. While it has already been mentioned

49. Hayashi, 'Understanding *Shinju*, and the Tragedy of Fumiko Kimura', *L.A. Times*, 10 April 1985, pt. II, at 3, col 1 as cited by C. Choi, *loc. cit.*, p. 82 and M.-M. Sheybani, *loc. cit.*, p. 761.
50. Illustrative on this point is that Belgium recently experienced a series of what are called (and this is already significant) 'family dramas'. A few cases have arisen in which a man killed his family (wife and children) and then committed suicide. Although only few cases have occurred, each of them received extensive media coverage in which a sentiment of not-understanding or 'how is this possible' could be traced. Here one can recognise a difference in cultural appreciation of acts that are materially analogous.
51. S. Poulter (1989), *loc. cit.*, pp. 123–125 and H. Wiersinga, 'Het "beschavingsoffensief" en de wetgever. Over culturele factoren in wetgeving', 23 *Recht en kritiek* (1997) pp. 128–154.
52. H. Wiersinga, 'Het "beschavingsoffensief" en de wetgever. Over culturele factoren in wetgeving', 23 *Recht en kritiek* (1997) pp. 128–154. *See also* references in note 9.

that these norms can prescribe a different behaviour for different persons,[53] behavioural norms are also very situational. Much of the arguments used to deny the use of cultural elements in the defence of a defendant are based on the consideration that this might lead to chaos and raise the individual opinion of the defendant above the law. This argument is false in that it does not take into account the fact that culturally different behaviour is also very much structured. One can not go around killing people and claiming it is to protect one's honour, for example. According to the customary rules in Turkish society there are a whole range of ways to resolve a conflict that has occurred because of an offence of one's honour. Violence is only one of the options and one can only resort to violence when other methods of conflict resolution have failed.[54] Although certain cultures may be somewhat more lenient towards the use of violence, in the domestic sphere by the head of the family this does not mean battering wife and children can be justified at all occasions. This means that spousal violence cannot always be qualified as a cultural offence. A more in-depth study of the specific cultural norms is needed before one can make a correct statement in an issue such as this.[55]

Behaviour has to be placed in its context of causes and reactions. One can only then decide whether or not that a person has acted according to his cultural values or if he has possibly over-reacted.[56] This is fundamental for judging to what extent an offence is motivated or caused by the offender's cultural background and to what extent the defendant is, objectively, justified to use his cultural background in his defence. This makes for a more or less objective measurement: the act, labelled offence, must have been committed according to the cultural norms of the defendant.

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53. *See* point 2.1.2.2.
54. About the ways to purify one's honour see f.e.: R.H. Wormhoudt, *Proces* (1986) n° 6, *loc. cit.*, pp. 165–166.

    Concerning the loss of *namus* caused by an adulterous relationship of one's wife or a female member of the family, Van Eck claims that the killing of that person to purify one's honour (*namus*) is the exception. One should first resort to non-violent means to achieve this goal. (C. Van Eck, *loc. cit.*, p. 8.) A whole range of circumstances can play a role in the outcome of these cases. The loss of *namus* is more serious when (1) more people know about it, (2) the adulterous relationship has been going on for a long time, (3) a man does not have a social position that can provide him with another kind of honour (*Seref*) because he is unemployed, … , (4) etc. (C. Van Eck, *loc. cit.*, pp. 228–231)
55. The topic of cultural defence and domestic violence is very sensitive.

    See: N.S. Kim, *loc. cit.*, pp. 111–112; H. Maguigan, 'Cultural Evidence and Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts', 70 *New York University Law Review* (1995) pp. 36–99; N. Rimonte, 'A Question of Culture: Cultural Approval of Violence against Women in the Pacific-Asian Community and the Cultural Defense', 43 *Stanford Law Review* (1991) pp. 1311–1326; V.L. Sacks, 'An Indefensible Defense: On the Misuse of Culture in Criminal Law', 13 *Arizona Journal of International and Comparative Law* (1996) pp. 523–550, R. Sherman, 'Double Standard? "Cultural" Defenses Draw Fire', *National Law Journal* 1989 (17 April) pp. 3 and 28 and L. Volpp, *loc. cit.*, pp. 57–101. On the position of children: A. Dundes Renteln, 7 *Law and Anthropology – International Yearbook for Legal Anthropology* (1994), *loc. cit.*, pp. 27–106.

    An interesting article on the cultural implications of violence against women from the point of view of the victim; K. Wang 'Battered Asian American women: community responses from the battered women's movement and the Asian American community', 3 *Asian Law Journal* (1996) pp. 151–184.
56. F.e. C. Van Eck, *loc. cit.*, p. 228.

2.1.5. A crime

The term 'crime' is used only with reference to the legal norms of the dominant group. These norms are easy to identify because they are the basis on which the judges will base their verdict. This term needs some explanation.

We have avoided, in this definition, to refer to the norms of the minority group as 'law' or 'legal norms'. We are well aware of the criticism that might be raised, as this is an ethnocentric approach (from the dominant culture's point of view). Nevertheless, there are some reasons why we have used these terms. They are not meant to be a value statement about the norms and values of the minority culture.

First and foremost, we have tried to avoid being tangled up in the infinite debate on what is 'law'.[57] Secondly, we believe that this approach may reflect reality more closely. The problem of a cultural offence can only arise in a situation where the ethical and moral norms of the minority group are not (completely) recognised by law. Thirdly, this approach avoids reducing the cultural values of members of immigrant groups to the legal system of their country of origin. The examples that were used have already shown that the cultural norms of minority groups or their customary 'law' can differ fundamentally from the state law.[58] This approach does not imply that non-state law or non-codified law is not law at all.

When considering the law of the dominant culture, one must not only take into account the 'letter of the law' but also how it is in fact interpreted and applied. An example will illustrate this point and will also show that within occidental society the cultural appreciation of an act is important. Chapter I of Title VIII of the Belgian Penal Code deals with the voluntary killing of a person and the voluntary infliction of wounds. These offences come in different gradations but these articles are applicable each time someone knowingly inflicts a wound on another person. As a consequence, performing a medical operation is a penal offence when one cannot rely upon an excuse. Such an excuse can be that the surgery was medically necessary and performed by a physician. Based on this, one can argue that circumcision is a penal offence except when there are medical grounds to do so. Male circumcision[59] is often performed by people who have no medical degree and without an immediate

57. *See* P.J. Magnarella, *loc. cit.*, pp. 65–66.
58. *See* point 2.1.1.
59. It is not our argument to equate male and female circumcision, as it is generally recognised that (most forms of) female circumcision are far more severe than their male counterparts. Although female circumcision (or excision) tends to be more severe (J.M.T. Labuschagne, 'Circumcision and Female Genital Mutilation: A Human Rights and Anthropo-legal Evaluation', 13 *S.A. Publiekreg/Public Law* (1998) pp. 278–283) the legal qualification in Belgian Penal Law does not differ (at least not if the circumcised person does not die or if there are no other complications which may cause a permanent handicap).

medical need for performing such surgery.[60] One can only conclude that there is a tolerance for male circumcision despite the fact that according to the 'letter of the law' it is not legal if there is no medical necessity. And even that 'medical necessity' needs interpretation. Cultural values play an important role at all these levels.

2.2. Crime: socio-economic causes, cultural causes and the problem of cultural offences

Up to now, the different elements that play a role in the definition of a cultural offence have been defined. This definition should enable one to demarcate the cultural offence and answer the most essential question: when can an individual act be qualified as a cultural offence? Is each offence, committed by a member of a minority group that can be considered as culturally distinct from the dominant group, a cultural offence? This is where the most essential aspect of the definition comes into play.

The offence, in order to be a cultural offence, has to be caused directly by the fact that the minority group, of which the offender is a member, uses a different set of moral norms when dealing with the situation in which the offender was placed when he committed the offence. The conflict of diverging legal cultures has to be the direct cause of the offence.

While this may seem an obvious statement at first, it gives rise to another very fundamental problem. It is sometimes disputed whether socio-economic or cultural factors are the cause of differing levels or kinds of criminality among minority groups. Without going into the details of this difficult discussion, an overview is needed to show the difference between culture as a structural explanation of crime and the concept of cultural offences.

We will argue that cultural offences are a specific category of crimes committed by members of cultural minority groups. Furthermore, although cultural offences may quantitatively be of only minor importance,[61] they are usually the most tragic and fundamental cases of a clash of cultures. Thus, it is important to develop a scheme to recognise these cultural offences.

After having explained the difference between a cultural offence and the structural approach on criminality, we will deal with the topic of recognising a cultural offence. *Primo*, a short theoretical comment will be given on the problem of the different motivations of (criminal) behaviour and when such behaviour can be qualified as a cultural offence. *Secundo*, a practical scheme on how to approach the problem in practice will be elaborated and proposed.

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60. Because it is such a 'minor' surgery, the reasons for doing so are interpreted very flexibly. This again proves the fact that it is culturally more acceptable.

    The argumentation of A. Samuels: '*By long convention matters as ear piercing, tattooing (although not tattooing of minors: Tattooing of Minors act 1969), removal of birth marks, and circumcision, have all been accepted by the law, although they do not represent the custom of any particular identifiable minority group.*'; A. Samuels, *loc. cit.*, p. 242. But aren't they accepted because they are a part of the dominant culture, not in that everyone does so, but in that it is tolerated?

61. Comp. P. de Beer, *loc. cit.*, p. 23.

2.2.1. Structural explanation of crimes of minority groups: the role of cultural and socio-economic factors

Before going into the debate on whether or not an offence finds its cause in the cultural background of the offender, it is very important to point out another controversy. This debate concerns the structural explanation of crime among members of minority groups. The two issues have to be kept apart. While the cultural defence is a problem situated on the level of an individual offender, the second issue is a criminological debate which aims to give a structural explanation of the general crime rate of a group. While such a study may focus on minority groups, it does not take into account individual offences.

The problem of the structural explanation of crime among members of minority groups is possibly the single most difficult topic and discussion one can encounter when dealing with criminal behaviour of minority groups. It is common knowledge that, when discussing the structural causes of crime, to take into account the socio-economic background of the offender. When used as an explanation or a partial 'excuse' for an action, the socio-economically inferior position of a criminal is always relevant. This is, of course, also the case when a member of a minority group commits a crime. In most cases, the members of a minority group find themselves in a socio-economically inferior position. As such, the crime rates of members of these groups need to be explained considering these circumstances. When criminologists are confronted with a differing crime rate among members of a minority group, they tend to refer to socio-economic circumstances. Nevertheless, cultural elements can also be of importance in explaining behaviour of members of minority groups (criminal behaviour is but one kind of social behaviour). When a lower crime rate has to be explained (for instance: lower criminality in Japan), reference to the cultural background of the minority group is easily accepted.[62] However, social scientists seem much more reticent to refer to cultural backgrounds in explaining higher crime rates.[63]

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62. About lower crime rates in Japan: W.-K. Park, 'Explaining Japanese Low Crime Rates: A Review of the Literature', 35 *International Annals of Criminology* (1997) pp. 59–87 and N. Komiya, 'A Cultural Study of the Low Crime Rate in Japan', 39 *British Journal of Criminology* (1999) pp. 369–390.

    Illustrated in the Kimura case: The petition of the Japanese American community on behalf of Mrs Fumiko Kimura states: '*1. The Japanese culture has traditionally maintained a high respect for authority and for obedience to the law … as evidenced by the low crime rate of our members*.' (cited by D. Woo, *loc. cit.*, p. 404.)

63. We can not go into the discussion on this point. Even criminologists seem to debate ferociously about the numbers they are using, and different researches sometimes point to totally different conclusions. In a study in the Netherlands, Marianne Junger pointed out that crime rates among youths of Turkish or Moroccan background are indeed higher. She based her research on arrest statistics and self reported crime (M. Junger, *Delinquency and ethnicity. An investigation on social factors relating to delinquency among Moroccan, Turkish, Surinamese and Dutch boys* (Deventer 1990) 189 pp.). A recent study of the University of Leuven concerning the crime rate of immigrants in Belgium (of which Turkish and Moroccans form a large group) seems to lead to an opposite conclusion ('Migranten vaker de klos', *De Morgen* (Belgian newspaper) 10 December 1999 p. 32). If one wants to take into account a differentiation according to types of crimes, the problem becomes even more complex.

Socio-economic and cultural factors both seem to be important and even influence each other. But when is a cultural factor determining and when is the socio-economic factor decisive?

This discussion is a very delicate one, from a political point of view.[64] The more progressive or left-wing political view likes to keep culture out of sight when explaining alleged higher criminal statistics by minority groups. From their point of view, the primary cause of crimes by members of minority groups is their inferior socio-economic position. Politicians who are more right-wing like to point out the cultural factor, to argue that the minority groups are not well-integrated in 'our' society, or that they have a cultural (rather than racial or natural) tendency to commit crimes.

2.2.2. When is an offence culturally motivated?

2.2.2.1. The essence of a cultural offence

The implicit or explicit motivations and causes for someone to commit an 'offence' (or what is labelled an offence by the dominant group) can be diverse. There can be social and economical factors at play, cultural elements may be important or a combination of these factors. When confronted with individual cases or certain kinds of criminal behaviour, one can recognise more clearly, in some cases, a cultural motivation or cause for that act, while in other cases the socio-economic factors seem predominant. Everyone can grasp the difference between a person killing another, in order to defend his honour, and killing a cashier while robbing a grocery store. The examples that are used when debating a cultural offence or defence, and the appreciation of those cases are common sense. The question to what extent the actions of the offender are indeed grounded in his cultural background, is often skipped in order to debate the issue of the opportunity of accepting a cultural defence.

The definition that was proposed is a first step in the direction of a conceptual tool to confront these cases. On a theoretical level, we will now illustrate the essence of a cultural offence. *This essential aspect lies in the fact that a cultural offence is caused by the adherence to a differing legal or moral norm.* A cultural offence can not be regarded as caused by one culture, but can only occur when there are different legal and moral concepts at hand and there is a clash with another legal culture.[65] The act of the offender has to be motivated by his cultural background. The word 'motivation' does not imply that it was actively caused, nor that this motivation is conscious. It means that there has to be a direct link with a moral norm

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For a general overview of this debate in the Netherlands, *see*: P. de Beer, *loc. cit.*, pp. 17–27. Also: F. Bovenkerk, 16 *Justitiële Verkenningen* (1990) n° 5, *loc. cit.*, pp. 8–28; W. de Haan, *loc. cit.*, pp. 29–35 and C.J. Maas-de Waal, 'Wetenschappelijk Onderzoek naar Criminaliteit van Allochtonen; een Taboe Doorbroken?', 33 *Tijdschrift voor Criminologie* (1991) pp. 87–100.

Recent discussion in Belgium: F. Feys, *loc. cit.*, pp. 51–522.

64. Comp. W. de Haan, *loc. cit.*, pp. 29–37 and C.J. Maas-de Waal, *loc. cit.*, pp. 87–100.
65. Terminology, cf. S. Sherman, 'Legal Clash of Cultures', *The National Law Journal* 1985 (August 5) pp. 1, 26–27.

or value of the minority group. In other words: the actions and behaviour of the offender have to be in accordance with his or her background.[66]

Some examples may clarify this. The dramatic case of Kong Moua performing a marriage by capture is a clear example. The way he acted conformed to his specific cultural background. The marriage by capture is, for the Hmong, a traditional and valid way of marrying. By performing this marriage by capture, there was a clear reference to a cultural normative background, which was thus the cause and motivation for his actions.[67] His actions nevertheless were given a completely different interpretation in the American context, and this caused a clash of legal norms. The Hmong marriage by capture can be a clear example of a cultural offence, on condition that the traditional rules of the marriage by capture are respected or the offender thinks so.[68] Because of the displacement from their homes in the highlands of Laos to California, the Hmong provide a series of other examples of cultural offences, which are at least as interesting although not as dramatic. Sherman mentions problems that have arisen concerning the regulations on fishing and hunting in the USA.[69] Having a completely different culture when it comes to hunting or fishing (which are not sports for the Hmong but a way of subsistence), some Hmong were prosecuted because they ignored the regulations concerning seasons for hunting and fishing. Apparently, this problem does not disappear even when they are aware of the local regulations.[70] These offences can also be qualified as cultural offences. Their actions were of course not intended to conform to their cultural background, but they were in accordance with it. In their home country those activities are far less restricted. While less obvious than the marriage by capture case, these actions of the Hmong tribesmen are also based on a cultural background and set of rules which differ from the American.

A final example will show how difficult it sometimes is to judge whether or not one's actions were in accordance with or in order to conform to one's cultural background. This case involved an adherent of the Winti religion who committed an armed robbery. When asked what the motivation for his actions was, he argued he needed

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66. Again, this can mean two things: or the actions were meant in order to conform to this background, or they were performed according to these norms. This distinction is subtle and not very important because in both cases one can claim that there is a cultural offence at hand. In the first case, the actions are instrumental and aimed at a goal, which is dictated by one's cultural background. The second case implies that the actions themselves are shaped by the cultural background. The two may overlap.
67. The Hmong marriage by capture does not give a man the right to capture any woman to be his bride. There has to be a form of courtship at the end of which the girl has to give her consent. Nevertheless, at the moment of the capture she has to resist to prove she is virtuous. The man has to 'force' her in order to prove he is 'strong'. The fact that the woman has to consent in the preliminary stage is very important, although sometimes (conveniently) not mentioned by some authors arguing against the cultural defence. More information about the Hmong marriage by capture: *see* note 8 (specially the article by D. Evans-Pritchard and A. Dundes Renteln).

    M. Thompson adds an interesting fact to this debate. In some cases charges of rape were filed by the family of the bride because they were not pleased with the groom or as a strategy to get a higher bride-price. M. Thompson, *loc. cit.*, p. 27.
68. It is, for example, possible that the bride-to-be did not approve but the capturer interpreted her acts wrongly.
69. S. Sherman (1986), *loc. cit.*, p. 35.
70. S. Sherman (1986), *loc. cit.*, p. 35.

the money to go back to his grandmother, whom he expected to die shortly after (which did in fact happen), in order to say goodbye. If he couldn't say goodbye before her death, her spirit would not forgive him and haunt him.[71] This is an example of the shady boundaries of a cultural offence.

2.2.2.2. Recognising a cultural offence: practical approach

In order to identify a cultural offence in practice, a three-step reasoning is proposed. In a first step, one needs to look for the subjective motivation or justification as used by the offender himself. Once this person claims to have acted according to certain cultural norms, one needs to control whether or not other members of the cultural group of the offender agree with that view, whether or not they estimate his actions appropriate in the given situation. This way, this subjective reasoning is objectified and one can control if there is a cultural basis and background for the actions of the offender and if he conformed to this background. In a third step, which can already be deduced from the second one, the culture of the offender is compared with the norms of the dominant culture and the decision is thus made.

The key issue is whether or not the motivation of the offence was based on certain cultural values. When confronted with an offence, one has the first indication at hand: the offender. First, one needs to find the motivation of the offender for his actions. To evaluate whether or not an act constitutes a cultural offence, one has to look at the individual level. Thus, it is not an explanation of crimes at large by way of statistics, but an explanation of an individual act that is sought. It is obvious that the first step is to find out the motivation of the offender. It is only when the offender calls upon cultural values to explain his behaviour, that one can speak of a cultural offence. Nevertheless, two important considerations need to be kept in mind. First of all, the motivation, justification or explanation of the offender does not have to point directly and explicitly to certain explicitly named cultural norms. As such, the word 'explanation' is better than justification or motivation. This implies that one has to link the offenders' explanation to certain cultural norms, which the offender does not necessarily mention explicitly. Secondly, one should not only look at the offence as such, but take into account the surrounding circumstances and the way the offender interpreted these. For example, the Kimura case can not be properly understood if one does not consider the infidelity of Kimura's husband and the way this infidelity was perceived by her. The Moua marriage by capture case cannot be understood if one does not take into account the previous relationship between Moua and his wife-to-be and the way Moua interpreted her previous actions (such as the exchange of tokens) which he saw as an approval of the marriage by capture.[72] Although some circumstances might at first sight be trivial or unimportant, they can have a very important meaning in the culture of the offender. For instance, spitting at another person without touching him or her does not strike us as very serious. Nevertheless, in Molukan (Indonesia) culture this is perceived as very insulting, to such an extent that it once

71. R.H. Wormhoudt, 'Culturele Achtergronden en Strafrechtspleging. Winti', *Proces* (1991) n° 4, p. 108.
72. D. Evans-Pritchard and A. Dundes Renteln, *loc. cit.*, pp. 8–12.

caused a fight, including iron bars and swords, between two families.[73] This cultural sensibility has to be taken into account.

The subjective motivation of the offender is of course not sufficient. One might very well argue that this is just an excuse or a *post factum* justification. And this does not prove that the offender's values are shared on a broader base, by a 'cultural group'. An individual appreciation of a situation is hardly a sufficient basis to build a cultural practice or value on. These two arguments lead to the conclusion that the appreciation of the situation and the offence by the offender needs to be *objectified*. One has to certify whether or not other persons that can be considered as having the same cultural background as the offender appreciate the specific situation in which the offence was committed the same way as the offender did, and if the way the offender reacted can be seen as an appropriate way to (re)act. This objectification places the motivation or excuse of the offender on the more general level of what is considered to be his group, and thus provides an insight into the appropriate way of acting given the circumstances.[74] One cannot, of course, expect an absolute and uniform answer from all the members of the cultural group, but this gives an insight to the general feeling and reaction. One needs to check whether or not that general feeling and appreciation of the situation and of the acts in question, is in accordance with the appreciation of the case by the offender. And whether or not his reaction is, in general, seen as acceptable and up to what extent. If so, one can speak of a diverging cultural value that led to a *cultural offence*.

In order to have an accurate view of the situation, it is necessary to consider especially the immediate environment of the offender. Gradually, one can move away from the immediate surroundings of the offender and thus reconstruct a more objectified view on the cultural norms applied by the cultural group of the offender. Anthropologists can intervene as experts in this stage.

In a third step, by comparing the cultural background of the offender with the legal norms of the dominant group, one can check if there is a difference in approach. This means that there is a differing cultural norm at play, which governed the appreciation of the situation and the acting of the offender. This conclusion, of course, is not necessarily a black and white picture. The difference in appreciation does not have to be an absolute one but can be gradual.[75] This scheme is an open one, in the sense that it uses criteria that are not absolute and that debate and discussion are always possible. This creates uncertainty, but the positive effect is that it is a broad approach that can take into account all the aspects of a specific situation.

By using this approach, one has a tool to decide whether or not one can be entitled to use his or her cultural background as an excuse or justification. This 'working tool' can be the starting point of a legal theory. As such, the arguments raised by J.

73. F. Strijbosch, *loc. cit.*, p. 670.
74. This implies qualifying the offender into a cultural group. The problems that can arise with this have been already discussed. *See* point 2.1.2.
75. This problem has been already discussed. *See* point 2.1.3.

Sams[76] are incorporated within this scheme. According to Sams, the recognition of a cultural defence doctrine causes two problems. First, it has to be decided which groups can use this defence in court and secondly, which individuals are entitled to raise such arguments. By comparing the individual justification of the offender to the arguments and approaches of the cultural group of which he can be considered a member, one can recognise whether or not there is a sufficiently distinctive group and cultural pattern, and if the offender stuck to that pattern. This will eliminate fake arguments and abuses of a cultural defence.

The reasoning as outlined above can be illustrated by the study of Marion Van San. Van San does not mention the term 'cultural offence', but the data of her study are very useful.[77] Without judging the value of Van San's work or her conclusions,[78] her approach can be used as a valuable illustration of a possible approach of the problem of cultural offences. Van San is primarily interested in the arguments Curoçaian boys use for justifying their criminal behaviour. She focuses on and uses the criminological concept of *neutralisation techniques* as developed by criminologists Sykes and Matza. Van San's approach is nevertheless much more qualitative: she did not use many statistics and questionnaires, but did fieldwork among a small group of persons. Her work is very interesting in our perspective because she does not only study the arguments that the delinquent boys use for legitimising or explaining their actions, but also focuses on other persons that are close to the offender. Apart from persons with a criminal record, she also interviewed the mothers of the delinquents, and other youths without a criminal past and their mothers. Those three other groups were confronted with certain criminal acts and asked to give their opinion on what happened.

She decided to divide the offences into two categories. On the one hand, she classifies some offences as *instrumental offences*. These are offences that can be considered as a means to an end, mainly material gain. In this category she places offences such as theft, robbery, selling narcotics and stolen goods, etc. On the other hand, she qualifies some offences as *expressive*. These are the offences where the goal lies in the offence itself. This category consists mainly of offences linked with violence, fighting and the possession of weapons. This division can be criticised. However, when studying the arguments that are used as a legitimation by the offenders and comparing them with the opinion of the other three groups (mothers of offenders, non-offenders and mothers of non-offenders), there is a striking difference. In case of instrumental offences, the arguments used by the offenders are different from the explanation of criminal behaviour given by the other groups. The arguments are labelled as 'excuses'. On the other hand, when studying the expressive offences, one gets a completely different picture. The arguments used by the offenders to explain their behaviour, are also mentioned by the three other groups as valid circumstances to resort to violence. Self-defence and defence of one's honour and the honour of one's mother

76. J. Sams, *loc. cit.*, pp. 345–348.
Cf. also C. Choi, *loc. cit.*, p. 89.
77. M. Van San, *op. cit.* This book ends with a brief outline of Van San's findings in English.
78. For critical thoughts about her work *see*: M. Mourings, 'Stelen en Steken. Delinquent Gedrag van Curoçaose Jongens in Nederland (boekbespreking)', *Proces* (1998) pp. 152–153.

are recurring arguments to legitimise the use of violence. Although the mothers tend to focus more on the aspect of self-defence, both offenders and non-offenders agree that when one has to defend one's honour or life, violence can be used legitimately.

This does not mean that all of these expressive offences as mentioned by Van San are cultural offences, such a conclusion would be premature as the individual cases have to be studied. Nevertheless, this shows clearly that the cultural background of the persons interviewed provides a different ethos when it concerns the use of violence. This does not imply that the use of violence is permitted whenever one feels like fighting, but it implies that there is a cultural difference in the toleration of violence in *certain circumstances*. If one is to recognise these circumstances, a more detailed study is needed.

This nevertheless provides an example of an approach that could be used in order to identify a cultural offence. After the circumstances as appreciated and explained by the offender are studied, one can question other members of the cultural group of the offender to obtain a more objective view on the cultural values that govern the specific situation and whether or not the offender behaved according to these norms. Anthropologists could play an important role in this by functioning as cultural experts.[79] Or to use the words of Winkelman:

> 'An important utilization of anthropological skills lies in orienting the defence to the cultural factors which may establish both the normalcy and deviancy of an individual's behaviour, relative to their culture and to the dominant culture. […] Effectively presented cultural background material should help juries understand causal factors involved in an individual's intent, as well as cultural factors leading to duress, nonresponsibility or mental illness.'[80]

2.2.3. Cultural deviance: the problem of delinquent sub-cultures

The definition of 'culture' and 'cultural group' that has been used up to now, was rather broad and abstract. This means that problems may arise when confronted with sub-cultures that promote delinquent behaviour: the problem of what is known in criminology as *delinquent sub-cultures. Delinquent sub-cultures* are groups with some particular values that differ from the larger society. The essence of delinquent sub-cultures is that their value system differs with respect to criminal behaviour and criminal values.[81] Though this topic can not be discussed in detail, it needs to be mentioned. Because of our broad definition of culture, one might be inclined to argue that these groups are a culture and as such it might be argued that criminal activities by these groups are cultural offences.[82] A whole range of theoretical and practical arguments may be raised against such a point of view.

79. M. Winkelman, 'Cultural Factors in Criminal Defense Proceedings', 55 *Human Organisation* (1996) pp. 157–158 (describes a few cases where he was asked as a cultural expert).
80. M. Winkelman, *loc. cit.*, p. 159.
81. *See* M. Junger, *op. cit.*, p. 85.
82. This problem is also mentioned by W.I. Torry, *loc. cit.*, pp. 139–141.

Marianne Junger challenges the very existence of these groups or cultures.[83] She argues that, even on the basis of the material presented by those who argue in favour of the delinquent sub-culture theory, these are constructions rather than reality. According to the delinquent sub-culture theory, there are social networks that are shaped around values that differ from those of the dominant culture and are often criminal. Within those groups the members have a close social bond and can develop criminal careers. According to Junger, one cannot say that these groups are very tight and close, nor can one claim that there are criminal careers in the making. She even challenges the idea that the members of those groups share a set of (sub-cultural) values. In each of the cases where other authors have argued that there was a delinquent sub-culture, it seemed that this 'group' did not consist of people who are close and have friendship ties, but rather that there is a constant feeling of distrust and hostility. Rather than a criminal career, a downfall is a more realistic perspective. Above all, and this is the most important point, the members of those groups often do not share the criminal values as such, but explicitly mention they want to rejoin the larger culture, believing their lifestyle will only bring them down. The conclusion of Junger seems to correspond with other findings, such as those by Elliot Liebow.[84] Although Liebow does not deal with real delinquent sub-cultures, but rather with the culture of marginalised people, his conclusions are parallel. Although seemingly adhering to very divergent values compared with the larger society, the people he studied longed to be a part of the larger society and shared in effect its values of what is a 'good' life.[85]

Junger's second argument for rejecting the idea of a delinquent sub-culture (as an explanation for the criminal behaviour of the minority groups studied by her) is that she could not, in her data, find any reference to a culture of delinquent values. Strangely, those groups with the highest rate of criminality seem to endorse in general the strictest attitude towards criminal behaviour and punishment.[86]

Besides these criticisms a more fundamental, yet debatable, argument can be raised. One can wonder whether or not these groups are in effect 'cultures' in the traditional meaning of the word. There is no doubt that these groups have their own set of norms and values. Nevertheless, those groups have, significantly, always been named sub-cultures and not cultures. They do not correspond entirely to what is seen as a culture in the classic anthropological sense of the word. One can very well argue that the values endorsed by these sub-cultures can only be understood with reference to the larger culture, even if their values are, to a certain extent, a negation of those of the larger culture. In addition, those sub-cultures differ from the larger society only on certain domains but the greater part of their values and approach to the world is common with the dominant culture. Furthermore, these values are not only the same (which also happens between different cultures in the classic sense of the word), they are rooted

83. M. Junger, *op. cit.*, pp. 89–100 mentioned by M.-C. Foblets (1998), *op. cit.*, p. 197.
Comp. W.I. Torry, *op. cit.*, pp. 131–132. He describes the debate concerning this issue.
84. M. Junger, *op. cit.*, pp. 93–94 and E. Liebow, *Tally's Corner. A Study of Negro Streetcorner Men* (Boston 1967) 260 pp.
85. E. Liebow, *op. cit.*, pp. 209, 219–224.
86. M. Junger, *op. cit.*, pp. 95–100.

in the values of the larger society and could be described as an 'offspring' of the dominant society. One can also argue that, when construing a delinquent sub-culture and defining it as a culture, one arrives at a circular reasoning. Often the only defining element of delinquent sub-cultures is their differing approach to criminal values, and that difference (which may well be the only fundamental difference between the sub-culture and the larger group) is then used as the distinguishing element. In other words, cultures are qualified only by their criminal values. The main thing we wanted to prove, the fact that a delinquent group is a culture, is proved by defining culture on the basis of the criminal values of a group.[87]

A final argument, or series of arguments, against the view that delinquent sub-cultures are cultures when defining cultural offences, has a more practical nature. Qualifying delinquent sub-cultures as cultures and defining their criminal activities as cultural offences bears the risk of totally taking away all credibility of the concept and, as such, endangering the use of a cultural defence in cases where there is a reason to do so. It would be unacceptable that a group whose culture is solely based on diverging criminal and deviant values would refer to their diverging philosophy to justify or excuse their actions.

Defining 'culture' and 'cultural group' is essential. In demarcating those concepts, the scope of the cultural offence and the cultural defence will be decided: the broader the definition, the more situations will fall under the term cultural offence. This also has an impact on the credibility of the concept. It is true that the lines of a cultural group are, to a certain extent, arbitrary, and arguments can be advanced to incorporate groups of all sorts, such as sub-cultures based on age, profession, social standing, wealth, etc. There is no denying that all of those groups have, to a certain extent, a certain degree of (often implicit) auto-regulation and social control. Nevertheless, opening the possibility of a cultural defence to all members of some kind of sub-culture with a certain number of differing values can lead to an erosion of the concept cultural offence and the cultural defence.

3. CULTURAL DEFENCE

Now that we have defined cultural offences, we can connect this concept to the problem of the cultural defence, which we have already occasionally mentioned. The abundant literature that has grown in the United States concerning the clash of legal cultures, is primarily focused on the problem of the cultural defence. In the literature concerning the cultural defence, two meanings can be recognised as attached to this term. According to the first meaning '*[A] cultural defense maintains that persons socialized in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture's norms, should not be held fully accountable for conduct that violates official*

87. This problem was already mentioned when defining culture. *See* point 2.1.2.1.

law, if that conduct conforms to the prescriptions of their own culture'.[88] Besides this broad definition, which is always implicitly present when dealing with the problem, a second definition of the cultural defence is used. The cultural defence is then referred to as a *specific doctrine* that recognises the cultural background of the defendant as an excuse or mitigating circumstance in a penal case. The first can be called a *substantial definition* of the cultural defence, while the second is a *formal definition*.[89] The difference is important. While the second definition implies the recognition of an explicit and new doctrine on the domain of penal excuses, according to which cultural factors can be used as an excuse or mitigating circumstance; the first definition aims at all the cases in which cultural elements are put forward within a penal case. It may well be that the cultural arguments are put forward within the framework of criminal excuses that are traditionally accepted, such as provocation,[90] temporary insanity or the diminished responsibility defence.[91] Within this article, the substantial definition of a cultural defence is used.

Without going into the debate on the opportunity of the recognition of cultural factors within a substantial or formal cultural defence, one needs to outline the conditions in which this defence is *relevant*.[92] As was shown above, not all offences by members of minority groups are cultural offences, only those where the cultural elements played a direct and important role in the constitution of the offence can be qualified as cultural offences. An identical argument can be raised for the cultural defence. Not in all criminal cases involving members of minority groups, is the use of the cultural defence relevant. There has to be a relevant link between the offence and the cultural background of the offender. At this point, the theories of cultural offences and the cultural defence can be linked. It was shown extensively that, in order to qualify an act as a cultural offence, there has to be a specific connection between the act of the offender and his cultural background. The other way around, in order for a cultural

88. P.J. Magnarella, *loc. cit.*, p. 67. Comp. C. Choi, *loc. cit.*, p. 81 ('*A cultural defense, by definition, negates or mitigates criminal responsibility for acts committed under a reasonable, goodfaith belief in their propriety, based on the actor's cultural heritage or tradition*'), J.C. Lyman, *loc. cit.*, p. 88 ('*A cultural defense will negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their property, based upon the actor's cultural heritage or tradition*'); M. Thompson, *loc. cit.*, p. 26 ('*When a recent immigrant from a foreign country with a completely different set of values commits an illegal act that would have been perfectly acceptable in the homeland, defense lawyers argue the act was not necessarily a crime*.'); L. Volpp, *loc. cit.*, p. 57 ('*The "cultural defense" is a legal strategy that defendants use in attempts to excuse criminal behaviour or to mitigate culpability based on a lack of requisite mens rea. […] The theory underlying the cultural defense is that the defendant […] acted according to the dictates of his or her culture*') and M. Winkelman, *loc. cit.*, p. 154 ('*Cultural factors motivating the defendants behaviour*').

89. A similar distinction is used by S.M. Tomao. She uses the terms *formal* or *informal defense*. S.M. Tomao, 'The Cultural Defense: Traditional or Formal?', 10 *Georgetown Immigration Law Journal* (1996) pp. 241–256.
Comp. N.S. Kim, *loc. cit.*, pp. 102–103 and L. Volpp, *loc. cit.*, pp. 57–58 and 91.

90. *See* the article of J.J. Sing, *loc. cit.*

91. *See* J. Sams, *loc. cit.*, p. 340 who argues that there is no need for a distinct cultural defence theory because cultural elements can be incorporated within the scheme of other existing defences.

92. Compare with N.S. KIM, *loc. cit.*, pp. 121–136. She proposes a framework for analysing cultural evidence to support a cultural defence.

element to be relevant in the defence, there has to be a specific link between the offence and the cultural elements that are used as a defence. Or, in other words, cultural offence and cultural defence can be seen as two sides of the same coin.[93]

All the arguments put forward concerning the identification and the diverse character of cultural offences are applicable on the cultural defence. A cultural defence is logically (not a value, nor an opportunity statement) justified when and to the extent that the offence committed can be qualified and understood as a cultural offence. This also means that the cultural defence is not a monolith but, like a cultural offence, needs to be moulded and shaped according to the specific circumstances of the case. This approach implies that a gradual and individual application of the cultural defence is in order. Rather than an absolute statement that a cultural defence may lead to an acquittal, this means that the extent into which it can be used as a defence is directly linked to the degree into which the cultural element was important in the causation of the offence, and it thus constitutes a cultural offence.

The link between the two concepts is very important. The cultural offence denotes those situations where the cultural background of the offender played an important role in the *mens rea* of the crime. In order to use cultural elements in a defence, those elements need to be relevant in the case. Cultural elements are relevant as soon as one can qualify an offence as a cultural offence. In that case, there is a sufficient link between the cultural background of the offender and the offence itself. As cultural offences come in various degrees, so does the cultural defence. When keeping this connection in mind, many arguments against the cultural defence seem to disappear. As a judge needs to conclude that there is a relevant link between the offence and the offender, or in other words that there is a cultural offence, this will avoid an absurd use of the cultural offence in cases where the cultural element is irrelevant. In other words: the concept of cultural offence provides us with a measurement scale to decide if and to what degree cultural elements are relevant in the defence.

The vagueness which accompanies the term 'cultural defence' in literature does not make this link self-evident. One might argue that in fact the problem of a cultural defence is broader than the construction of a defence only in the case of a cultural offence. In this case, a cultural defence could refer to the use of any evidence on the cultural background of the offender in each case, and not solely in cases of what we can recognise as a cultural offence. The illustrations of the cultural defence used in the literature nevertheless refer to cases that have the character of a cultural offence. It seems that those authors who write about the cultural defence always have some sort of clash of legal cultures in mind. In addition, because cultural offences can be approached in a very gradual way, this means that they can incorporate a whole range

93. Compare the definition of the cultural defence by P.J. Magnarella with the definition of a cultural offence.

of situations where differences in cultural norms and values played a role in the constitution of the crime.[94]

Once there is a clear definition of a cultural offence and of the cases in which a cultural defence can be used, a discussion can be started about whether or not a legal system should recognise culture as a defence and to what extent. This discussion is not the goal of this article, nevertheless such a discussion risks to be a meaningless one if a clear demarcation of the object is not made.

4. CONCLUSION

There is a big difference between 'continental' and 'common law' literature dealing with the problem of offences that are culturally motivated. While European literature tends to focus on the act itself, naming it *cultural offences* or *délits culturels*, American literature tends to deal with the problem from the viewpoint of the defence of the accused, calling it *cultural defence*. Of course, these terms are closely related. First, a definition of cultural offences was given: *an act by a member of a minority group or culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation*. By demarcating this concept, a more or less clear distinction was made between cultural offences and other crimes. The complexity of this term was examined as well.

The main point was that cultural offences are those offences that are primarily motivated by or find their source within the cultural background of the offender, which means there is a relevant link between the offence and the cultural background of the offender. These cases are the kind of cases that justify a cultural defence. Thus, in order to decide whether or not a cultural defence is justified, and to which extent, one has to look at the facts and at the role the cultural elements have played. The degree of motivation or of causation of the culture on the behaviour of the offender can vary. The essential guideline is a situational approach, taking into account all the nuances of the specific case.

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94. Only one author seems to use a broader perspective on cultural defences. Because of the absence of a clear definition we can only interpret his text, but the problem is fundamental. In his theoretical outline of the problem of cultural defences M. Winkelman uses the traditional approach of a cultural defence, i.e. '*cultural defense refers to criminal trials in which cultural factors motivating a defendant's behaviour are presented to establish mitigating circumstances, serving to reduce charges or receive leniency in sentencing*'. (M. Winkelman, *loc. cit.*, p. 154) Yet, when he starts giving examples of cases where he intervened as a cultural expert he uses a broader definition by referring not only to factors which are linked to the offence, but any factor which sheds some light on the individual situation of the offender. ('*The cultural dimensions of mitigating and extenuating circumstances may conceivably involve any aspect of the defendant's cultural background which is relevant to establishing the defendant's situation*', *loc. cit.*, p. 158) This use of the term cultural defence is much broader in that the link with what was essential for the cultural 'motivation' of a crime, i.e. the clash of legal cultures, is broken. By denying this aspect, one does not take into account what is fundamental in a cultural defence as opposed to the traditional criminal defences.

The problem was approached in an objective way: defining cultural offences and the cultural defence, showing its complex nature and the gradual influence this can have on the behaviour of an offender. We have not focused on the problem whether or not these cultural elements which played a certain role in an offence *should* be considered when dealing with the case in a court.[95] This approach is fundamentally different, while the first approach concerns the implications of culture on criminal behaviour, the second approach implies a value-statement: whether or not to consider these factors. An answer to this question should in the first place be given based on objective facts. Important for this debate is that accepting a cultural defence does not imply a black-and-white statement that every cultural defence should lead to exculpation of the offender. As there are gradations in the essence of cultural offences, there should also be gradations in their application in court. In addition, the value statement whether or not a cultural defence should be accepted by the courts, is in itself not an absolute statement either. Again, gradations in the application of a cultural defence can be justified for reasons that touch the debate of the opportunity of the cultural defence. The different values that live in our society, such as pluralism but also the protection of social peace and individual life and property, have to be taken into account. However, before one can discuss these issues, a definition is needed of the concepts that are 'under fire'[96].

95. Some interesting articles in this discussion: F. Bovenkerk and Y. Yesilgöz, *loc. cit.*, pp. 241–247; C. Choi, *loc. cit.*, pp. 85–90; A. Dundes Renteln, 7 *Law and Anthropology – International Yearbook for Legal Anthropology* (1994), *loc. cit.*, pp. 53–69; M. Fisher, *loc. cit.*, pp. 678–702; N.S. Kim, *loc. cit.*, pp. 108–117; P.J. Magnarella, *loc. cit.*, pp. 65–84; J. Sams, *loc. cit.*, pp. 345–352; J.J. Sing, *loc. cit.*, pp. 1877–1884 and L. Volpp, *loc. cit.*, pp. 91–101.
96. '"Cultural' Defenses Draw Fire', an article by Rorie Sherman in *The National Law Journal*, 1989 (17 April) p. 3.