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The cultural defense and women's human rights: An inquiry into the rationales for unveiling Justitia's eyes to 'Culture'

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Abstract

In our era of globalization, migration increasingly enforces cultural heterogeneity at the level of single societies and countries mirroring the cultural heterogeneity at the macroscopic level, i.e. the planet. Thus, the question of intercultural understanding and coexistence not only is crucial when it comes to states, but is increasingly gaining in importance in terms of identifying preconditions that enable individuals from various cultural backgrounds to share *one* commonwealth. At present, a growing number of people are convinced that this challenge is not easily met due to what are believed to be fundamental moral disagreements between 'western' and 'non-western' (in particular, Islamic) culture(s). Against this background, different proposals have been provided to rise to the above-mentioned challenge. One of them is to allow for 'cultural' justifications in matters of criminal law. In this article I try to outline the state of discussion on claims for a 'cultural defense' by identifying and analysing three distinct rationales: the argument from pluralism; the argument from fairness; and the argument from necessity. Finally, I critically reflect on them from a human rights perspective.

Keywords

Cultural defense, honor-based violence, human rights, multiculturalism, punishment, relativism

The cultural defense in the context of challenges posed by the plurality of values in European societies

Over the course of the last decades, migration due to colonial heritage, mobility of labor and asylum regimes has transformed nearly all European societies to substantial

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multicultural conditions. Millions of immigrants have fueled Europe's economic productivity in times when it was strongly needed and today also compensate for European societies' lack in reproductivity. Recently these changes have become more and more obvious, not least because of frictions stemming from the side-by-side existence of different mores. The problematization which the multicultural project is currently witnessing not just on the part of right-wing parties but also on the part of scientists as well as human rights¹/women's rights activists reveals a growing discomfort when it comes to 'alien' values imported by migrant populations. This anxiety has grown substantially once the assimilation paradigm, i.e. the expectation that immigrants would soon get rid of their cultural imprint once they got in touch with supposedly superior European civilization, experienced an empirical rebuttal.² The multicultural project – by many previously envisaged as a harmonious melting pot of various fruitful ethnic contributions – turned out to be rather more of the same: separated national or cultural entities on a miniature scale. Segregation and 'parallel societies' are phenomena with which all immigration countries in Europe currently have to cope on a larger or smaller scale.

Two contrary proposals are currently being discussed to tackle these issues. The first one, the homogeneity approach, adheres to a concept that German political scientist Bassam Tibi has called '*Leitkultur*' – a dominant culture (cf. Tibi, 2002). The idea behind it can be described as a search for common ground on the basis of the majority culture's moral norms and values. Even though the definition of a European *Leitkultur* poses a range of difficulties given the internal heterogeneity of European societies themselves, the message of this approach is clear: immigrants have to adopt the predominant lifestyle and worldview of the host countries. The second proposal to rise to the challenges posed by the plurality of values, however, is not yet convinced of the failure of multiculturalism in Europe and rather advises broadening the realm of legitimate cultural diversity in legal matters as well. Two distinct features regarding this pluralistic approach can be observed. First, legal pluralism allows for different legal systems to coexist within one society. In particular, this issue has been raised in regard to the Islamic law, the shariah.³ Second, the cultural defense concept aims at justifying by reference to 'culture' what is basically prohibited behavior. Whereas up to now no such formal principle exists within Europe's legal systems, the inclination to establish one can be observed among certain 'progressive' theorists and jurists.

The cultural defense and the criminal law: Current discussion and rationales

The cultural defense concept is an attempt to unveil justice's eyes to culture, or more precisely: to recognize 'cultural' values and norms in terms of legally privileged justifications. Basically, within a given criminal law system the cultural defense can function in two respects: in regard to exculpation, i.e. the exclusion of any guilt with the effect that no punishment is inflicted; or in regard to mitigating factors, which reduce the defendant's guilt and the successive penalty.

The discussion on the cultural defense originated in the United States where cultural defenses are regularly accepted by courts. The cases involving cultural justifications range from homicide, refusal of medical treatment, use of drugs, treatment of animals,

or child marriage to the prohibition of autopsies (cf. Renteln, 2004). The concept is initially linked to common law, where the term *cultural defense* refers to traditional mechanisms of excluding or reducing criminal responsibility, such as the *insanity defense* or the *defense of provocation*. However, irrespective of the differences of common law and continental law, the rapid multiculturalization of many European countries during the last decades has drawn the attention both of practitioners and theorists to this concept which indeed mainly focuses on the criminal law system, but is also gaining in importance in matters of civil law, e.g. regarding the validity of marriages contracted in foreign countries.

Dealing with cultural justifications in criminal procedures not only varies from one European country to another, but is often inconsistent within the same state. In Germany, ‘cultural defenses’ – again, no such formal objection exists there – are regularly raised in association with so-called ‘honor killings’ within Turkish/Kurdish or Arabic communities (cf. Maier, 2009). To grasp the specific nature of those acts, it is of utmost importance to understand the patriarchal background from which they emerge – a background tinged with the ‘idea that girls and women are first and foremost sexual servants of men – that their virginity before marriage and fidelity within it are their pre-eminent virtues’ (Moller Okin, 1999: 19).⁴ One significant implication of this fact is that honor crimes usually are collective crimes to the effect that they constitute a plot of the entire family against one of its female members. That is why moral sanctions for these crimes as ‘the ultimate form of social control over women by men’ within the affected group are often non-existent (Maier, 2009: 236). Sylvia Maier points out: ‘Once in prison, honour killers are treated like celebrities by their families, guards and other inmates, especially if they are underage, because in that case they have “sacrificed” themselves for their family’s honour’ (ibid.: 235).

There are no official German statistics revealing the actual scale of this phenomenon that is, in fact, ‘imported’, but in a peculiar way nevertheless seems to touch upon a tradition of defending one’s honor that was not totally alien to European (aristocratic) society until the second half of the 20th century. According to Maier, until recently, honor killers could count on leniency in German courts. In judicial terms, this leniency is possible once the crime is not categorized as murder, but as manslaughter. The former generally requires the perpetrator to have acted on base motives [*niedrige Beweggründe*]. Whether or not honor-based killings presuppose base motives is still a point of discussion among German jurists, the consequence being that there still is ‘no unequivocal, consistent jurisprudence on either the state or federal level’ (2009: 240). A legal turn, however, was encouraged by a decision of the Federal Court of Justice in 2004, stating that the standards of culpability are solely those of the German majority society (ibid.: 241). By contrast, advocates of the cultural defense concept demand that in the case of honor-based crimes, the perpetrator’s social context and socialization definitely should be taken into account. This position is *inter alia* put forward by Winfried Hassemer, former vice-president of the German Federal Court of Justice (Hassemer, 2009).

In Austria, there exists a similar possibility to downgrade honor killings from murder to manslaughter. Here the *differentia specifica* lies in the furious emotion underlying the act of killing that in addition has to be broadly comprehensible [*allgemein begreifliche heftige Gemütsbewegung*]. Hence, in regard to honor killings the question arises for how many people it is comprehensible to kill for (sexual) shame and honor. Similarly, in cases of ‘ordinary’

domestic violence, the intercultural hermeneutics of emotions can cause troubles. In 2010, when an Austrian regional court sentenced an Austrian national of Turkish origin to 6 years in prison for the attempted manslaughter of his wife by referring to his strong emotions when faced with her application for a divorce, the decision caused an intensive public discussion as to whether the effect in this special context was broadly comprehensible or not (cf. Seeh, 2010 [online]). The opinion of the court, which was later confirmed by the appeal court, reads as follows: ‘Especially foreigners or persons with a migratory background often face extraordinarily difficult living conditions that can – fostered by their origin – erupt in the heat of the moment. Although foreigners’ affects can be rooted in moral values that are alien to Austrian citizens, they nevertheless can be broadly comprehensible’ (ibid.).⁵ In consideration of the prevalence of indigenous domestic violence fueled by male thirst for power and control over women (belittling ‘jealousy’) this case is also a good example of Anne Phillips’ observation: that ‘when “culture” echoes gender norms in the wider society, or gendered practices in the law as a whole, [. . .] it is most likely to be recognized as an excuse’ (Phillips, 2003: 529).

In Italy, too, the emerging concept of ‘culturally motivated crime’ [*reato culturalmente motivato*] is debated among jurists and reflected in several recent judicial cases and decisions, particularly in regard to violence against women (cf. Basile, 2011). In the Netherlands, to mention another example, cultural defenses have also strongly gained in importance and attracted considerable attention in Dutch criminal law (cf. Siesling and Ten Voorde, 2009). Following a trend towards a multiculturalization of criminal law – including the possibility of taking into account the defendant’s cultural background in terms of conscientious objections⁶ – the Netherlands now witness an ambivalent development. Even though Dutch criminal law shows great potential for flexibility, the willingness to accept cultural justifications is obviously declining. This holds particularly true for honor-based crimes: ‘Th[e] lenient attitude towards culture in criminal justice matters has changed since the end of the 1990s’ (ibid.: 164). The same can be said of Spain, where the legal situation is markedly restrictive since the Statute on the Rights of Foreigners (2000) declares that ‘foreigners’ fundamental rights shall be interpreted in conformity with the Universal Declaration of Human Rights’ (cited in Truffin and Arjona, 2009: 90). Explicitly, ‘[r]eligious and cultural beliefs cannot be alleged to justify acts contradicting those norms’ (ibid.).

However, on the part of the advocates of an official cultural defense, three different rationales are (implicitly) presented as to why *Justitia* should unveil her eyes to ‘culture’. Interestingly, with very few exceptions,⁷ these argumentative, *philosophical* foundations of the cultural defense are almost always neglected – both by its supporters and its opponents. Therefore, in the next section, I will try to reconstruct common arguments in favor of the cultural defense, namely (1) *the argument from fairness*; (2) *the argument from pluralism*; (3) *the argument from necessity*.

Common arguments in favor of the cultural defense

The argument from fairness

This rationale, based on the motive of fairness, can be outlined as follows in my terms: ‘(Some) norms and values of (some) immigrant cultures cannot be consolidated with

the norms and values of the majority culture and its legal system. Imposing the norms and values of the majority culture on immigrant cultures would be *unfair*.⁷ This motive of fairness can be subdivided into a *relativistic*, a *deterministic* and an *epistemic* one. The latter is based on the assumption that certain legal provisions simply are not known or understood by people of foreign origin, which in the view of some is a factor to call for – in the words of Neal A. Gordon (2001) – a *cognitive* cultural defense. By contrast, the relativistic motive of fairness is constituted by the idea that the values and norms of different cultural systems are incommensurable and that it would be unfair to measure everyone with the same yardstick. The deterministic motive, however, ascribes to culture and its ethical imperatives such a compelling force that pressuring someone to act against them is deemed highly unfair.

The argument from fairness is also put forward by Winfried Hassemer who 15 years ago already predicted that increasing cultural heterogeneity cannot but profoundly transform (Europe's) penal law systems in the long run (Hassemer, 1999: 171). In regard to honor killings he recommends that the perpetrator's social context and socialization should be taken into account (Hassemer, 2009 [online]) because paying attention to the perpetrator's 'normative consciousness' would be 'modern and humane' (ibid.). To integrate the cultural defense into the German judicial system in cases of honor-based violence, Hassemer suggests that honor killings should not be qualified as murder because the perpetrators just might lack base motives since they are convinced of having acted with the highest motives possible – protecting their families from being shamed. Classifying these killings as murder, according to Hassemer, would be 'too abstract, too fast and would be a bit of a stretch' (ibid.). The appropriate delict for honor killings, then, would be voluntary manslaughter [*Totschlag*], again resulting in a significantly lesser range of punishment.

Most often the argument from fairness is also presented with reference to the 'greater sacrifice of cultural values' that conformity to the law would require from foreigners (Phillips, 2003: 518). According to this perspective, the inequity of a legal system lacking a formal cultural defense would consist of the fact that the effect of static legal norms is not neutral towards all subjects alike but puts a special strain on some of them. In 2007 a Swiss think tank took up this position proposing the introduction of a new mitigation of punishment based on the 'foreign origin' of the accused (Frischknecht, 2009: 72 f.). In the additional explanation of their statement in favor of the cultural defense the members of the expert group stated: 'The judge mitigates the punishment if his biography or foreign origin made it more difficult for the offender to behave according to the law' (ibid.: 72).⁸ Notions of honor were explicitly mentioned. Even though this expertise provoked major criticism on behalf of the Swiss public, the extreme extension of the maxim *ultra posse nemo obligatur* also obtained approval from other legal experts (ibid.).

Alison Dundes Renteln, author of the standard work on the cultural defense (2004), also refers to the (deterministic) motive of fairness when she argues: 'Cultural differences deserve to be considered in litigation because enculturation shapes individuals' perceptions and influences their actions. The acquisition of cultural categories is largely an unconscious process, so individuals are usually unaware of having internalized them' (Renteln, 2009: 62). The view that our own 'culture' did not put us in a position to interpret and assess the world in a way other than that in which we were brought up is also

emphasized by proponents of the theory of memetics. Accordingly, cultural ideas (*memes*) reproduce in analogy to genes. ‘Memetics’, says Gordon, ‘shows that a person’s experiences shape his actions to a point where moral blame for failing to overcome these experiences is unfounded’ (Gordon, 2001: 1824).

In 1986 the Harvard Law Review Association [HLRA] already put forward a statement pro cultural defense by employing the argument from fairness:

A society’s socializing institutions not only make its members aware of its norms, but also instill in its people a sense that they are morally obliged to abide by their culture’s norms. Thus, persons raised in other cultures, who are subject to influences that inculcated in them a different set of norms, will likely feel morally obligated to follow those norms. Once norms have acquired this moral dimension, conformity with conflicting laws becomes more difficult. (1986: 1300)

The principles of equality as well as of individualized justice complement the association’s conception of fairness (HLRA, 1986: 1299 ff.). According to Kumaralingam Amirthalingam it is especially in the context of the hierarchy of mainstream society vs minority groups that ‘a question of fairness’ is raised: ‘[I]s it justifiable to punish a member of a minority culture under laws or norms reflecting those of the majority culture?’ (2009: 35). It is quite obvious that these sorts of fairness arguments are based on ethical/cultural relativism to a large part. As the cultural anthropologist Melville Herskovits emphasized, ‘the very definition of what is normal or abnormal is relative to the cultural frame and reference’ (Herskovits, 1960: 66). If there is no objective, non-relative ground for evaluating different ‘ways of culture’, from this perspective it simply would not be *fair* to impose one’s own standard on others. What justifications would there be left to do so except the reference to the right of the most powerful?

Next to these relativistic/deterministic motives of fairness an epistemic motive of fairness can be observed in the discussions on a cultural defense. To punish immigrants despite possible ignorance of the law in question, according to the HLRA, is simply unjust: ‘Although ignorance of the law is generally no excuse in a criminal prosecution, fairness to the individual defendant suggests that ignorance of the law ought to be a defense for persons who were raised in a foreign culture’ (1986: 1299). This is also stressed by Hassemer in regard to honor killings as he raises the concern that in those special cases, perpetrators among immigrant families sometimes simply might not be aware of the prohibited nature of the act (Hassemer, 2009). The epistemic argument from fairness can also be applied to non-empirical, i.e. metaphysical, ‘knowledge’. An example of this is the reason given by the Bremen District Court for the conviction of three Kurdish men for manslaughter instead of murder. The court opined that the accused, due to their internalized value of honor, were not able to realize the objective immorality of their intentions (cf. Maier, 2009: 214).⁹

The argument from pluralism

The second argument put forth in support of the cultural defense replaces the motive of fairness with the motive of pluralism: ‘(Some) norms and values of (some) immigrant

cultures cannot be consolidated with the norms and values of the majority culture and its legal system. Imposing the norms and values of the majority culture on immigrant cultures would *destroy cultural diversity* which is highly precious.'

The motive of pluralism, which aims at maintaining a culturally diverse society, can also be broken down into different sub-motives as the appreciation of this diversity can rest on various grounds. One could argue, for example, that cultural diversity is desirable from a macro-economic point of view (*economic* motive of pluralism), that cultural norms and values are able to stabilize or safeguard society's morals (*ethical* motive of pluralism), that cultural diversity functions as a buffer against tyranny and dictatorship (*political* motive of pluralism), or that it is simply beautiful to have different cultures contributing to one commonwealth with their different ways of life (*aesthetic* motive of pluralism). Apart from the argument from fairness, the HLRA also emphasizes pluralism as 'society's vigor' (1986: 1300) that 'justifies the cultural defense as a manifestation of America's commitment to . . . cultural pluralism' (ibid.: 1296). Although this commitment 'must be weighed against society's interests in imposing certain common values on all of its members' (ibid.), a culturally pluralistic society principally remains a firm goal: 'The cultural defense is integral to the United States' commitment to pluralism: it helps maintain a diversity of cultural identities by preserving important ethnic values' (ibid.: 1301). That some values here are described as important indicates that this argument from pluralism is – at least partly – based on the ethical motive of pluralism. This assumption is supported by the legal experts connecting these important values to the function of guaranteeing law-abiding conduct: 'Indeed, the protection of cultural beliefs through a cultural defense may actually further the goal of maintaining social order . . . Cultural values provide norms of conduct to fill the gaps in the criminal codes' (ibid.: 1305). In addition, the HLRA argues with the aid of the political motive of pluralism. Pluralism, reflecting the United States' 'ideals of liberty' (ibid.: 1301), would ensure a certain societal dynamism that is necessary in order to prevent totalitarian tendencies. The association states: '[M]odern dictators have been quick to exploit societies in which the individuality of people's ideas and lifestyles is subordinated to the impulse for a conformist, monolithic society' (ibid.) – a rationale also employed in the work of Tom Frischknecht. According to him, the plurality of different cultures, worldviews and moral codes is valuable because it functions as a wall against orthodoxy and despotism: 'A society that assumes its moral concepts to be unalterable runs the risk of enforced conformity. There exists the danger of the establishment of orthodox thinking' (Frischknecht, 2009: 235).¹⁰ Renteln, too, shares the pluralistic paradigm when she regards culture as constitutive of identity and the 'flourishing of multiple identities' as the main duty of government policies in open societies. She concludes: 'In order to ensure that ethnic minorities are accorded the dignity and rights which are their due, some kind of formal cultural defense is essential' (Renteln, 2004: 187).

However, according to the HLRA, without a formal cultural defense, all society's conjuration of pluralism is of little worth since the risk exists that immigrant groups could interpret the refusal of cultural claims raised in criminal trials in terms of non-recognition of their culture as such: 'It is hard to imagine a system more likely to convince a person that the majority regards her culture as inferior than one that punishes her for following the dictates of her culture' (1986: 1302). Interestingly, the association

explicitly refers to honor crimes, emphasizing the guiding function of ‘honor’ in traditional (Muslim) communities: ‘Blanket repudiation of a cultural defense in a case in which a person’s attempt to uphold that honor collides with the criminal law might be perceived as an official indictment of the principle of honor, rather than as a denunciation of the particular means of vindicating that ideal’ (ibid.).

The argument from necessity

The fear as to whether immigrants might equate the rejection of ‘cultural defenses’ with the rejection of their cultural, or more aptly religious, identity per se, and consequently not only distrust society’s alleged pluralistic orientation, but, worse, might threaten the stability of that society, constitutes the basis of the third argument put forward in support of the cultural defense. Especially in European countries that have witnessed insufficiently regulated immigration over the course of the last decades, worries about social cohesion and civil peace are increasing. Hence, it comes as no surprise that the view according to which immigrant populations might be further alienated from mainstream society in the future without certain (painful) concessions is particularly common (see also n. 3). In order to avoid parallel jurisdictions, advocates for permission of cultural defenses argue that one should choose the ‘lesser evil’ and officially take into account different cultural backgrounds in criminal law cases. According to Frischknecht, without an official cultural defense major tensions between the majority and minority groups are bound to occur in one way or the other (2009: 233 f.). He especially warns against the danger of ‘parallel societies’ and isolation on behalf of immigrants – who in some areas are anything but a minority but rather already represent significant percentages of the population.

A general critical assessment

The critical questions provoked by all three types of argumentation, operating with the motive either of fairness or pluralism, are numerous. Since my aim is to examine the cultural defense approach from a human rights perspective, I will mainly focus on the set of problems arising in this regard. But before doing so, I will express some general concerns regarding pro-cultural-defense reasoning.

Culture contested

First, it is the idea of culture entailed by the conception of cultural defense that is highly questionable. The argumentation for admitting cultural defenses to a certain degree seems to rest on the assumption that culture is a quality which – from an ontological perspective – exists autonomously from individuals, determining their being and behavior via one-way causality. Perceived as some sort of *factum brutum*, it is stable and therefore recordable and describable. But what if culture is rather something we produce and construct, not least by the way we treat cultural defenses?¹¹ What if there is more than one construction of a particular culture? What if the ‘cultural values’ that motivate someone to certain actions are not held to be essential values of their culture by other members or

are not assumed to be part of their culture at all? How many cultural anthropologists would a court need to hire in order to settle these issues?

The risk of cultural determinism imbedded in the cultural defense conception is regularly emphasized by its critics. According to Anne Phillips, the cultural defense is not only associated with the danger of cementing cultural clichés, for it ‘lends itself to stereotypical representations of the non-western “other”’ (2003: 514), but also ‘risks . . . subordination to someone else’s version of what is appropriate to one’s culture’ (ibid.: 520). Therefore, to argue that cultural evidence put forth in criminal procedures would present ‘no philosophical problem as it functions in the same way as any other type of evidence’ (Gordon, 2001: 1812) is a rather unreflective position. Imagine a court that allows for a cultural justification in the case of ‘marriage by capture’ conducted, for example, by people from Kyrgyzstan.¹² Other people from the same cultural background who oppose this practice and might be trying to outlaw it will be put in a difficult position since they have just officially been branded as people belonging to a culture that practises this ritual specifically. If evolution is understood to be an integral part of every cultural system, the concept of cultural defense might in fact impede these dynamics by applying finalized definitions. Certainly, one could argue that in the course of individualized justice, it is not a specific culture as a whole that is assessed and fixed, but culture per definition is not a private matter, but a community affair. Therefore, the labeling of group members can hardly be avoided once a cultural defense is officially granted to an individual. According to Doriane Lambelet Coleman the paradigm of culturalized justice typically reveals an ‘old racist perspective – about the propensities of “others” to violence and about the relative insignificance of their victims’ (2001: 990). Using the example of violent men exculpated on the basis of their cultural origin she summarizes the chain of thought on the part of the judge and the defense in the case of Dong Lu Chen, a man who emigrated from China into the USA and who killed his wife out of ‘jealousy’. It reads as follows: ‘While all men may be angry, provoked to violence even, by their wives’ adulterous behavior, Chinese men due to cultural influences may become so angry that their capacity for reasoned thought . . . will be so diminished as to rob them of the mental capacity to form intent’ (ibid.: 998). It is not difficult to imagine (with Coleman) that – irrespective of the good intentions of its proponents – a cultural defense concept with such underpinnings can also be used in *disfavor* of the accused and his compatriots.

That the danger of cultural essentialism poses a significant challenge to cultural defense advocates can also be exemplified by Renteln’s zig-zag line of argumentation in dealing with her cultural defense test established in order to prevent abuses. The test recommended by her includes three questions (2009: 64): (1) *Is the litigant a member of the ethnic group?* (2) *Does the group have such a tradition?* (3) *Was the litigant influenced by the tradition when he or she acted?* It is especially the second question Renteln is obviously struggling with the most. When she analyses the Reddy case – involving a man of Indian origin charged with forced labor and sexual exploitation for smuggling young Indian girls to the USA – she disallows a cultural defense arguing that the litigant would present ‘a social practice as though it were an accepted and normal cultural tradition’ (ibid.: 74). Without further explanation of what precisely the difference is between a social practice and a cultural tradition, Renteln rephrases her cultural defense

test clause from *existing* tradition to *accepted* and *normal* tradition without warning: 'While it may be true that girls are victimized in India and in other countries, this social practice is not widely regarded as desirable. It is more accurately seen as a reflection of harsh economic conditions' (ibid.: 77). In another case, Renteln obviously recognizes the dilemma of demanding that traditions be widely accepted in terms of definitory power as well as ousting minorities within groups and again departs from the formulated criterion, since she asserts that in cases of internally contested traditions, disagreement about their particular aspects or merit is irrelevant as long as the members 'will not deny there is such a cultural tradition' (ibid.: 80).¹³

A second question adjunct to the conception of culture (and the deterministic motive of fairness in particular) on the part of cultural defense advocates dives deep into one of philosophy's core problems: the freedom of the will. Renteln argues that a defendant whose act is motivated by culture is less blameworthy (2004: 189). This contention can be interpreted in two ways. First, Renteln could be convinced that cultural values in general have to be held in high esteem because they enrich society. In that case this would constitute an argument for the cultural defense using the motive of pluralism and therefore a normative statement to be treated in the following section. But second, it could also be perceived as the descriptive premise of an argument containing a relativistic/deterministic motive of fairness. As a consequence, it has to be subjected to empirical testing. Is it true that the 'power of enculturation' (ibid.) by its force is able to override our free will? To answer this question with 'yes' implies that culture, considered as an internal restriction of our freedom of action, ranks in the same class of compulsions as, for example, neuroses or dementia. One can doubt whether it is 'fair' of those who excuse perpetrators for their behavior on cultural grounds to explain with: 'Their culture *forced* them to do it.' In this case, a cultural defense argument would implicitly link actions based on foreign cultures to (quasi-)insanity (Gordon, 2001: 1831; cf. also Amirthalingam, 2009: 44 f.).

Of course, culture could also be regarded as an external restriction of some people's freedom of action. For example, the role that brothers in families with a migratory background have in the honor killing of their sisters is quite a telling illustration of this. It is a well-documented fact that in the case of such crimes, families often elect the youngest brother to commit the deed because of the expected lesser range of punishment resulting from his age (cf. Brandon and Hefez, 2008; Wikan, 2003). Can the pressure his parents and/or siblings inflict on him 'justify' his action? One might argue that in severe cases of coercive persuasion – which have also been documented in connection with suicide terrorist attacks – one cannot be held fully accountable for one's actions. But this would not constitute a genuine cultural defense but rather fall into the category of mere trivial coercion. Cultural reasons are not a necessity to argue for this coercion to be considered a mitigating factor.

Another reply to cultural defense proponents that I regard to be most crucial from a phenomenological point of view poses the question: What exactly is it that distinguishes culture from religion and from mere worldview or ideology? Would proponents of the cultural defense concept be as willing to accept justifications that simply point to religious doctrine or ideological tenets? Considering the motive of pluralism as well as that of fairness, what makes culture more valuable or more formative for the individual than,

for example, a political ideology? Could we imagine the belief system of a member of the Nation of Islam – according to that *inter alia* white men are devils – functioning as a mitigating factor? Or the withdrawal of the charge against a militant animal rights activist who convincingly proves to the court her deeply held beliefs about the inherent dignity of all creatures? Or as Phillips puts it: ‘An unsophisticated Proudhonist who claims that property is theft is unlikely to cut much ice when he uses this to explain why, in his world, it is entirely legitimate to appropriate his landlord’s property. Why then should a Rastafarian [not] be able to argue that smoking *ganja* conforms to the prescriptions of his religion, and is not an offence within his culture?’ (2003: 513).

To be sure, culture does play a significant role in the shaping of one’s identity, but so do other systems of belonging. This is also emphasized by Gordon who is convinced that the cultural defense ‘implicitly assumes that people from the domestic culture are freely able to conform their actions to the law’. He asks: ‘But what if people cannot freely choose their actions in any meaningful moral sense? What if everyone’s actions are the result of factors, both cultural and genetic, beyond his or her control?’ (2001: 1816). He concludes with a plea for equal treatment: ‘Everybody is at the mercy of the ideas he encounters; the cultural defense just arbitrarily defines culture narrowly enough to shut out most of these compulsions’ (ibid.: 1810). Given this parallel, Amirthalingam rightly warns: ‘There is a real danger of overplaying the culture card in criminal law’ (Amirthalingam, 2009: 37).

The ambiguity of necessity

This argument in favor of a cultural defense is ambivalent insofar as the possible negative outcomes of disallowing cultural defenses could also be brought about by allowing them. It is not difficult to imagine that analogously to angry immigrant groups members of the majority population might rise up against any form of privileged ‘parallel jurisdiction’, maybe even with the help of anti-foreigner propaganda calculated to spread hatred and violence (cf. also Basile, 2011: 366 f.). Simply to point to the dangers coupled with reservations against the cultural defense conception is therefore not convincing. To the warning ‘If only the majority’s values are accepted, those holding contrary values are likely to be looked upon unfavourably’ (Gordon, 2001: 1829) one could easily add: ‘If a minority’s values are accepted to the extent of a culture defense, those inhabitants holding contrary values are likely to engage in resistance and hatred of foreigners might further increase.’

Rationales for the cultural defense: A human rights perspective

In addition to the *pragmatic* argument from necessity, two main *philosophical* rationales for allowing for cultural defenses have been identified in the previous sections, one resting on a motive of fairness, the other on a motive of pluralism. In general, both the argument from fairness – whether operating with an epistemic, a relativistic, or a deterministic motive – and the argument from pluralism are open to straightforward refusal. The reason for this can be found in their logical structure which bridges descriptive terrain and normative conclusions with the aid of the respective motives.

Once these motives are rejected or altered, the deduction proves to be imperfect. Since according to the ‘law’ of Hume a fundamental gap exists between *is* and *ought*, but no direct way of reasoning exists from the realm of facts to the realm of norms from a logical point of view, the hypothetical motives of fairness or pluralism indeed play the essential role in the whole chain of argument. Thus, in evaluating the arguments in favor of the cultural defense I will focus exactly on their underlying motives. It is important to mention, however, that even though these motives linking the descriptive premise (e.g. ‘our ways of moral reasoning are dependent on external, e.g. cultural, factors’) with the prescriptive one (‘no one must be disadvantaged for his or her cultural conditioning’) are subjective, i.e. depending on individual approval, they are not invalid. But they are challengeable, as I will try to specify below when assessing human rights implications of the cultural defense approach by focusing on the accuracy of the motives in question especially in cases of honor-based violence. The reason for choosing extreme cases such as these is vested in their quality of best highlighting the whole set of problems contained in the ‘cultural defense vs human rights discourse’. It is quite evident that such problems occur to a far lesser extent if a cultural defense is raised by, for example, immigrants of East African origin charged for chewing *khat* or by Orthodox Jews and Muslims insisting on their specific ways of animal slaughter.¹⁴

A pair of scales: plurality and human rights

As has been outlined above, the motive of pluralism which aims at maintaining a culturally diverse society can be broken down into different sub-motives: economic, ethical, political, aesthetic. I would like to confront those four types of pluralistic motives with the most repellent practices that have emerged in Europe due to immigrant presence during the last decades. Honor killings have become, as the Norwegian anthropologist Unni Wikan points out, ‘a part of European reality’ (2003: 4). Even though they are not restricted to a particular religion, they are rooted in traditional patriarchal structures which only too often are backed by religions, *in concreto* the religion of Islam. Against the background of the patriarchal notion of sexual shame and honor, unmarried girls are especially at risk of shaming their male relatives – their ‘guards’ – by adopting a liberal lifestyle exemplary in pre-marital relationships, western dressing, or clubbing. Sometimes, for the girl’s family the public disgrace stemming from her behavior is felt to be so grave that the only way to ‘solve the problem’¹⁵ is physically to eliminate her. To fully grasp the phenomenon of honor killings, it is important not to mistake it for ordinary domestic violence which indeed appears to be quite independent of culture and tradition. Honor crimes are not necessarily crimes of passion – ‘it is about power and control’ (ibid.: 16). In most cases honor killings constitute a conspiracy to kill conducted with the full consent of the extended family (Brandon, 2008: 58; cf. also Wikan, 2003: 15). To realize this difference, as Sawsan Salim, a NGO worker in London stresses, is ‘a matter of life and death’ (cited in Brandon and Hefez, 2008: 114). The aim to control women’s sexuality is also the rationale behind the practices of forced marriages and female genital mutilation (FGM). The latter – originally practised in large parts of Africa, the Middle East and parts of Asia – has been ‘imported’ to Europe by

immigrants from these regions. Different severities of FGM exist, ranging from cutting off the clitoris and labia in part or in total to additionally sewing the vulva shut, leaving open but a tiny hole. Immigrant families clinging to this harmful tradition¹⁶ either carry it out secretly in Europe or take the girls back to their parents' country of origin for this purpose. Similar to this, forced marriages are also often performed by abducting girls to the parents' native country. Again, the root of this practice is fear, 'fear of "western" culture that they see as something that is against what they are and which is appealing to the young people – particularly to their sexual desire' (ibid.: 12).

Returning to the 4 motives of pluralism, one cannot help but doubt whether they are still valid in case of the above-mentioned severe violations of human rights, i.e. the right to life, liberty of person, freedom from torture or cruel, inhuman or degrading treatment.¹⁷ The motives most easily outweighed by human rights considerations are the ones grounded in economic and aesthetic preferences. There is nothing 'beautiful' in cutting a girl's throat or mutilating her genitals, nor is there any reason for the right to life, liberty and security of person or the right to freedom from cruel, inhuman, or degrading treatment to be ranked below economic considerations. Likewise the ethical motive, according to which there are cultural values highly desirable for society as a whole, becomes dubious in case of values such as sexual shame and honor or female chastity. In this respect the opposite of what the HLRA claims is true: 'Cultural values provide norms of conduct to fill the gaps in the criminal codes: such values serve independently from legal sanctions as a check on undesirable behavior' (1986: 1305). The political motive of pluralism is also questionable for being potentially self-contradicting. The argument that without cultural diversity 'the individuality of people's ideas and lifestyles is subordinated to the impulse for a conformist, monolithic society' (ibid.) reaches its bounds when it comes to practices that clearly represent a tyranny of families or clans over the (female) individual's way of life and sexual autonomy.

It should have become clear that in the discussion of the cultural defense, it is not sufficient to put forth pro arguments on an unconditional commitment to pluralism without confronting the pluralistic motives with potential practical implications of an official cultural defense – in particular in regard to human rights protection. When the HLRA argues that '[i]mmolating one's own children for the sake of honor, executing an adulterous wife, and lashing out at someone in order to break a voodoo spell may seem very bizarre – indeed barbaric and disturbing – to the majority. But this is no reason to attempt immediately to quash the values of foreign cultures' (1986: 1311), the human-rights-conscious pluralist could very well reply: 'These values need not be quashed immediately, but when after a thorough weighing our motives for cherishing a pluralist society turn out to be less considerable than our desire of universal human rights enforcement, we are justified in rejecting them.' Likewise the enlightened pluralist can subscribe to Gordon's remark that '[i]t is difficult for a nation to claim that it is founded upon the ideas of freedom, tolerance, and personal liberty and at the same time not accept the values of other groups' (2001: 1828) and simultaneously insist that 'it is difficult for a nation to claim that it is founded upon the idea of universal human rights and at the same time accept structural human rights violations within certain groups'.

Unilateral fairness? Reassessing the victim's position

Having demonstrated why the motive of pluralism should not automatically outweigh core human rights, the argument for a cultural defense resting on the motive of fairness remains to be examined. Since I have already tried to explain why the deterministic motive of fairness cannot constitute the rational basis for a genuine cultural defense, I will now treat the argument in favor of the cultural defense relying on the epistemic motive of fairness and the relativistic one. The former expresses discomfort with punishing members of immigrant populations for breaches of rules they are not familiar with due to their special enculturation. Whether the empirical – not knowing that an act is prohibited by law – or the supposed metaphysical dimension of knowledge – not conceiving the moral wrongfulness of an act – is concerned, when it comes to core human rights the maxim *ignorantia iuris non excusat* [ignorance of the law is no excuse] should triumph over any culture-based excuses. Even though one could imagine that in special cases immigrants are simply not aware of legal stipulations, e.g. the prohibition of certain drugs, or cannot find anything morally wrong in *kosher/halal* butchering, for example, it is difficult to argue how the lack of knowledge regarding the existence of human rights, such as the right to life or security of person as well as their moral imperatives, can excuse severe human rights violations without relinquishing human rights' universally binding nature altogether.¹⁸ Human rights would then no longer obligate all human beings, but only those who are able to recite correctly the Universal Declaration of Human Rights [UDHR]. Hence, Gordon is right in his verdict that any cognitive cultural defense 'does more than simply encourage more ignorance; it defeats the memetic power of the law' (2001: 1832).

A far more challenging sub-motive of the fairness argument is the relativistic one. Its apprehension of fairness is dependent to a high degree on the notion of equality. According to the relativistic motive of fairness, the treatment of people as equals requires that they are equal indeed. Since perpetrators in cases of honor-based violence regularly differ in their moral or axiological constitution from mainstream society, an undifferentiated application of legal standards seems unfair from a relativistic perspective. For many, regarding the cultural defense and women's human rights, it is precisely equality in terms of equal protection by the law – as stipulated in article 7 of the UDHR¹⁹ – that is at stake here. Susan Moller Okin asks: 'When a woman from a more patriarchal culture comes to the United States (or some other western, basically liberal state), why should she be less protected from male violence than other women are?' (1999: 20). Gordon, too, criticizes the cultural defense concept's neglect of the victim's rights: 'Minorities are denied the equal protection of the laws based on their cultural heritage' (2001: 1830). Similarly, Coleman emphasizes that critique of the cultural defense can be uttered 'in strong support of immigrants who would seek the protection of the laws' of the country to which they have moved (2001: 982). According to her, the cultural defense 'denies to the victims of a crime that is alleged to be the result of "culture" the rights to individual liberty and personal safety' (ibid.: 998).

Seizing the notion of fairness in terms of equality, one could ask whether it is fair for a society to protect some victims better than others. But is a court really denying equal protection to victims if it allows for a cultural defense? In order to answer this question it is

necessary to clarify who is meant by 'victim': the actual wronged party or potential future victims? Regarding the actual victim, it is quite obvious that in the case of an attempted honor killing, she is, in fact, less protected if her brother is exculpated and faces no punishment whatsoever. But it is dubious whether this evaluation also holds true in cases of reduced punishment, assuming that the lesser punishment is able to deter the offender from further assaults just as well. The latter must be supposed by default once the killing is completed and no further need to 'solve the problem' exists. In respect of the actual victim in that 'worst case', a cultural defense would not meet the conditions of violating the principle of equal protection since an end of punishment in terms of *special* prevention is pointless. But the situation might be different with regard to potential future victims once there is reason to believe that a granted cultural defense is able to undermine the end of punishment in terms of *general* prevention. Against this position one could argue that general prevention as such is more or less ineffective, especially in the case of crimes committed out of furious emotions. Now, what should have become clear over the course of this article is that in the majority of the cases, honor-based violence is not about crimes committed by people losing control over their feelings, but individuals or entire families precisely planning their actions because they are afraid of losing control over the lives of their daughters, sisters, cousins, or nieces.

Yet, some doubt that there is a negative impact in terms of prevention as long as a cultural defense does not result in a verdict of not guilty. Frischknecht, opposing the claim that the cultural defense could subvert general prevention, argues that as long as there is any criminal conviction at all, the norm as such would not be questionable (2009: 242 f.). A similar argument is put forward by Fabio Basile who holds the opinion that a modestly reduced punishment would still represent an opportune compromise between the victim's protection by means of the penal law on the one hand and fairness considerations towards the convicted criminal's background on the other (Basile, 2011: 377). Frischknecht, however, emphasizes: 'The effect of criminal law is essentially dependent on how a criminal conviction is communicated' (2009: 243). And it is exactly this that seems to be a solid ground for remaining skeptical towards an official cultural defense. In allowing for cultural defenses in cases like the one above, the court and the state run the risk of sending out the following message to average people with similar fears or intents: 'X is a crime and punishable by law. But if it is done out of certain motives or reasons, it's not so bad.' Admittedly, although the question of the effectiveness of general prevention is a tricky one, in cases of cultural defenses the following question should simplify the issue: 'Is the concept of cultural defense when applied in cases of honor-based violence a measure likely to increase the law's deterrence factor or to diminish it?'

In the cultural defense discourse, shifting the focus to the victims also attracts criticism. Frischknecht points out that in general, it is an improvement of modern criminal law not to be too concerned with the position of the victim since more abstract notions of justice are given priority over personal claims for revenge (2009: 262 f.). Likewise, Renteln argues that stressing the equal protection rights of victims 'misses the purpose of the criminal law, which is to ensure just punishment for the defendant by focusing on the mental state of the defendant, or *mens rea*' (2004: 196). This, in fact, is a rather flawed notion of criminal law for it misses the starting point of any discussion on the end

of punishment, i.e. the question how inflicting punishment can be justified at all. According to the modern theories of the state, which have been developed most prominently by Thomas Hobbes and John Locke, the establishment of a legal order endowed with a monopoly of legitimate force is a necessity resulting from the various harmful consequences of the state of nature, i.e. the pre-legal, pre-governmental anarchy where no protection of fundamental rights exists. The end of punishment in the liberal state therefore is the protection of (human) rights. Thus denying the relevancy of the victim's perspective not only is highly *unfair*, but also contradicts the very rationale of the criminal law itself.

Fairness and (the delusion of) state neutrality

By acknowledging the formal equality of different worldviews insofar as it is impossible to determine objectively whose values and moral convictions are true and whose are false, the relativist faces the question to what extent it is justifiable to impose legal standards upon people who do not share his or her underlying moral principles. If the defendant raises a cultural defense, so the argument based on the relativistic motive of fairness reads, there is no neutral ground for the court normatively to assess the defendant's worldview in relation to the majority's culture. Simply to impose the values of the latter would be lacking a just rationale and rather constitute a mere act of force.

Regardless of the accuracy of the relativist's reasoning,²⁰ the crucial question is the following: Why should the *state* adopt it? It may indeed be a respectable attitude for a member of a multicultural society not to force one's private moral judgments on others. But can this be a reasonable approach for the state? Those who answer this question with 'yes' often refer to the ethical neutrality a modern, particularly a liberal, state should observe. Such neutrality can be understood as either 'exclusion of ideals' or 'neutrality between ideals' (Raz, 1986: 134 f.). Starting with the former, to demand that a modern western state should be neutral with the result that no ideal, i.e. conception of the good, is favored seems profoundly absurd. As pointed out above, the modern state per definition is no end in itself but according to social contract theories is established to serve the individual in protecting her or his basic rights. Liberals adhering to this special interpretation of state neutrality tend to forget this nexus, misled in their belief that only religiously loaded ideals fail to meet the requirement of neutrality. Hence, any state uniformly excluding any ideal whatsoever simply cannot function, i.e. fulfilling any purpose since it denies itself any possible justification. The situation is similar with the second interpretation of neutrality, that of neutrality between certain ideals. A state defining itself by the ultimate objective of protecting fundamental rights just cannot be *neutral* between ideologies that foster human rights protection and others that threaten human rights observance. Considering this circumstance, it becomes clear that the argument from fairness which involves a relativistic motive pertaining to such notions of state neutrality is far from convincing.

However, the relativist's fairness motive need not be thrust aside entirely. Maybe fairness towards people with different, incommensurable moral outlooks can be achieved without going for the maximal version, i.e. granting cultural vindications in the realm of the law. Indeed, with a more modest and principled approach – which is localized in

the democratic-political sphere – an alternative standard of fairness could be suggested. According to this minimalist account, fairness is not achieved only if all different value traditions are equally taken into consideration in the course of the *application* of the law, but takes place as soon as all members of different worldviews are allowed to contribute to the *law-making*, i.e. to insert their perceptions of justice and the good life, etc., into the democratic process. In such a way, they would not have the right to find the legal system always mirroring their axiological and normative beliefs and ideals, but instead the right to try to change it accordingly in competition with the respective counter-beliefs and ideals. Of course such an approach poses weighty questions as to the accessibility of citizenship and minority/majority relations in general which cannot be explored here in detail. However, according to this concept of minimalist fairness, the neutrality principle could be reformulated in the following way: the state, once endowed with a certain function or objective (e.g. the protection of human rights) cannot be expected to be fully neutral between ideals. But it could still be fair and therefore neutral towards different cultural/axiological communities by allowing them entrance into the political arena where they can advertise their ideals and ideologies.

No doubt, such an approach involves a high price. From such a perspective – which could, as I tried to show, accommodate the relativist's pursuit of fairness – the state's objective in terms of safeguarding fundamental rights is not set in stone but conditioned on the people's (majority) approval. Such (constitutional) openness of the political horizon may indeed seem unacceptably hazardous to many. However, it would be most *fair*.

VI Conclusion and outlook

In this article I have highlighted the challenges posed to the legal system in multicultural societies exemplified by the concept of cultural defense. Having outlined the function of the cultural defense in criminal law and explored the rationales given for it, I analysed the specific elements they contain, i.e. various motives of fairness and pluralism, before finally rejecting them in cases where they are prone to be apologetic of severe human rights violations.

However, the insistence on the significance of human rights with respect to the cultural defense conception also faces criticism – in the name of anti-racism. Most prominently this position has been taken up by Leti Volpp (1996), who accuses of racist and colonialist thinking those claiming that 'western' human rights are able to protect immigrant women from their own culture. Explicitly referring to Coleman's skepticism towards the cultural defense, Volpp accuses her of invoking 'the name of women's progress in order to legitimize the exclusion of non-European immigrant culture from consideration by law' (ibid.: 1579) and suggesting 'that when non-European women are the victims of crimes, they are passive objects, waiting to be saved by the arm of the law and the largesse of European American feminism' (ibid.: 1582). Regardless of Volpp's *political* aim of avoiding (re-)victimizations of female crime victims, the *factual* reality all too often proves Coleman right: many women from immigrant backgrounds are passive simply because the gender roles prevailing within their communities force them to be. When Volpp complains about Coleman's portraying female victims as 'devoid of any agency' and without a 'sign that they resist patriarchal formations' (ibid.) she disregards

the actual conditions of many females of Asian or African origin. Reading the study of Brandon and Hefez (2008), for example, one rapidly gets an idea of how many women indeed are waiting eagerly to be 'rescued' by the arm of the law from patriarchal despotism present in certain types of immigrant communities.

There is one last argument in favor of the cultural defense – even if this *would* violate fundamental human rights – left for evaluation. It is the argument from cultural rights as declared in article 27 of the International Covenant on Civil and Political Rights [ICCPR].²¹ According to Tom Hadden it is an 'individualistic fallacy' to assume that human rights only protect the individual (2001: 78). Indeed, the individualistic nature of 'western' human rights has been repeatedly challenged. The claimed right to culture/cultural defense and its potential to conflict with (individual) human rights leads us to what Ayelet Shachar calls 'the paradox of multicultural vulnerability' according to which cultural minority rights can be granted only at the expense of individual rights and vice versa (2001: 3). To allow cultural rights to triumph over individual human rights would result in the collective's tyranny over the individual and therefore cancel nearly all original human rights that have been drafted precisely with the intention of protecting the individual from his or her society's coercion and suppression. For the very aim of human rights in the first place is not to help cultural groups flourishing in their traditions; in case of conflict fundamental individual human rights should always be given the primacy over all sorts of 'group rights'.²²

Unveiling *Justitia's* eyes towards action-guiding values and worldviews is of crucial importance in order fully to grasp the heterogeneity of modern multicultural societies, but also to do (criminal) justice to its citizens. However, when it comes to allowing for cultural defense one should weigh thoroughly its rationales and precise motives against the defense of core human rights.

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Notes

1. The human rights in question are notably those of women. This is owed less to a specific feminist outlook of this article but rather to the circumstance that in most of the cases in which a cultural defense is raised/discussed and which are pertinent to fundamental human rights (i.e. the right to life, bodily integrity, etc.) the victims are actually female. In light of this, I avoid speaking of women's rights and prefer the term women's human rights since it is a defining feature of the concept of human rights that they are universal, i.e. belonging to each and every human being regardless of individual properties such as sex. Another emphasis is laid on core human rights, e.g. the right to life or to security of person. That of course presupposes some kind of *hierarchy* among human rights which – despite the United Nations' assertion of 'indivisibility' (cf. 1993, the Vienna Declaration) – is agreed on by many human rights scholars (cf. e.g. Shue, 1996; Griffin, 2008). Nevertheless, the precise elaboration of that hierarchy is contested. According to my understanding, human rights protecting goods such as life and physical integrity should spearhead any ranking of priority rights.
2. For one of this paradigm's early critics see Poulter (1987).

3. In 2009, when the head of the Anglican Church, Rowan Williams, argued for permitting the British Muslim community to govern themselves in matters of financial and personal law, i.e. family and inheritance law, he grounded this request by claiming that shariah law in the United Kingdom was 'unavoidable' (BBC, 2009). Officially functioning as 'arbitration tribunals', shariah courts have already been established in many cities, among them London, Birmingham, Bradford, Manchester and Nuneaton (Tahar, 2008).
4. A formal cultural defense regarding honor killings exists in many Arab countries, such as Syria (where no man can be prosecuted who kills a female relative after having witnessed her committing an 'immoral act'), Lebanon, Egypt, Kuwait, or Yemen (cf. Brandon and Hefez, 2008: 81).
5. Translation by the author.
6. A recent case cited by Siesling and Ten Voorde (2009: 150 f.) concerns a Muslim father who objected to his daughter's taking part in coeducational swimming lessons and therefore inhibited her from going to school – a criminal defense in the Netherlands. In that particular case, the Supreme Court rejected the father's claim.
7. See esp. Frischknecht (2009) and Gordon (2001).
8. Translation by the author.
9. This argumentation differs from the relativistic argument from fairness insofar as it indeed points to an objective axiological reality that generally can be grasped, but that in some cases, too, can be missed.
10. Translation by the author.
11. The notion that cultures are rather shaped or produced, respectively, by power relations than representations of 'natural' entities has especially been accentuated by scholars in the field of postcolonial studies (cf. e.g. Said, 2003). The background for this approach, however, can be found in French existentialism, in particular in Jean- Paul Sartre's dictum that *existentia* comes prior to *essentia*, meaning that it is man's existence, i.e. in particular his choices, that constitutes his 'essence' and not the other way around.
12. The tradition of bride kidnapping is known in different times and regions through the world. I have chosen Kyrgyzstan as an example because despite kidnappings happening frequently, it is contested among Kyrgyz whether or not it is a cultural 'tradition' (cf. Kleinbach and Salimjanova, 2007).
13. Renteln, who makes it clear that in the case where a cultural tradition would undermine 'human rights of vulnerable groups, it should be rejected' (2009: 78), could have avoided this dithering by starting first with this human rights criterion and applying the cultural defense test in another step.
14. In that regard, Fabio Basile distinguishes between low and elevated offensiveness supporting greater tolerance concerning the former category of offences (Basile, 2011: 367 f.).
15. This was the expression used by a father charged for killing his daughter (Wikan, 2003: 16.).
16. For the disastrous effects of FGM on a girl's health and sexuality see Macklin (1990).
17. See also Poulter (1987) who makes a case for balancing cultural pluralism against 'fundamental rights and freedoms' expressed in international human rights conventions (ibid.: 599).
18. Given the double nature of human rights in terms of legal and moral rights, the term 'universally binding' might need some further explanation. The moral claims contained in *declarations* such as the UDHR grant entitlements to everybody while at the same time demanding certain behaviors from everybody (in particular in regard to negative rights, e.g. to abstain

from harming others). Hence, they universally entitle *and* universally oblige at the same time. However, without certain institutions to enforce these claims – which turn them into rights in the strict sense – this universally binding nature remains but an ideal. Thus, to allow for excuses based on the concept of mistake of law would seriously frustrate any human rights implementation. In this context, however, this question is to be distinguished from the contested universality of human rights, i.e. the possibility of achieving a universal consensus on them. Whereas this first and foremost concerns the *international* dialogue that in light of the sovereignty of states and peoples' self-determination barely can do without (sometimes painful) compromise, there is no reason why a (western) society's *internal* orientation in terms of a robust human rights agenda should not assert itself vis-à-vis immigrants/prospective citizens. For the question of fairness regarding citizens holding alternative/dissenting human rights views see above, 'Fairness and (the delusion of) state neutrality'.

19. 'All are equal before the law and are entitled without any discrimination to equal protection of the law' (United Nations, 1948). See also article 26 of the International Covenant on Civil and Political Rights (ICCPR).
20. This accuracy is doubtful if the relativist assumes tolerance to be the only valid practical implication of her meta-ethical, i.e. non-cognitivist, position (cf. Frick, 2010).
21. 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language' (United Nations, 1966).
22. For a critical assessment of group rights from the perspective of human rights individualism, see esp. Griffin (2008: 256 ff.).

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