

National School of Political Studies and Public Administration

**Cultural Diversity and Justice.
The Cultural Defense and Child Marriages in Romania**

- Summary -

**Scientific coordinator:
Prof. Univ. Dr. Gabriel Andreescu**

**PhD Candidate:
Măriuca-Oana Constantin**

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In plural societies, cultural diversity determines social, political and ethical issues which are inevitably associated to distinctive cultural characteristics. *Cultural identity and cultural diversity are connected and complementary. Addressing them effectively at both political and judicial levels, involves answers to moral dilemmas.*

The cultural defense is one of the moral controversies which directly address the conflict between *the custom* (as an internal norm of the community) and *the law* (as an external and generally applicable regulation) or the respect of *human rights* (as a universal principle). In a very condensed definition, the cultural defense implies the differentiated application of the law, *on the basis of cultural identity*. It is frequent in criminal cases, when the parties raise the argument of their cultural background or the judge evaluates that the defendant is less guilty if under the influence of tradition. The cultural defense also operates in civil trials, when at least one of the litigating parties requests the application of a different set of norms instead of the applicable legal framework. The argument that „culture matters for justice” (Renteln 2004) is essential for the use of the cultural defense. It is important to point out that, so far, the cultural defense is only an informal instrument, since no state endorsed it as a legal institution *per se*, but the mechanism is present in the case-law of multicultural countries and has become a research topic in the field of social science.

This thesis deals with the topic of the cultural defense – *both in theory and in practice* – in an attempt to reveal one aspect of *the relation between justice and cultural diversity in Romania*. *The research also aims to identify solutions for the situations in which the application of the cultural defense lacks not only a legal basis, but also a moral justification.*

Consequently, the thesis is not a plea in favor of the cultural defense, but an endeavor to attentively analyze the legitimacy of its use in Romanian jurisprudence and the patterns leading to its informal application.

Two objectives are attached to this endeavour. *At theoretical level*, I aspire to contribute to the development of the concept, considering its *dual nature: ethical and judicial*. *At the research level*, I investigated through document analysis the recent criminal case-law correlated to the custom of child marriage, from the perspectives of multicultural liberalism and liberal feminism. The common destination of these two complementary directions is to propose a legal innovation, capable of compensating the current legal deficiencies which neither allow, nor prohibit the employment of cultural defenses when they affect individual rights. In order to generate this proposal *de lege ferenda*, it is important to conjoin the theoretical aspects with the conclusions of the research. For these reasons, the analytical approach is interdisciplinary and the structure of the thesis is symmetrical, adapted to the two objectives: it consists of two parts, which are also complementary.

Part I is an attempt to contribute to *the theory of the cultural defense*: (1) by formulating a *comprehensive definition of the concept* and (2) by identifying *general conditions that can operate as a test for the legitimacy* of the mechanism. These two potential contributions are based on and preceded by a *critical analysis of the theories and ideologies that directly or indirectly address the topic of the conflict between cultural identity and the legal framework*.

The first chapter explains the Romanian translation of the concept and the arguments which justify this option, given the large scope of the cultural defense. *The second chapter* explores a few imperative topics for the cultural defense: (1) the divergence of moral values in plural societies, (2) the equitable accommodation of illiberal communities within liberal societies and (3) the deceptive contradiction between universal fundamental rights and moral relativism. I confront these topics with the ideological landmarks established by liberal multiculturalism, liberal feminism and liberalism. I argue that there is a privileged relation between the cultural defense and multiculturalism, but also a clear difference. *Liberal multiculturalism openly supports the preservation and the promotion of cultural identities, but firmly rejects the prioritization of community privacy and internal norms when at the expense of individual rights*. On the contrast, illiberal multiculturalism is indulgent towards both abusive and non-abusive customs, by emphasizing their primacy (Andreescu 2010, 59). I focus on the existence of „minorities within the minorities” (Green 1997, 260) and their increased vulnerability when the expectations towards them in the private sphere are augmented. (Okin, 1999, 9). I show that the liberal version of multiculturalism will discourage the internal customs which are restrictive towards some members of a community in the same way it excludes the abusive practices of the majority against minorities. (Kymlicka 1992, 142). It follows that the

application of the cultural defense can be legitimate only if does not protect an abusive tradition which infringes the fundamental rights of others and harms their physical or psychological wellbeing.

The first two chapters shape the theoretical framework which I adopted as a filter for the analysis of the research results in the second part of the thesis. At the same time, they tackle the *ethical dimension* of the cultural defense. The *third chapter* also approaches the cultural defense on a theoretical level, but it addresses only its *legal dimension*. In this regard, I observe the compatibility between the mechanism of the cultural defense and the Romanian criminal legislation. *I show that the institutions which are inclined to „disguise” the use of the cultural defense, as informal legal instrument, are the „judicial mitigating circumstances”.* Chapter IV is the conclusion of the first part and it elaborates an extensive definition of the concept of cultural defense, based on its dual nature.

The Second Part is complementary to the general theoretical framework and it analyzes empirically the phenomenon of the use of cultural defenses in the Romanian criminal case-law derived from the custom of child marriage practiced by some traditional Roma communities.

I highlight the fact that it is not the tradition *per se* that represents the object of this research, but the case-law which is derived from it. I also point out that the present study is not a critique against the verdicts or the legal reasoning of the judges. Instead, *it investigates the presence of the cultural defense and the patterns leading to its use. The objective is to discover if the courts apply this mechanism for the situations of child marriage, given the fact that neither the cultural defense, nor this specific tradition benefit of explicit legal provisions.* It is also important to mention that *the use of cultural defense in the jurisprudence derived from child marriages represents a phenomenon which occurs at judicial level and has a profound impact at social and political level.* The research focuses on this precise phenomenon and this fact justifies the importance of the study.

Chapter V provides details concerning the methodology and explains why it was necessary to adapt the document analysis to the characteristics of the criminal verdicts. I also present the limits of the research endeavor, highlighting the issue of the retrained access to the relevant jurisprudence. *Chapter VI* is an introduction in the issue of child marriage practiced by certain Roma communities. It is important to place this perspective in dialogue with the present moral and legal requirements regarding gender equality, personal autonomy and individual freedoms. Some of them are included in *the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)*, ratified by

the Romanian Parliament in September 2016, legal instrument that I adopted as a landmark for the proposition *de lege ferenda* in the last chapter of the thesis.

Chapter VII extensively presents and comments the results of the research. Not only is the tradition *visible* in the reasoning of the courts, but it is also considered as *relevant* in all the cases which have been studied, despite the fact that in some of them, the tradition was only deceptively incident. Moreover, it has been a determinant factor in establishing the punishment and the regime of implementation of the sanctions (with two exceptions). In other words, the custom of child marriage was assimilated to a judicial mitigating circumstance. The subsequent conclusion concerns *the informal use of the cultural defense by the criminal courts, in criminal cases derived from child marriages, without applying a „legitimacy test” based on the protection of the fundamental rights of the victims and without verifying if this custom actually defines the Roma cultural identity or not.*

The next step was to confront the research results with the principles of liberal multiculturalism and liberal feminism which shape the theoretical filter of the document analysis. A few ideas need to be mentioned.

First, child marriages are not brought to the attention of the criminal courts *directly*, since there are neither civil, nor criminal provisions on this matter. Despite this fact, they represent the context and sometimes the cause for two criminal behaviors: *sexual act with a minor* (prescribed by article 220 of the New Criminal Code) and *mistreatment of the minor* (prescribed by article 197 of the New Criminal Code). Second, this custom has proven negative social consequences, especially regarding the young girls who are traditionally „married”. The deprivation of education, the early motherhood – with a negative effect on their physical and emotional wellbeing, the adoption of traditional gender roles which determine a permanent restraint upon their freedom of choice are just a few examples. For this reason, *when the court is required to settle the criminal and judicial relation in cases generated by this tradition, it will implicitly address the legitimacy of the custom, as well as the power relations within the community which accompany the custom.* This is a fundamental premise of the thesis. The two above mentioned criminal behaviors (sexual act with a minor and mistreatment of a minor) protect important social values, but *even the conjunction of the two articles from the New Criminal Code would not suffice to encompass the actual social impact and the consistent effects of child marriages.* The custom principally affects the personal autonomy of children, which is a fundamental requirement for individual freedom and an intrinsic value in any democratic society.

I argued that the way in which the courts deal with the conflict between moral norms and legal norms represents a reflection of the version of multiculturalism that characterizes a certain society. On the one side, the use of the cultural defense *with regard to child marriage* signals a legal approach attuned to an illiberal multiculturalism because *the multiple vulnerability of the victims is neither prioritized, nor considered*. On the other side, in the same way „policy lacks moral purpose if it does not aim to raise the autonomy of the individual” (Miroiu 2004, 25), verdicts will be ethically questionable when they are based on a cultural defense with an indirect (*but predictable*) effect of consolidating the custom and, *implicitly, augmenting the dependence of the most vulnerable members on the community*. I emphasize the non-judicial consequences of a judicial approach which justifiably endorses the relevance of the cultural identity, but unjustifiably and in the absence of express legal provisions, gives precedence to the cultural identity.

Based on this analysis, *Chapter VIII* targets two sensitive issues: (1) the silence of the Romanian legislation with regard to the custom of child marriage and (2) the absence of admissibility rules concerning the mitigation based on cultural circumstances. The current legislation does not contain a crime corresponding to child marriage, but, in line with the Istanbul Convention, this practice contains the social danger of a criminal act. For this reason, I argue that a new crime should be established through legal norms: *the forced matrimonial partnership of minors*, which addresses the social phenomenon of child marriage as a specific form of manifestation of forced marriage in Romania. In this way, there is no confusion left to the situations of conflict between traditions and individual rights. I highlight the importance of the responsibility of the state for the political and legislative (in)visibility of this phenomenon and its actual consequences.

No matter what is the sphere where the cultural defense is employed, its use is characterized by complex facets and effects which are beyond the judicial level. In culturally sensitive cases, the courts deal with the judicial relation of the case. However, the verdict indirectly impacts the moral conflict which accompanies the facts, the relation between minority and majority, as well as the status of the individual inside the community. The way in which the judicial authority tackles these multicultural cases reflects a certain conception on the social and moral norms that are valued within a society.