Journal of Criminal Law and Criminology

Volume 100
Issue 2 *Spring*

Article 4

Spring 2010

Cultural Defense, Cultural Offense, or No Culture at All: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and of the Factors Affecting Them

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0091-4169/10/10002-0475
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 100, No. 2

Printed in U.S.A.

CRIMINOLOGY

"CULTURAL DEFENSE," "CULTURAL OFFENSE," OR NO CULTURE AT ALL?: AN EMPIRICAL EXAMINATION OF ISRAELI JUDICIAL DECISIONS IN CULTURAL CONFLICT CRIMINAL CASES AND OF THE FACTORS AFFECTING THEM

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This Article presents an empirical picture of judicial decisions in cultural conflict criminal cases and the factors affecting those decisions. Over fifty years of Israeli district court and Supreme Court criminal judicial decisions in cultural conflict cases are reviewed. The research reveals that while the literature and public debate have mainly dealt with the question of whether a cultural defense is accepted or rejected by a court, two other central judicial decision patterns exist: (1) cultural offense—cases in which cultural background is a consideration for more severe punishment, as an indication of offense elements, or as a reason to reject a defense claim, and (2) disregard—cases in which the cultural background is ignored in guilt and punishment decisions, though judges are aware of it. The findings also indicate that courts' tendency not to consider cultural background in mitigation is strongly linked to power relationships between groups within the society and not due to lack of sufficient legal tools or a desire to protect liberal values, as commonly assumed in the literature. These findings indicate that there are important issues, which have not gained adequate attention, that are significant for future academic

* I am grateful to David Weisburd and Vered Vinitzky-Seroussi for their thoughtful comments on this work. I would also like to thank The Minerva Center for Human Rights and The Israeli Society of Criminology for the financial support of this research.

and public debates on cultural conflict criminal cases, as well as for law and social practitioners.

I. BACKGROUND

Criminal courts in heterogeneous societies around the world, including the United States, Canada, Britain, France, Holland, Australia, and Israel, face cultural conflict situations. Cultural conflict situations are situations in which different groups in society have different conduct norms for the same situation. In cultural conflict situations, cultural minorities that act according to their cultural norms, values, and worldviews may be accused of committing crimes because the criminal law reflects the norms, values, and worldviews of the dominant groups.[1] Examples of such cases are bigamy and family honor murder.

The questions motivitating this research include (1) what are the judicial decisions in cultural conflict criminal cases?; and (2) what are the judicial considerations in such cases? For instance, how does the court react to someone accused of bigamy who claims that his religion allows or even encourages him to take a second wife? What is the verdict when someone accused of murder claims that he acted in self-defense against life-threatening witchcraft?

Despite the fact that criminal courts have dealt with cultural conflict situations for more than one hundred years[2] and the growing academic and public debates on cultural defense,[3] no empirical research based on a sample of cases has been conducted on judicial decisions in cultural conflict cases. The current research, therefore, empirically examines judicial decisions in cultural conflict criminal cases and the factors affecting those decisions.

This Article begins with a review of the cultural defense debate. It continues with a review of what is known about judicial decisions in cultural conflict cases. Following that is a discussion of the various

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[1] THORSTEN SELLIN, CULTURE CONFLICT AND CRIME 63-67 (1938).

[2] Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalists on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 56-57 (1995).

[3] "Cultural defense" refers to the practice of presenting cultural arguments in court in order to negate or mitigate criminal responsibility or to mitigate punishment. To date, no state has formally recognized a general cultural defense. Cultural arguments, therefore, are raised through existing defenses such as provocation, necessity, duress, and self-defense. *E.g.*, Alice J. Gallin, *The Cultural Defense: Understanding the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 725 (1994); Alison D. Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD., 437 (1993); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

possibilities for addressing cultural conflict cases. The Article then turns to examining the circumstances in which it is predicted that a cultural defense will be accepted. The methodology and the findings are presented, and the Article concludes with a discussion of the implications for future academic and public debates as well as for practitioners' work.

A. THE CULTURAL DEFENSE DEBATE

In recent decades, we have witnessed a growing public and academic debate on cultural defense centered on whether, and to what extent, cultural background should negate or mitigate criminal responsibility and punishment. This Section briefly presents the reasoning and arguments for and against considering cultural background as a mitigating circumstance.

One reason to consider cultural background as a mitigating circumstance is multiculturalism. The multicultural movement promotes respect for other cultures and strives to change political, legal, and economic arrangements in order to respect minority cultural rights and enable cultural minorities to preserve and develop their culture.[4] While multiculturalism supports the use of cultural defense, it should be noted that cultural arguments were raised in courts long before the emergence of multiculturalism[5] and multicultural philosophers hardly address cultural defense.[6] Moreover, most multicultural scholars claim that cultural practices should not be recognized as legitimate to the extent that they limit individual liberties or are gender discriminative.[7]

The argument that cultural practices should not be recognized if they limit individual liberties or are gender discriminative has been criticized for being based on value judgments of minority cultures, for promoting one culture over other cultures, and for presuming that Western values are

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[4] YOSSI YONAH & YEHOUDA SHENHAV, *RAV TARBUTIUT MAHI? AL HAPOLITICA SHEL HASHONUT BEISRAEL* [WHAT IS MULTICULTURALISM? ON THE POLITICS OF IDENTITY IN ISRAEL] (2005).

[5] Criminal courts have dealt with cultural arguments for over than a century. *See* Maguigan, *supra* note 2, at 56. Claghorn's research from 1923, published in the book *The Immigrant's Day in Court*, described a number of cases among Italian immigrants in the United States in which cultural arguments were accepted. *Id.* at 57. In the United Sates, during the 1960s, the cultural argument was raised in what was called "Social Framework Evidence" aimed to provide information on the social and psychological state of the accused. *Id.* at 58.

[6] ALISON RENTELN, THE CULTURAL DEFENSE (2004).

[7] *E.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996); Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 7, 17-22 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999).

superior to other cultures.[8] For instance, it was argued that the idea of human rights is not based on universal concepts but lies in Western and liberal perceptions.[9] Likewise, it is problematic to limit cultural relativism based on the liberal idea of the harm principle because the definition of "harm" is culturally relativistic. For instance, coining, the act of rubbing a coin on the back and chest of a child, is considered in Western societies as child abuse, but, among the Vietnamese, it is considered a healing treatment.[10] Similarly, scarring a child's face is considered an assault in Western societies but is considered a mark of group identity in some non-Western societies.[11]

While multiculturalism is one reason for considering cultural background as a mitigating circumstance, it is not necessarily the main one.[12] An important reason for considering the cultural background of the defendant as a mitigating circumstance is individual justice.[13] The principle of individual justice suggests that different people charged with the same crime should receive different treatments based on their relative moral guilt. Here, personal circumstances of the accused are presented at the sentencing phase in order to tailor the punishment to the moral guilt of the accused. Advocates of defendants' rights, however, have thought that the individual justice approach should be extended to the guilt phase. Under this approach, for instance, the battered spouse defense was recognized.[14] It is claimed that the law should recognize the role that motive plays in crime when adjudicating guilt and punishment in order to assure that people are punished only as much as they deserve.[15] According to the individual justice principle, the accused should be allowed to present his or her cultural background because when a person holds different cultural values than those of the legal system, his or her legal blameworthiness will not necessarily fit his or her moral blameworthiness.[16]

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[8] Homi K. Bhabha, *Liberalism's Scared Cow*, *in* IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 7, at 83.

[9] *See, e.g.*, Chris Brown, *Universal Human Rights: A Critique*, INT'L J. HUM. RTS., Summer 1997, at 41; R. Panikkar, *Is the Notion of Human Rights a Western Concept*? DIOGENES, Dec. 1982, at 75.

[10] RENTELN, *supra* note 6, at 57.

[11] Renteln, *supra* note 3.

[12] *Id.* at 439-40.

[13] RENTELN, *supra* note 6, at 187-89; Doriane Lambelet Coleman, *Individual Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1122 (1996); Renteln, *supra* note 3, at 439-40; Note, *supra* note 3, at 1298-311.

[14] Note, *supra* note 3, at 1299; Coleman, *supra* note 13, at 1116-17.

[15] Renteln, *supra* note 3, at 442-44.

[16] *Id.* at 442.

The decision of whether to recognize a cultural defense also touches upon the issue of equality before the law. Opponents of cultural defense argue that the cultural defense will lead to the special treatment of immigrant and minority groups and to discrimination against members of the dominant group who are not entitled to such a defense.[17] Supporters of the cultural defense criticize this position and claim that members of the dominant group do not need a cultural defense since the law already embodies their cultural values.[18] They argue not only that the cultural defense does not violate the equality principle, but that it actually promotes equality, since the admittance of cultural arguments in court ensures that minority or immigrant defendants are afforded the same protection enjoyed by members of the dominant group—the evaluation of their behavior according to their cultural code.[19] In other words, the equality principle is violated not by presentation of cultural defense claims, but by lack of consideration of cultural diffrences in cultural conflict cases.

While discussing the cultural defense in the context of equality, one must also consider the obligation of the state to provide equal protection from criminal conduct for all members of society regardless of their group affiliation. This brings us to one of the central arguments against cultural defense: the cultural defense has been criticized for violating women's and children's rights. Feminists have raised the concern that the acceptance of cultural claims will be understood as forgiveness and condonation of practices that subordinate women and violate their rights and will undermine the deterrent effect of law in those cases.[20]

This feminist position against cultural defense, however, has been criticized from inside the feminist movement itself, by women of color feminists. Women of color feminists criticize Western or white feminists for not recognizing the fact that women of color are not only suffering from gender oppression but also from racial and cultural oppression. They criticize white feminists' perceptions of minorities' cultures as being merely sources of oppression, the resulting position that the cultural defense should not be recognized, and the implication that minority women should give up

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[17] *See* Coleman, *supra* note 13, at 1141-44.

[18] *See* Daina C. Chiu, Note, *The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1097 (1994).

[19] James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1879-80 (1999); Michael Winkelman, *Cultural Factors in Criminal Defense Proceedings*, 55 HUM. ORG. 154, 155 (1996).

[20] *See* Alice J. Gallin, *The Cultural Defense: Understanding the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 743-44 (1994); Okin, *supra* note 7, at 18-20.

their culture.[21] A good example of the difference between white feminist perceptions of cultural defense and those of women of color is the reaction to *People v. Chen*.[22] Chen was an immigrant to the United States from China who killed his unfaithful wife. The court accepted the cultural defense claim that Chen acted because of cultural pressures.[23] Following the decision in *Chen*, the National Organization of Women filed a complaint against the judge.[24] Organizations of Asian women that initially joined the complaint later withdrew, fearing that the cultural defense option would be lost altogether thus leaving minorities unable to use it in other contexts.[25] One group's representative explained, "[T]o bar the use of cultural defense promotes the idea that when people come to America they have to give up their way of doing things. This is a notion that we can not support."[26]

To summarize, the idea of cultural defense lies not only in cultural sensitivity but to a large extent in individual justice. This means that those who do not agree with multicultural ideas can still support cultural defense. On the other hand, as explained above, multicultural scholars will not necessarily support the cultural defense notion. How one reacts to cultural conflict cases is complicated by the need to find the right balance between conflicting values (such as individual justice versus women's rights) and choose between different interpretations of legal principles (such as the equality principle). The decisions of criminal courts in cultural conflict cases and the considerations underlying those decisions are therefore far from obvious. The following Section reviews what is known about judicial decisions in cultural conflict criminal cases.

B. THE LITTLE WE KNOW ABOUT JUDICIAL DECISIONS IN CULTURAL CONFLICT CASES

The literature has focused on the question of whether there should be a cultural defense and examined the different possibilities for raising cultural

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[21] Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1576-88 (1996); Leti Volpp, Note, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 80-83 (1994).

[22] People v. Chen, No. 87-7774 (Sup. Ct. N.Y. County Dec. 2, 1988).

[23] *Id.*

[24] Paul J. Magnarella, *Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial*, 19 J. ETHNIC STUD. 65, 74 (1991); Volpp, *(Mis)Identifying Culture*, *supra* note 21, at 77.

[25] Magnarella, *supra* note 24, at 74; Volpp, *(Mis)Identifying Culture*, *supra* note 21, at 77.

[26] Magnarella, *supra* note 24, at 74.

evidence in court.[27] Little is known, however, about the actual reactions of courts in cultural conflict cases, as there is no empirical research based on a sample of judicial decisions in such cases.

The literature reports instances in which cultural evidence mitigated defendants' liability and sentences, but the success rate of this defense strategy has not been clear to date. Some authors have argued that courts have been reluctant to admit cultural evidence,[28] while others have claimed that cultural evidence has been used successfully to reduce charges and sentences.[29]

This literature on cultural defense is mostly based on examples of cases and not on an empirical examination of samples of cultural conflict cases. Specifically, writers have presented examples to illustrate their claims,[30] analyzed one or two cases,[31] reviewed recent cases,[32] or presented cases in which they took part.[33] In fact, the primary source of data for most of the cultural defense literature is the same three high-profile criminal cases: *People v. Kimura*,[34] *People v. Moua*,[35] and *People v. Chen*.[36,37]

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[27] *E.g.*, RENTELN, *supra* note 6; Coleman, *supra* note 13, at 1093-167; Kay L. Levin, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 39-86 (2003); Renteln, *supra* note 3; Volpp, *(Mis)Identifying Culture*, *supra* note 21; Note, *supra* note 3.

[28] *E.g.*, Valerie L. Sacks, *An Indefensible Defense: On the Misuses of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 532 (1996); Renteln, *supra* note 3, at 501.

[29] *E.g.*, Sing, *supra* note 19, at 1848; Gallin, *supra* note 20, at 724.

[30] *E.g.*, LEON SHELEFF, THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM (2000); Gallin, *supra* note 20, at 723-45; Magnarella, *supra* note 24, at 65-84; Charmaine M. Wong, Note, *Good Intentions, Troublesome Applications: The Cultural Defense and Other Uses of Cultural Evidence in Canada*, 42 CRIM. L. Q 367, 367-96 (1999).

[31] *E.g.*, Austin Sarat & Roger Berkowitz, *Disorderly Differences: Recognition, Accommodation, and American Law*, 6 YALE J.L. & HUMAN. 285, 285-316 (1994); Sing, *supra* note 19, at 1845-84; Volpp, *(Mis) Identifying Culture*, *supra* note 21, at 57-102; Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime:* Karagar *and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 873 (1999); Deborah Woo, The People v. Fumiko Kimura*: But Which People?*, 17 INT'L J. SOC. LAW 403, 403-28 (1989).

[32] *E.g.*, Maguigan, *supra* note 2, at 36-99; Sacks, *supra* note 28, at 523; Taryn F. Goldstein, Comment, *Cultural Conflict in Court: Should the American Criminal Justice System Formally Recognize a Cultural Defense?*, 99 DICK. L. REV. 141, 141-68 (1994).

[33] Winkelman, *supra* note 19, at 154.

[34] Record of Court Proceedings, People v. Kimura, No. A-09113 (Super. Ct. L.A. County Nov. 21, 1985).

[35] Record of Court Proceedings, People v. Moua, No. 315972-0 (Super. Ct. Fresno County Feb. 7, 1985).

[36] People v. Chen, No. 87-7774 (Sup. Ct. N.Y. County Dec. 2, 1988).

[37] Randall R. Berger & Jeremy Hein, *Immigrants, Culture, and American Courts: A Typology of Legal Strategies and Issues in Cases Involving Vietnamese and Hmong Litigants*, 26 CRIM. JUST. REV. 38, 40-41 (2001).

Some studies presented more systematic research on cultural defense. Those studies have dealt with the issue of raising cultural arguments in criminal courts, but none has directly addressed the issue of judicial reactions to cultural arguments. For instance, Renteln has reviewed a large number of cultural defense criminal and civil cases in order to examine the nature of the debate surrounding the admissibility of cultural evidence.[38] Her study, however, was not based on a scientific sampling of the cases, nor did it systematically examine the judicial decisions in those cases. Likewise, while Beger and Hein's study of American criminal and civil cases involving Vietnamese and Hmong defendants is based on a sample of cases, it portrays the legal strategies and issues related to raising cultural arguments in court and not the judicial decisions in cultural conflict cases.[39] Similarly, Winter reviewed the history of female circumcision trials in France.[40] She did not focus, however, on the judicial decisions in those cases but instead explored the debate surrounding the issue of female circumcision.[41]

In short, the issue of criminal courts' reactions to cultural conflict cases has not yet been adequately examined empirically. This Article attempts to fill that gap in the literature by providing an empirical examination of judicial decisions in cultural conflict cases and of the factors affecting those decisions.

C. DIFFERENT POSSIBILITIES FOR ADDRESSING CULTURAL CONFLICT CASES

The literature and public debates have mainly focused on whether cultural defense arguments should be accepted or rejected as a consideration in decisions about guilt and punishment. This focus has ignored the the possibility of "cultural offense," namely the use of cultural background *against* a defendant. This Section starts with a short review of the existing legal possibilities for considering cultural background in mitigation before turning to the less acknowledged possibility of cultural background being used offensively against the accused.

To date, no state has recognized the cultural defense as a formal defense in the general part of its criminal law, though this possibility has been raised by officials. For instance, the Canadian Department of Justice suggested adding a cultural defense to the general part of its criminal law in

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[38] RENTELN, *supra* note 6.

[39] Berger & Hein, *supra* note 37, at 38-41.

[40] Bronwyn Winter, *Women, the Law, and Cultural Relativism in France: The Case of Excision*, 19 SIGNS 939 (1994).

[41] *Id.*

1994.[42] It was suggested that a "person would be found not guilty for conduct that would otherwise be criminal when the person acted in accordance with his or her customs of beliefs."[43] However, the idea was rejected due to public outcry and concerns within the House of Commons.[44] In Israel in 2008, an Ethiopian member of the Knesset proposed a bill for cultural defense that read: "If a member of a national-ethnic group has been convicted of felony behavior that is common and acceptable to his/her cultural group, the court may consider cultural background as a mitigating circumstance in the decision on punishment."[45] The proposed bill did not come even to a preliminary vote in the Knesset. Despite attempts in different states to formally recognize cultural defenses, no Western state has yet recognized cultural defense as a formal defense.

Cultural arguments, therefore, are raised through existing defenses (for example, provocation, necessity, duress, and self-defense) in order to negate or mitigate the criminal liability of the accused.[46] An example of this is found in the Californian rape case *People v. Moua*,[47] in which cultural evidence was introduced as part of a mistake-of-fact defense. Specifically, the defense argued that the defendant, a Hmong man from Laos, lacked the intent necessary for a rape conviction since the cultural practice of marriage-by-capture led him to mistakenly believe that the victim consented to the sexual act.[48] According to the cultural practice of marriage-by-capture, a woman must protest against the sexual act as an indication of her virtue, and the man is supposed to continue the sexual act despite the woman's protest to show that he is worthy of being her husband.[49] The judge in *Moua* accepted the argument that the accused genuinely believed that the victim consented, reduced the charges against the accused from rape and kidnapping to false imprisonment, and gave the defendant a lighter sentence.[50]

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[42] CANADA DEP'T OF JUSTICE, REFORMING THE GENERAL PART OF THE *CRIMINAL CODE*: A CONSULTATION PAPER 23 (1995).

[43] *Id.* at 23.

[44] Wong, *supra* note 30, at 367-68.

[45] Cultural Defense, Draft bill amending the Penal Code, (no. 3728), 2008, HH, 1, *available at* www.knesset.gov.il/privatelaw/data/17/3728.rtf.

[46] *E.g.*, Renteln, *supra* note 3, at 445-87; Note, *supra* note 3, at 1294. For review of ways in which cultural evidence can be incorporated into pre-existing defenses, see Renteln, *supra* note 3, at 445-87.

[47] Record of Court Proceedings, People v. Moua, No. 315972-0 (Super. Ct. Fresno County Feb. 7, 1985).

[48] *Id.*

[49] *Id.*

[50] *Id.*; *see also* RENTELN, *supra* note 6, at 126-27; Gallin, *supra* note 20, at 728-29; Maguigan, *supra* note 2, at 64.

Cultural arguments can also be raised as mitigating circumstances at the sentencing stage. It is possible to raise cultural arguments as part of the consideration for punishment due to the large discretion that judges have at the penalty stage.[51] The idea is that the defendant whose acts are culturally motivated is less blameworthy and therefore deserves a lesser punishment.[52]

While the literature and public debate have mainly focused on cultural defense, there is also the possibility that cultural background will be used offensively against the accused. While the literature has rarely referred to the possibility (which I refer to as cultural offense),[53] it is reasonable to expect this judicial decision pattern for two reasons. First, the existing legal framework allows cultural evidence to be considered offensively against the accused in three ways: (1) as an indication of an offense element (for example, the custom of protecting family honor can be used to indicate intent in murder cases); (2) as a reason to reject a defense argument (for example, an insanity defense may be rejected where evidence shows that the defendant's actions are considered normal in his or her cultural group); and (3) as a consideration for inflicting harsher punishment (for example, imposing a more severe punishment in order to eliminate the cultural norm).

Second, there is some evidence in the literature that prosecuting attorneys have used cultural evidence offensively. Berger and Hein found 2 criminal cases, out of 181 criminal and civil cases, in which cultural evidence was used offensively by the prosecution or by an expert witness for the state.[54] Likewise, Roberts has identified cases in which cultural evidence was used against black defendants.[55]

It seems that there are three possible judicial reactions to cultural conflict cases: accepting cultural defense arguments, rejecting cultural defense arguments, and considering cultural background offensively against the accused. The research hypothesis guiding this Article is that judges will tend not to consider cultural background as mitigation but will instead reject cultural defense arguments or even consider cultural background offensively. This hypothesis is based on the theoretical frameworks of the conflict perspective.[56]

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[51] Note, *supra* note 3, at 1295.

[52] RENTELN, *supra* note 6, at 187-92; Renteln, *supra* note 3, at 441-45.

[53] For exceptions, see Berger & Hein, *supra* note 37, at 53-54; Dorothy E. Roberts, *Why Culture Matters to Law: The Difference Politics Makes*, *in* CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 97 (Austin Sarat & Thomas R. Kearns eds., 1999).

[54] Berger & Hein, *supra* note 37, at 53-54.

[55] Roberts, *supra* note 53, at 97.

[56] The conflict perspective was chosen as the theoretical framework to address that phenomenon of cultural conflict cases, since it is based on the premise that there is no

According to the conflict perspective, law enforcement is steeped in the conflict and power differentials among social, economic, and political interest groups in society. One claim that arises from this perspective is that the criminal justice system embodies the interests of the powerful groups in society and controls subordinated groups who threaten the dominant groups' interests.[57] It is expected, therefore, that court decisions in cultural conflict cases will protect the culture of the dominant groups. The protection of the dominant culture preserves not only that culture but has implications for the social status of groups within the society. In heterogeneous societies, the acts of defining certain behavior as moral and certain behavior as violating that morality are political. Court decisions that glorify the values of one group while demeaning those of another are acts of support of one cultural group as they enhance the social status of the groups carrying the affirmed cultural values and degrade other groups in the society, which are are labeled as deviant.[58]

Based on the conflict perspective, it is expected that courts' attitudes toward cultural differences in cultural conflict cases will be negative. Namely, judges will tend to reject cultural defense arguments and may consider cultural background offensively.

D. FACTORS AFFECTING JUDICIAL DECISIONS IN CULTURAL CONFLICT CASES

No empirical research on the factors affecting judicial decisions in cultural conflict cases has been conducted. However, the literature presents some predictions about the circumstances in which a cultural defense will be accepted. A review of those predictions led to the following four plausible circumstances for acceptance of cultural defense. First, judges will tend to be more sensitive to cultural differences at the trial court level

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agreement between groups in society on the norms and values embodied in the criminal law. The alternative perspective—the structural functionalism perspective—seemed less appropriate, as it assumes the existence of social consensus and does not deal with conflict in society. GEORGE RITZER & DOUGLAS J. GOODMAN, SOCIOLOGICAL THEORY 112 (6th ed. 2004). A perspective that assumes a social consensus on the norms and values is a less suitable framework for understanding the phenomena of cultural conflict cases—cases that are in essence about conflict between groups on the norms, values, and worldviews underlying the criminal law. Nevertheless, the possibility of explaining judicial reactions to cultural conflict cases using the alternative perspective—the structural functionalism perspective—was examined. *See infra* note 151.

[57] *E.g.*, WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, LAW, ORDER AND POWER (1982); RICHARD QUINNEY, THE SOCIAL REALITY OF CRIME (1970); AUSTIN T. TURK, CRIMINALITY AND LEGAL ORDER (1969).

[58] Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175, 178 (1967).

than at the appellate level.[59] Second, cultural defense arguments are more likely to be accepted when there is no expectation that the minority group in question has yet had the opportunity to absorb the conduct norms of the dominant group, as in cases of new immigrants[60] or when the cultural practice is being handled by the court for the first time.[61] Third, cultural defense arguments will be accepted when a minority group is presented as an inferior one, for example, when the defense argument is presented along the lines of "these poor illiterate Africans don't know any better."[62] Fourth, cultural defense arguments will be accepted in cultural similarity cases in which the actions of the defendant are perceived as not departing substantially from the dominant cultural behavior.[63]

The three latter circumstances are similar in that they are all circumstances in which there is little threat to the dominate groups' status. For example, when a cultural defense is accepted due to perceived cultural similarity, the cultural argument is treated favorably because of its resemblance to dominant cultural norms and not out of respect for cultural differences.[64] Acceptance of a cultural difference by domesticating it to fit prevailing cultural assumptions maintains domination, since the difference disappears and, with it, the perceived threat posed by that difference to social stability.[65]

Likewise, when the minority group is presented as inferior, the acceptance of a cultural defense does not threaten the status of the dominant groups since the dominant culture is presented as superior. Acceptance of cultural arguments when minority groups have not had the opportunity to adopt the conduct norms of the dominant groups also does not threaten the dominant groups' status. This is because the acceptance of cultural arguments in those cases reflects forgiveness rather than recognition of

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[59] SHELEFF, *supra* note 30, at 269. The reason for this claim is that trial court judges have direct contact with the defendant and, therefore, can perceive his or her belief, whereas in appellate hearings the court tends to focus on the theoretical issues involved, conscious of its role in creating precedents and future norms. *Id.* at 269-70.

[60] Magnarella, *supra* note 24, at 68; Roberts, *supra* note 53, at 98.

[61] Renteln, *supra* note 3, at 484.

[62] Winter, *supra* note 40, at 948.

[63] Chiu, *supra* note 18, at 1113-20; Roberts, *supra* note 53, at 98; Sing, *supra* note 19, at 1877. For instance, in the well-known case of *People v. Wu*, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991), which involved parent-child suicide, the judges allowed cultural evidence to be introduced as a mitigating circumstance because the accused was presented as a self-sacrificing mother. *Id.* at 887 (allowing instruction which told the jury that "it may consider evidence of defendant's cultural background in determining the existence or nonexistence of the relevant mental states").

[64] Chiu, *supra* note 18, at 1113-20; Sing, *supra* note 19, at 1877.

[65] Chiu, *supra* note 18, at 1113-20; Roberts, *supra* note 53, at 99; Sarat & Berkowitz, *supra* note 31, at 290.

cultural diversity—it is expected that, over time, minorities will assimilate into the dominant culture, and hence, the dominant culture will continue to be the standard for proper behavior.[66]

Based on this analysis and on the conflict perspective, it is expected that a central reason for courts' negative reactions to cultural differences is the need to protect the interests of the dominant groups in society. There are, however, other possible explanations for a decision to reject cultural defense arguments or to consider cultural background offensively. For instance, a judge may reject the cultural defense due to a lack of legal tools necessary to consider the cultural evidence or regard the cultural background as a consideration for severe punishment in order to protect human rights. This Article examines those and other explanations for courts' negative reactions to cultural differences.

II. METHODOLOGY

This Article examines courts' reactions to cultural conflict cases in the context of the Israeli judicial system. Israel is a culturally heterogeneous society with a number of different ethnic and religious groups, thus making it a good research field to study courts' reactions to cultural conflict cases. The dominant groups in Israeli society are Jews, Ashkenazim (Jews from European or North American origins), and Secular Jews. This Article examines judges' attitudes in cultural conflict cases involving defendants from the three main minority cultural groups in Israel: Arabs (including Muslims, Christians, Druze, and Bedouins), Mizrachim (Jews of Middle Eastern, North African, or Balkan origins), and Religious Jews.[67]

The research examines the Israeli criminal court system. The findings presented are likely to have relevance to other Western legal systems. Israeli criminal justice institutions, criminal law, and court procedure are based on British law. In fact, the British Mandate criminal code was the Israeli criminal code until 1977 and the basis for the criminal code after 1977.[68] The principles informing the Israeli criminal justice system are similar to those informing Anglo-American legal systems.[69] One

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[66] Roberts claims, likewise, that courts may be more willing to consider cultural defense in cases involving Asian defendants, as they see Asians as a model of minorities who have successfully emulated American values. Hence, the cultural argument was accepted because this immigrant group was perceived as one that adopted the dominant culture and did not, therefore, pose a threat to the dominant group. Roberts, *supra* note 53, at 96.

[67] The research examined cases of new immigrants, of immigrants that have resided in Israel for quite some time, and of persons born in Israel.

[68] YORAM RABIN & YANIV VAKI, DINE ONASHIM [PENAL LAW] 6-9 (2008).

[69] Arye Rattner & Gideon Fishman, JUSTICE FOR ALL? JEWS AND ARABS IN THE ISRAELI CRIMINAL JUSTICE SYSTEM 10 (1998).

significant difference bears mentioning: all Israeli court cases are tried by professional judges and not by juries.

The avenues available for raising cultural arguments in Israeli criminal courts are similar to those available in other Western criminal courts. Like legal systems elsewhere, the Israeli legal system does not officially recognize a separate cultural defense, but it is possible to make cultural arguments through the existing criminal code, using traditional defense arguments (for example, self-defense and provocation), through the "reasonable person" test, and as a consideration in punishment, an area in which Israeli judges have broad discretion. In the context of the Israeli criminal code, however, it should be noted that the Israeli criminal code's definition of "self defense" and "necessity" included "protection of honor" until 1992.[70] Those defenses, therefore, could have been used in cultural conflict cases involving honor protection (for example, family honor killing).

The data for this Article come from published cases of the Supreme Court of Israel and district courts.[71] Relying on published cases is a common practice in research on judicial decisions.[72] Reliance on published cases may lead to a selection bias due to possible differences between published and unpublished cases. In fact, research has shown that there is a difference between published and unpublished rulings in some aspects, including verdict length and appellant success rates.[73] The existence of differences between published and unpublished cases does not mean,

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[70] SANGERO BOAZ, HAGANA ATZMIT BAMISHPAT HAPLILI [SELF-DEFENSE IN CRIMINAL LAW] 153-54 (2000).

[71] The Israeli criminal judicial system is composed of three courts: magistrate courts, district courts, and the Supreme Court. The magistrate courts exercise criminal jurisdiction over offenses punished by fine or no more than seven years imprisonment. The district courts exercise criminal jurisdiction in all criminal cases beyond the jurisdiction of magistrate courts and serve as appellate court for magistrate court decisions. The Supreme Court exercises jurisdiction over the district courts' decisions and serves as the state's High Court of Justice. This research did not examine decisions of magistrate courts for practical reasons. Rulings of magistrate courts are kept for only fifteen years and have only been published since the 1980s, so no information is available on the rulings of these courts for considerable part of the period examined in the research (1948-2001).

[72] Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Publication of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1153 (1990); Donald R. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206 (1988).

[73] *See, e.g.*, Burton M. Atkins, *Data Collection in Comparative Judicial Research: A Note on the Effects of Case Publication upon Theory Building and Hypothesis Testing*, 45 POL. RES. Q. 783, 785-90 (1992); Siegelman & Donohue, *supra* note 72, at 1150-56.

however, that one cannot rely on published cases alone; rather the researcher must consider the possibility of selection bias.[74]

The main concern in this study is that the published cases may reflect only what the legal system is willing to expose. Based on interviews with judges charged with the selection of cases for publication, it seems that this is not a significant concern. The judges charged with the task of selecting cases for publication said that the main selection criteria are whether the verdict is innovative, deals with important legal notions, or aggregates the legal material in the field. They have stated that the selected cases reflect a variety of judicial opinions and that improper expressions by the judges are not a consideration against publication.

Published cases might, however, be more focused on certain kinds of offenses or on certain kinds of legal claims.[75] One should not draw conclusions based on the current research about the types of offenses in which a cultural conflict occurs, or on the kind of legal claims (such as provocation or self defense) used to introduce cultural arguments.

Whereas legal issues (including offense types and the nature of defense claims) are criteria for publication, the way courts deal with cultural differences is not a factor in the selection of cases for publication. For the majority of the cultural conflict cases examined in this research (70%), the cultural issue was not mentioned at all in the index of published cases. It is also questionable whether the rest of the cases in which cultural issues were mentioned in the case description (30%) were selected for the cultural issue. This is because of the lack of any "cultural" keyword in the verdict index and the fact that cultural differences are not regarded as a central issue by legal practitioners (for example, there are hardly any legal textbooks discussing this issue). It seems, therefore, that most cases were chosen for publication for reasons other than the existence of a cultural conflict issue. Thus, it is reasonable to assume that the risk of selection bias is low in this regard.

Over fifty years of judicial decisions in cultural cases were reviewed for this Article. Each one of the Israeli district court and Supreme Court published criminal judicial decisions between 1948, when the state of Israel was founded, and 2001—nearly five thousand criminal cases—was reviewed in order to identify all cultural conflict cases.[76] Cases were selected for examination when the criminal act in the case was committed

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[74] Siegelman & Donohue, *supra* note 72, at 1165-66.

[75] *Id.* at 1153-54.

[76] A decision was made to go through all criminal cases in the relevant period, since there is no legal index that identifies cultural conflict cases, and because using keywords, such as "culture," "custom," and different cultural practice names in computer database searches would not pull up all cultural conflict cases.

because of the defendant's different cultural background and where culture was relevant to determination of guilt or punishment.[77] In order to understand judges' attitudes toward cultural conflict cases, the study examined all cultural conflict criminal cases and not just cases in which cultural defense arguments were made.

The definition of "cultural conflict case" is, however, problematic. The vast majority of the articles on cultural defense do not define what a "cultural background crime" is. In an attempt to present some structure to the debate on cultural defense, Van Broeck has defined a "culturally motivated crime" as "an act by a member of a minority culture, which is considered an offense 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." [78]

This definition does not provide a workable conception of cultural offenses because of the complexity of defining "culture." There are many definitions of the term "culture," and hence, different scholars refer to different things when they refer to "culture."[79] Culture is a difficult concept to define because it has no clear geographic, national, or ethnic boundaries,[80] a person can belong to a number of cultural groups simultaneously,[81] and cultures are constantly changing over time and not monolithic—different parts of the same cultural group may define their culture differently (for example, there might be differences in cultural perceptions between religious and secular members of the same cultural group). Moreover, the definitions of ethnic groups and their cultural characteristics are socially constructed and subject to different meanings according to political and economic needs.[82] The emphasis or elimination

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[77] Cultural background is relevant not only for the determination of guilt or punishment. Cultural background can also be raised, for instance, in plea bargaining or pretrial negotiations. Chiu, *supra* note 18, at 1295; Magnarella, *supra* note 24, at 75.

[78] Jeroen Van Broeck, *Cultural Defense and Culturally Motivated Crimes (Cultural Offenses)*, 9 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 1, 5 (2001) (emphasis omitted).

[79] JOHN R. HALL ET AL., SOCIOLOGY ON CULTURE 6 (2003).

[80] CHRIS BAKER, MAKING SENSE OF CULTURAL STUDIES: CENTRAL PROBLEMS AND CRITICAL DEBATES 72-77 (2002).

[81] Yehouda Shenhav & Hanan Hever, *The Postcolonial Gaze*, 20 THEORY & CRITICISM 9, 15-16 (2002).

[82] *E.g.*, CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); Fredrik Barth, *Introduction* to ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURAL DIFFERENCES 32-37 (Fredrik Barth ed. 1969).

of a certain cultural characteristic of a group can be done by the group itself,[83] other groups in society, or the state.[84]

For the purposes of this research, it has been decided to avoid an a priori definition of "cultural behavior"; instead, cultural behavior is identified as such where it has been presented as cultural behavior before the court,[85] regardless of who made the definition—the judge (who often belonged to a dominant group),[86] the defendant (who was a member of a minority group), the prosecution, defense counsel, or a professional witness—as long as the judge was aware of the cultural issue. The emphasis on judge's awareness was motivated by the primary research goal of examining judges' reactions to cases in which the defendant acted according to his or her culture. Therefore, cases were included only where there was an indication in the verdict that the judge was aware of the cultural dimension of the offense.[87]

A case was selected if it fit one of the following three criteria, which indicate the judges' awareness of the cultural background. First, a case was selected if it was stated in the verdict that the act was committed by a minority group member due to his or her cultural or religious background (for example, if the verdict contained references to "Muslims customs" or included language such as "in the defendant's sector it is considered provocation"). Second, a case was included if the name of the cultural

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[83] *E.g.*, GEERTZ, *supra* note 82, ch.10; Fredrik Barth, *Introduction* to ETHNIC GROUPS AND BOUNDARIES, *supra* note 82, at 32-37.

[84] KAREN L. PLISKIN, SILENT BOUNDARIES: CULTURAL CONSTRAINTS ON SICKNESS AND DIAGNOSIS OF IRANIANS IN ISRAEL (1987); Longina Jakubowska, *Resisting Ethnicity: The Israeli State and Bedouin Identity*, *in* THE PATHS TO DOMINATION, RESISTANCE, AND TERROR 85 (Carolyn Nordstrom & JoAnn Martin eds., 1992); Steven Kaplan & Chaim Rosen, *Ethiopian Immigrants in Israel: Preservation of Culture and Invention of Tradition*, 1993 JEWISH J. SOC. 35, 35-37 (1993).

[85] "Cultural behavior" in this research means behavior that is considered a proper one in the relevant culture—not a behavior that is common but is not considered a proper cultural value (for example, tax evasion). This is because a conflict between the culture of a minority group and the law of the state exists only for cases in which the minority group viewed a behavior—or the values that lead to such behavior—as proper.

[86] Israeli judges are most often Jews, Ashkenazim, and Secular. For instance, only 15% of all the Supreme Court judges were Mizrachim, and 13% were religious Jews. Birnhack, Michael Dan & David Gussarsky, *Kisaot Ihudiim, Deot Miut u Pluralizm Shiputi* [*Designated Seats, Dissenting Opinions and Judicial Pluralism*], 22 TEL AVIV U. L. REV. 499, 505 (1999). The first Arab judge was appointed to the Israeli Supreme Court in 1999 as a temporary appointment. An Arab judge was appointed to a permanent appointment in 2004.

[87] Selection criteria did not include the authenticity of the cultural claim, because, among other things, this research examines judges' reactions to the cultural claims presented to them, for example, whether rejections of cultural defense arguments were based on the determination of reliability of cultural claims presented to the court.

practice was mentioned in the verdict and it was clear that an Israeli judge would know that a cultural practice was involved (for example, family honor murder or blood revenge). If the practice at issue was not necessarily cultural, as in the case of bigamy, for example, the case was not selected unless the first selection criterion was met. Third, cases were included if it was absolutely clear from the description of the case that the judge was aware of the cultural issue involved. It was assumed in those cases that the judge did not mention the practice by name or state that it was the custom because it was so obvious that the judge did not feel there was a need to mention it. The cases in this category are mainly cases of family honor murder in which a statements like "the accused killed his sister because of the shame her pregnancy has brought on the family" were sufficient to determine that an Israeli judge was aware of the cultural issue. When it could not be determined from the verdict that the judge was aware that a cultural issue was involved, the full case protocol was examined.

After identifying the cultural conflict cases, the complete files of the cases were retrieved from the courts' archives. Those files were reviewed in order to gain additional information about the case and the material presented to the court.[88]

Choosing only those cases in which the judge's awareness of the cultural issue was indicated was necessary for assessing judicial attitudes toward cultural issues.[89] The cases, however, do not necessarily represent all the existing cultural conflict cases as there is evidence of cultural cases in which judges did not mention the cultural issue in the verdict despite being aware of it in the course of the trial.[90] For that reason, one should not attempt to ascertain the actual percentage of cultural conflict cases in Israel based on this research, nor the types of crimes that involve a cultural background.

The cultural conflict cases were analyzed by combining qualitative and quantitative research methods.[91] The quantitative analysis was based on

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[88] The archive files include verdicts given by all court levels, indictment, testimonies given in police interviews, reasons for appeal, and the protocol of the court in which the testimonies have been heard. The files do not normally include the protocol of the proceedings in the Supreme Court. A study of the files was possible for most—but not all—the cases in the research, since not all the file types are kept indefinitely.

[89] Not mentioning the cultural issue involved is, of course, a type of judicial reaction. However, since it was not feasible to systematically gather these cases, they were not included in the research.

[90] Cases for which the cultural background was not mentioned at the verdict stage were randomly discovered during a cultural background case search.

[91] Judges were not interviewed for this research—except regarding the criteria for publication of verdicts. The reason is that Israeli judges are not permitted to be interviewed. The Israeli Supreme Court ruled in 2002, in a petition submitted by a criminology student of

content analysis of judicial decisions. Content analysis enables a comparison of a large amount of textual data and can be used to reveal textual characteristics that are hard to identify through casual observation. In content analysis, the categories for examining the text are defined a priori, and the researcher examines whether these categories appear in the text, their frequency, the amount of emphasis given to them, the amount of words devoted to them, and their location in the text.[92] After the categories are defined, a systematic accounting of the text is conducted. The coding includes both content that is manifestand and content that is latent.[93]

Content analysis enabled an examination of different variables in the current research, but it did not allow a complete picture of judicial decisions in cultural conflict cases to emerge. This is because content analysis demands that categories for analysis be determined a priori, but it is impossible to determine a priori the categories for examination in the case of judicial decisions in cultural conflict cases, as so little is known on the subject.

For this reason, a qualitative analysis was conducted using grounded theory. In grounded theory, one starts with a research question, but the theory, the concepts, and the operation are developed during data collection. The data collection in grounded theory leads to the analysis, and the results of early analysis guide subsequent data collection; hence, the analysis is a spiral process. In the course of the review of the data, the researcher looks for key terms, key events, or key themes in order to create categories. After identifying primary concepts, the researcher looks for connections between them in the hope of finding a core explanatory concept. The analysis of the data is done by organizing data into categories, themes, and concepts. The data are presented in the form of words, ideas, and motives. The data are not quantified in numbers since qualitative researchers hold the position that not all aspects of reality can be measured using numbers.[94]

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the Hebrew University of Jerusalem, that research questionnaires are not to be presented to judges. The Court reasoned that the public trust in the judicial system might be harmed by such action. HCJ 2491/02 Ben Ari v. Menahel Batei Ha Mishpat [Courts Administration Director] [2002] Takdin (3) 9. Judge interviews regarding the criteria for publication have been conducted pursuant to a special authorization by the courts' management. The authorization limited the subject of the interviews to the publication technique and not prohibited any discussion of judges' considerations.

[92] WILLIAM LAWRENCE NEUMAN, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES 438-62 (2d ed. 1994).

[93] *Id.*

[94] *Id.* at 438-62; ANSELM L. STRAUSS & JULIET M. CORBIN, BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY (2d ed. 1998).

Part III presents the research findings on judicial decisions in cultural conflict cases and the factors affecting them. It starts, however, with a brief description of the cultural conflict cases examined in the research.

III. FINDINGS

A. PORTRAIT OF THE CULTURAL CONFLICT CASES[95]

Out of nearly five thousand criminal cases examined, seventy cultural conflict cases were found.[96] The majority of the cultural conflict cases in the research were from Supreme Court decisions (76%),[97] and the rest were distirict court decisions. Since most of the cases were Supreme Court decisions, most of the cases were appellate cases (77%), and fewer than a quarter (23%) of the decisions came from trial courts.

About half (54%) of the cultural conflict cases examined involved severe crimes, with 12% involving misdemeanors (see Table 1). This is probably not due to the characteristics of cultural conflict cases; instead, the explanation lies in the fact that most of the cases examined were appeals to the Supreme Court and that magistrate court cases were not included. The small number of misdemeanor cases in this research limits the ability to deduce much of anything about judicial decisions in cases in which the offense charged carries a maximum penalty of three years or less.

Two-thirds of the cultural conflict cases in the study involved Arab defendants. The proportions of defendants who were Mizrachim or Religious Jews were similar (17% each). The distribution of cases by ethnicity of the defendant does not reflect the distribution of the different ethnic groups in Israeli society. The Arab population, for example, comprises only about one-fifth of the Israeli population, but Arab defendants make up two-thirds of the cases. This distribution in the case universe was expected since we are dealing only with cultural conflict cases.

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[95] This Section presents characteristics of the cases that were analyzed in this study. As explained in the methodology section, those case characteristics do not necessarily reflect all cases with cultural background, so no conclusions should be made regarding the characteristics of all the cases with cultural backgrounds.

[96] The seventy cultural conflict cases located as part of the research constitute 1.5% of all published cases. This percentage does not necessarily reflect the actual percentage of cultural conflict cases. *See supra* Part II.

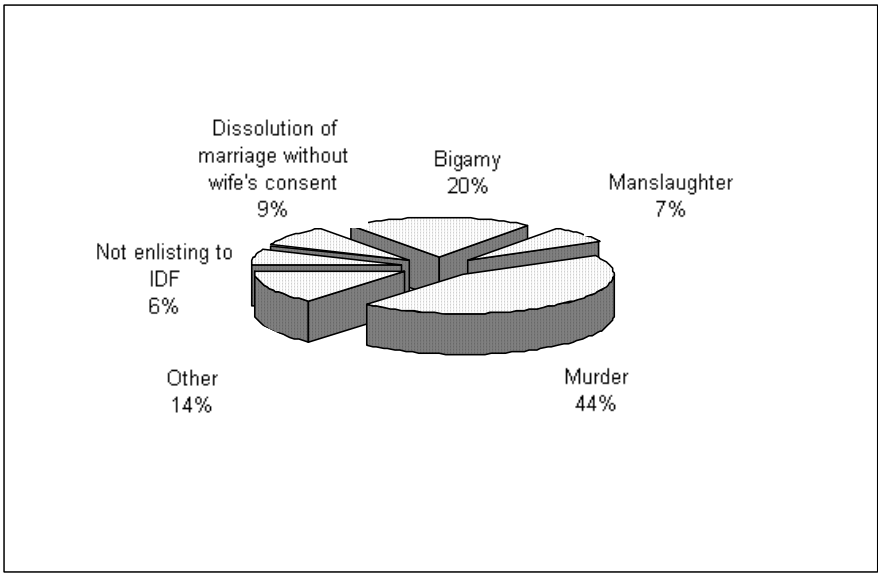
[97] The fact that Supreme Court cases have higher representation is not due to differences in the frequency with which cultural issues are raised in court but to higher publication rates of Supreme Court cases—a similar percentage of cultural conflict cases was found in the Supreme Court and district courts (1.5% and 1.3%, respectively).

Table 1
Cultural Conflict Cases

Offense Severity	**Frequency**	**Percentage**
Severe Crime (15 years or more imprisonment)	38	54%
Crime (3 to 15 years imprisonment)	24	34%
Misdemeanors (3 years imprisonment or less)	8	12%
Total	**70**	**100%**

The cases included a variety of offenses (see Figure 1). About half of the cases (51%) involved crimes resulting in the death of a victim or victims, including murder (44%) and manslaughter (7%). The next most

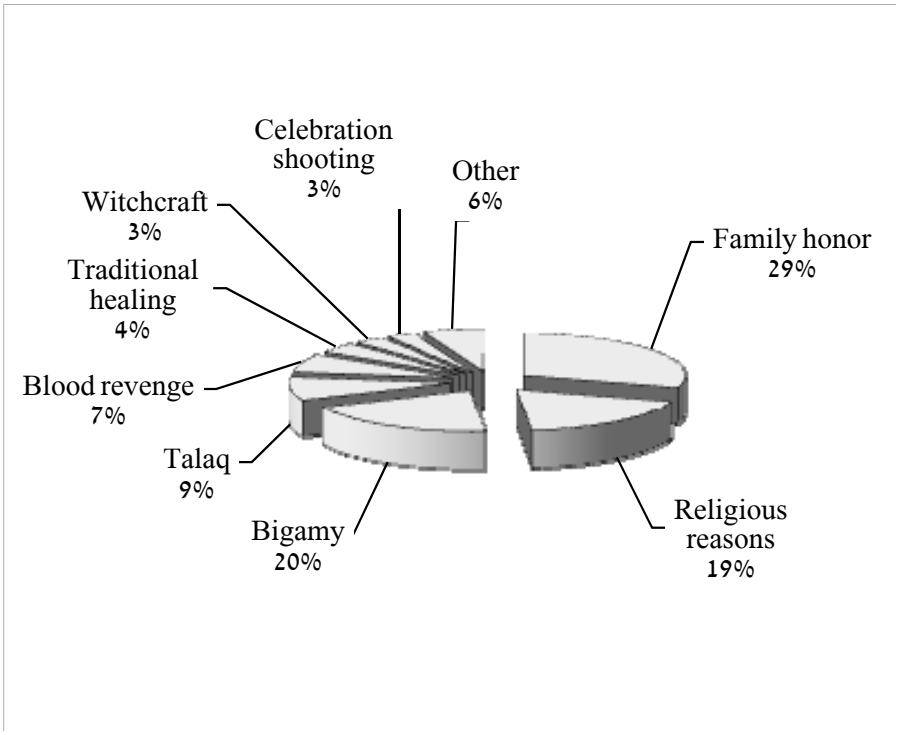
Figure 1
Case Distribution by Offense Type



frequent offense was bigamy (20%), followed by dissolution of marriage without wife's consent (9%),[98] not enlisting in the Israeli Defense Forces (6%), and other offenses, each constituting less than 5% of the cases, including unlawful association, assault, rape, bribery, conspiracy, and slander.

The cultural conflict cases examined included a variety of different cultural practices including protection of family honor, bigamy, talaq (Muslim unilateral divorce), blood revenge, traditional healing, witchcraft, celebration shooting, and practices motivated by religious reasons such as preventing desecration of Shabbat (the Jewish day of rest and worship) (see Figure 2).

Figure 2
Case Distribution by Cultural Background



[98] In Israel, dissolution of marriage without the wife's consent is a criminal offense. Israeli Penal Law, 1977, § 181.

The variety of cultural conflict cases, in terms of ethnicity, offense type, and cultural practice, allows for a good picture of courts' attitude to cultural conflict criminal cases.

B. JUDICIAL DECISIONS IN CULTURAL CONFLICT CRIMINAL CASES

The examination of judicial decisions revealed that four different judicial decision patterns exist in cultural conflict criminal cases.[99] The first category is that of **cultural defense**, cases in which the judge considered cultural background to mitigate liability or reduce punishment. For instance in a bigamy case involving a defendant who was a Jewish immigrant from Iraq, the judges considered as mitigating the fact that the defendant came from a country where bigamy was allowed:

> Considering all aspects of the case, the environment from which he came, its habits and customs, and, especially, the circumstances that led him to commit the crime and his current marital status, we believe that justice will be served if the punishment will be two instead of four months imprisonment.[100]

The second category is that of **rejection**, cases in which judges explicitly stated that cultural differences are not a consideration in deciding guilt or punishment. For instance, in a family honor murder case, the judges stated that "[e]ven though we understand that the background for the act is family honor, that has a special significance in this ethnic group, it is hard, or even impossible, for the purpose of sentencing, to take into account this ethnic or family custom."[101]

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[99] When examining judges' reactions to cultural conflict situations, the focus was on judges' statements on the issue and not on the outcome of the case, since the outcome of a case may not reflect judges' attitudes on the subject in all situations. For instance, this may be the case in a judges' panel; or when the judge stated that he or she would have taken into account the cultural background, but the law does not enable him or her to consider it (for example, in case of mandatory punishment); or when there are other considerations that affect the final decision (for example, punishment uniformity). In those cases, categorizing the judicial reaction to cultural conflict according to case outcomes would have led to the loss of the judge's cultural consideration statement.

Cases in which culture had influenced the judicial decision were classified as such when the judges' decision was affected by the fact that the accused held different cultural values, norms, or worldviews, as opposed to cases in which the cultural background was mentioned in relation to the judicial decision, but the cultural nature was of no importance. For instance, there were cases in which "family honor" was mentioned to indicate murder intent, but it was possible to change the motive—for example, to an inheritance dispute—without changing the logic of the decision. Those cases were not classified as cases in which culture was a consideration in the judicial decision because the cultural nature of the motive was of no significance.

[100] CrimA 287/58 Shlomo v. HaYoetz HaMishpati LaMemshala [Attorney General] [1958] IsrSC 13 197.

[101] CrimC 6/75 The State of Israel v. Abu Zaiad [1975] IsrDC 1975(2) 509.

The third category is that of **cultural offense**, cases in which the judge regarded the cultural background as a consideration for a more severe punishment, as an indication of offense elements, or as a reason to reject a defense claim. For example, in *Botel v. State of Israel*, the court rejected the insanity defense since witchcraft was a common belief in the defendant's cultural group, and hence, her belief in witchcraft could not be an indication of mental illness.

> The appellant believed at a certain stage that her husband exercised powers against her. It must be noticed that superstitions, including belief in witchcraft, which are natural in a certain social or cultural background, seem exceptional or abnormal, in the quasi-medical sense of the term, in the eyes of the ordinary person who does not live in the atmosphere of these beliefs and delusions. In any case, there is no reason to assume that a belief in demons and ghosts . . . is necessarily a sign of mental disease, for we know that beliefs in demons and witchcraft do exist in certain circles. . . . [O]ne cannot say that the mental problems of the appellant have reached the stage of a substantial and actual mental illness that justifies her discharge from legal responsibility.[102]

Cultural background was also used against the defendant in *State of Israel v. Faares*. Faares saw his sister's fiancé kissing his sister and asked him to leave the house. The men started to argue, and Faares shot the fiancé. In this case, an imam's testimony on the cultural practice of family honor was one of the reasons the judge rejected the defense's version of events, which included the accidental discharge of a bullet, and, instead, found that the evidence supported the charge of intentional murder. Based on the imam's testimony about family honor, the judge concluded that the defendant was motivated by his desire to protect family honor and rejected the defendant's claim that he was not disturbed by the behavior of the couple.[103]

In *State of Israel v. Halevi*, the defendant's cultural background led to the imposition of a more severe punishment. Here, the judge stated that a severe punishment was needed in order to uproot the cultural practice of bigamy: "the consistent ruling of this court was to impose imprisonment punishments in order to uproot the custom of polygamy."[104]

The fourth category was that of **disregard**, cases in which judges did not refer to the cultural issue in deciding guilt or punishment, despite their awareness of the defendant's cultural background as evidenced by references to it in other parts of the verdict. For example, in *Amash v. Attorney General*, a Muslim was charged with dissolution of marriage

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[102] CrimA 228/78 Botel v. State of Israel [1976] IsrSC 31(2) 141, 148.

[103] CrimC 202/91 The State of Israel v. Faares [1991] IsrDC 1993(2) 177.

[104] CimA 392/80 The State of Israel v. Halevi [1980] IsrSC 35(2) 689, 699.

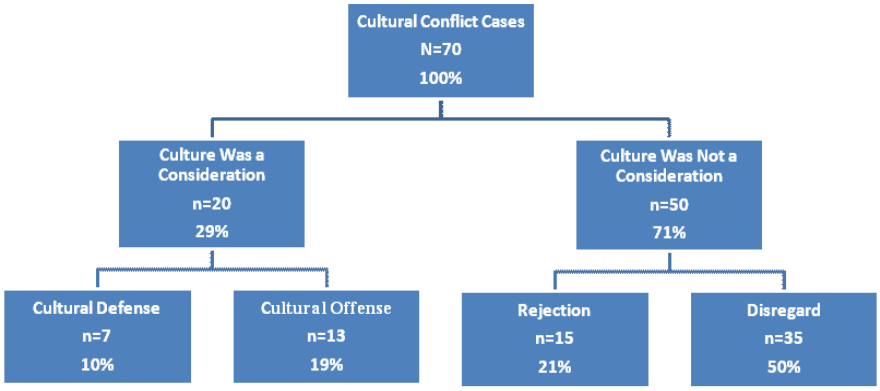
against his wife's will. When the judge described the case facts, he referred to the cultural background of the act:

> The appellant is a Muslim Bedouin . . . [who] argued he could in no way continue living with his wife, and repeated three times the word "talaqi" (I divorce you). According to Sharia law, after this statement of a husband in front of a witness, the wife is divorced. Hence, the Kadi approved the divorce and gave the appellant the verdict.[105]

Though it is clear from the citation that the judge was aware of the cultural factors that led to the actions of the defendant, he did not refer in his decisions about guilt or punishment to the fact that the defendant acted according to his religion. The judge did not mention cultural background as a consideration for mitigating liability or proving guilt, as a consideration for reduced or more severe punishment, nor did he note that he rejected the cultural background evidence—he merely ignored the cultural issue in his decision.

The examination of the distribution of the four different judicial decision patterns found in cultural conflict cases (Figure 3) indicated that, in the majority of cases examined, persons violating the law by acting

Figure 3
Judicial Decisions in Cultural Conflict Cases



according to their cultural norms, values, or beliefs were treated no differently than any other offender. In about three-quarters of the examined

[105] CrimA 485/65 Amash v. HaYoetz HaMishpati LaMemshala [Attorney General] [1965] IsrSC 20(1) 378, 379.

cultural conflict cases (71%), judges did not consider cultural differences in deciding guilt or punishment, either because they decided to reject the cultural defense argument or because they chose to disregard it. Disregarding the defendant's cultural background in deciding guilt and punishment was the most common judicial response—it was the response in half of the cases examined. The judicial decision to reject cultural arguments was also found to be a frequent pattern: in one out of five of the cultural conflict cases examined, the cultural defense arguments were rejected.

Cultural differences were considered in 29% of the cases. When culture was a consideration, decisions were both in favor of the defendant (cultural defense cases) and against them (cultural offense cases). Cultural offense cases made up almost one-fifth of the cases examined (19%,)— almost twice the proportion of cultural defense cases (10%). However, there were only twenty cases in which cultural differences were considered, and no significant difference was found between those two judicial decisions patterns.

C. THE FACTORS AFFECTING JUDICIAL DECISIONS IN CULTURAL CONFLICT CASES

The previous Section demonstrated that courts' reactions to cultural conflict cases were generally negative. This Section examines the reasons for those negative reactions. Based on the conflict perspective, it was expected that a central reason for courts' negative reactions to cultural differences would be the protection of the interest of the dominant groups in society. There are, however, other possible explanations, such as lack of legal tools and human rights considerations.

In order to reveal the different factors that judicial decisions are founded on, four analyses were conducted: (1) a statistical analysis of case characteristics and judicial decisions; (2) a qualitative analysis of the circumstances in which cultural defenses were accepted; (3) a qualitative analysis of judicial accounts in cultural offense and rejection cases; and (4) qualitative analysis of the cases in which cultural background was disregarded.

This Section presents the findings from the analysis of the factors that affected the judicial decisions in cultural conflict cases and begins with a presentation of the factors that did not affect the decisions in those cases.

1. The Factors that Did Not Affect Decisions

The analysis revealed a number of factors that did not significantly affect the judicial decisions in cultural conflict cases.[106]

First, judicial decisions in cultural conflict cases were not significantly affected by case characterisitics, such as court level (trial or appellate), offense severity (see Table 2), offense type (violent or nonviolent), ethnicity of the defendant (see Table 3), or the victim's gender.[107]

Second, lack of recognition of the cultural conflict was also not a significant factor in the judicial decisions in cultural conflict cases. Only in four cases did the judges claim that the cultural practice at issue did not exist in the defendant's cultural group[108] or that no contradiction existed between the law and the custom.[109] The fact that the claim of lack of cultural conflict appeared in only four cases implies that in most cases judges did acknowledge the cultural conflict.

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[106] Chi Square is the commonly used test for nominal level measures, but this test is problematic when analyzing a small number of cases. It is considered inappropriate to use this test when more than one in five cells in the table have expected frequency of five or less DAVID WEISBURD, STATISTICS IN CRIMINAL JUSTICE 176 (1998). The statistical test used in the research, therefore, the Fisher Exact test, is not dependent on the expected value. This test works similarly to Chi Square but calculates the exact probability rather than estimating it as is done in Chi Square.

[107] A possible explanation for not finding significance is the lack of sufficient statistical power, but it seems this is not the case for several reasons. First, the percentage differences across different judicial decision patterns are not substantial. Second, from the statistical power calculations for each of the tables, it appears that the statistical power for finding a large effect—a difference of 0.78 versus 0.40—was 0.88 or higher and that the statistical power for finding a medium effect—a difference of 0.65 versus 0.40—was 0.51 or higher (the calculation was done using Michael Borenstein's "Power and Precision" software). A power level of 0.80 is highly likely to evidence a significant finding and a power level greater than 0.50 is more likely to show a significant result than not if the null hypothesis is false in the population. *Id.* at 287. It seems, therefore, that the statistical power in the study enabled the finding of considerable differences in the judicial decision patterns.

[108] For instance, in a bigamy case, the judge wrote, "There is a big doubt, then, if and under which circumstances . . . Caucasus Jews were allowed to marry two wives—even according to the custom in the state of their origin." CrimA 36/50 HaYoetz HaMishpati LaMemshala [Attorney General] v. Yosefov [1950] IsrDC 4 457, 476.

[109] An example of a claim that no contradiction existed between law and custom is the case of Yosefov. In this bigamy case, the judge rejected the defense argument that prohibition of polygamy contradicts freedom of conscience by claiming that

> [r]eligious coercion is possible only when a religion dictates or forbids a certain act, and the secular legislator forces a violation of the forbidden act. We cannot speak of religious coercion regarding acts that a religion merely allows, without an absolute edict or ban, in the Jewish law, that oblige polygamy.

CrimA 112/50 Yosefov v. HaYoetz HaMishpati LaMemshala [Attorney General] [1951] IsrSC 5(1) 481, 494.

Table 2
Judicial Decisions by Offense Severity

	Offense Severity			
	Up to 15 Years Imprisonment*		15 Years or More Imprisonment	
	Frequency	Percentage	Frequency	Percentage
Cultural Defense	4	13%	3	8%
Other: Cultural Offense, Rejection, Disregard[1]	28	87%	35	92%
Total	**32**	**100%**	**38**	**100%**
Cultural Offense	5	16%	8	21%
Other: Cultural Defense, Rejection, Disregard[2]	27	84%	30	89%
Total	**32**	**100%**	**38**	**100%**
Influenced Decision: Cultural Defense and Cultural Offense	9	28%	11	29%
Did Not Influence Decision: Rejection and Disregard[3]	23	72%	27	71%
Total	**32**	**100%**	**38**	**100%**

Notes:

* The average offense severity in this category was 7 years imprisonment.

1. One Tail Fisher Exact Test: P = 0.403.
2. One Tail Fisher Exact Test: P = 0.395.
3. One Tail Fisher Exact Test: P = 0.576.

Third, legal factors are not a sufficient explanation for decisions in cultural conflict cases. This assertion is based on several factors. To begin with, none of judges stated that they rejected the cultural defense due to legal limitations. This is despite the fact that the cultural defense is not officially recognized by Israeli law. Further, cultural arguments were not recognized even when the law explicitly allowed for a reference to cultural customs. Until 1992, the Israeli criminal code's definition of "self-defense"

Table 3
Judicial Decisions by Ethnicity of the Accused

	Ethnicity of the Accused			
	Jewish		Arab	
	Frequency	Percentage	Frequency	Percentage
Cultural Defense	2	8%	5	11%
Other: Cultural Offense, Rejection, Disregard[1]	22	92%	41	90%
Total	**24**	**100%**	**46**	**100%**
Cultural Offense	4	17%	9	20%
Other: Cultural Defense, Rejection, Disregard[2]	20	83%	37	80%
Total	**24**	**100%**	**46**	**100%**
Influenced Decision: Cultural Defense and Cultural Offense	6	25%	14	30%
Did Not Influence Decision: Rejection and Disregard[3]	18	75%	32	70%
Total	**24**	**100%**	**46**	**100%**

Notes:
1. One Tail Fisher Exact Test: P = 0.528.
2. One Tail Fisher Exact Test: P = 0.520.
3. One Tail Fisher Exact Test: P = 0.426.

and "necessity" included "protection of honor,"[110] yet judges did not recognize honor as "self-defense" or "necessity" in family honor murder cases.[111] Moreover, the tendency among judges to disregard cultural background cannot be explained by the fact that attorneys failed to introduce cultural arguments. In about 30% of the cases in which cultural background was disregarded, there was evidence that the defense attorneys had raised the cultural issue, and it is reasonable to assume that the true percentage of cases in which a cultural defense was raised is even higher.[112]

[110] BOAZ, *supra* note 70.

[111] *See, e.g.*, DC (Haifa) 202/91 Israel v. Faares [1991] IsrDC 1993(2) 177.

[112] Evidence of the use of a cultural argument defense was gathered both from the verdict and from the archive files. In appeals cases, the archive files include only the written appeal

Moreover, Israeli judges are allowed to refer in their verdicts to issues they find relevant even if those issues were not raised by attorneys.

In addition, judges are not bound by precedent to reject cultural defense arguments. In a number of cases in which the judges rejected the cultural defense, they based their decision on precedent (five out of fifteen rejection cases). All of those cases were murder cases in which the cultural issue was raised in the context of provocation. Though provocation claims have rarely been accepted in Israeli court rulings,[113] the rejection of the cultural defense in cases in which a provocation defense was raised cannot be explained by this tendency alone for two main reasons. First, the Israeli Supreme Court is not bound by precedent and most of the cases examined in the research were Supreme Court rulings. Second, in the Israeli court system the judges determine the characteristics of the "reasonable person," and they could have chosen to shape a different "reasonable person" for each cultural group in society, as they do for minors and professionals.[114]

The use of cultural background as an indication of the existence of offense elements was the choice of judges and not forced by legal constraints. In a number of cases, cultural background was considered as an indication of offense elements (ten out of thirteen cultural offense cases). In these cases, it might seem that judges merely applied the law to case facts, but, in truth, the judges made a choice. The judges chose to consider cultural information as an indication of offense elements. In *Gabara v. HaYoetz HaMishpati LaMemshala*, for instance, cultural background was used to reject the provocation defense claim. The defendant claimed that he stabbed his wife after seeing her dressing subsequent to a stranger leaving her room: "Among us Arabs, it is a difficult thing . . . . [;] when I entered and saw my wife, I thought that—according to the Muslim religion—I must kill."[115]

The defendant's words, meant to show the severity of his wife's actions according to his culture, led the judges to reject the provocation claim: "I cannot find in the words I cited that the appellant lost his temper.

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reasoning and do not include complete protocols of the cases. Therefore, it is reasonable to assume that the percentage of "disregarded cases" in which a cultural argument was raised by the defense in the course of the appeal is even higher.

[113] Yoram Shachar, *HaAdam Hassavir VeHamishpat HaPlili* [*Reasonable Person and the Criminal Law*], 39 HAPRAKLIT 78, 87-89 (1989) (Isr.).

[114] Orit Kamir, *Eiech Harga Hasvirut Et Haisha: Hom Damam Shel "HaAdam Hassavir" Ve"Haisraelit Hametzuya" BeDoctrinat Azoalos*, [*Reasonableness Killed the Women*], 6 PELILIM 137, 154 (1997) (Isr.).

[115] CrimA 230/54 Gabara v. HaYoetz HaMishpati LaMemshala [Attorney General] [1954] IsrSC 9(1) 925, 930.

It can even be concluded the contrary—that he knew well what he was doing and thought that it was his duty."[116]

In *Gabara*, the judges regarded the defendant's cultural background as an indication of intent, but they could have just as well considered the cultural background as an indication of provocation or not considered it at all. It seems, therefore, that the use of cultural background as an indication of offense elements is not forced by legal constraints but is a choice that judges make. Judges could as easily choose to consider the cultural background as mitigating circumstances or not to consider it at all as they often did when it was relevant as mitigating circumstances.

The high percentage of cases in which cultural background was disregarded also cannot be explained by cultural background not being relevant for the determination of guilt. While irrelevance for guilt determination might explain some of the judicial responses in these cases, it cannot explain the the high percentage of cases in which judges disregarded the cultural issue since this line of reasoning appeared in only one verdict. Besides, even if the cultural background was not relevant for guilt determination, that irrelevance cannot explain why judges did not refer to the cultural issue at the punishment phase, where Israeli judges have wide discretion.

As a final legal reason, the high percentage of cases in which cultural background was disregarded cannot be explained by the assumption that Israeli judges were not aware that it is legally possible to consider cultural background. Even if we assume that the judges were not aware of the legal possibility of considering cultural background, this cannot explain their wide tendency not to refer to it in the sentencing decision where Israeli judges have wide discretion.

Overall, then, it seems that legal constraints as such do not sufficiently explain judicial decisions in cultural conflict cases.

A fourth factor that did not significantly affect the judicial decisions in cultural conflict cases was the issue of women's rights. The protection of women's rights is one of the central issues in cultural defense literature.[117] Yet, the analysis of judicial accounts in cultural offense and rejection cases indicates that women's rights were not central issues in terms of the frequency at which the issue was raised and the weight given to them in the decision. Women's rights were mentioned in only four cases. This rate is very low, considering the number of cases in which the issue appeared

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[116] *Id.*

[117] *See generally* Coleman, *supra* note 13; Gallin, *supra* note 20; Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001); Volpp, *(Mis)Identifying Culture*, *supra* note 21; Volpp, *Talking "Culture"*, *supra* note 21.

relevant:[118] twenty family-honor murder cases, fourteen bigamy cases, six unilateral divorces, and two rape cases. This lack of reference to women's rights is even more striking in light of the fact that the prohibition on bigamy was legislated as part of the protection of Israeli women's rights law.[119]

The fact that the rights of women were not a central consideration is also apparent from the weight given to the issue in the cases. For instance, in *Khativ v. HaYoetz HaMishpati LaMemshala*, the defendant was charged with rape, and while the desire to protect women's rights was mentioned in the verdict, it did not appear to affect the final decision. Khativ argued in his defense that he raped his fiancé in order to ensure their marriage after her father withdrew his consent to the wedding. The judge stated in the verdict that the law protects women from ethnic minority men who think it is acceptable to beat women. The judge regarded this case as an exceptional one and considered the defendant's cultural background as a mitigating circumstance in the punishment decision. The judge stated that, according to their cultural customs, the couple could not have married, despite their mutual will, without the consent of the woman's father and that the defendant acted only in order to ensure his possession of his fiancé.[120] Hence, the fact that the victim was bitten, held against her will, and struggled and screamed was secondary to the defendant's desire to marry and overcome the cultural limitations on this marriage. It seems, therefore, that the mention of women's rights was mainly tokenism and not reflective of a real concern on the part of the judge about the protection of women in society.

A fifth factor not related to judicial outcomes in the cultural conflict cases examined was anti-discrimination principles. Critics of cultural defense argue that the defense leads to special treatment of immigrant groups and, hence, discriminates against members of the dominant groups who are not entitled to such a defense.[121] Cultural defense critics have also pointed out that government should provide equal protection from criminal conduct for all members of society regardless of their ethnicity. One would expect, therefore, that those two issues would be among the reasons for

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[118] This category does not include all cases in which the victim was a woman. It includes the types of cultural conflict cases that are commonly regarded as involving violations of women's rights: family-honor murder cases, bigamy cases, unilateral divorces, and rape cases.

[119] Hok Shivuy Zehuyot ha Isha [Women's Rights Law], 1951, S.H. 248.

[120] CrimA 354/64 Khativ v. HaYoetz HaMishpati LaMemshala [Attorney General] [1964] IsrSC. 20(2) 136. The author of the article used the word "possession" as it appears in the judicial text (*hahzaka*, in Hebrew). This usage does not reflect the author's perceptions in any way.

[121] Coleman, *supra* note 13, at 1129-35.

cultural defense being rejected. The research revealed, however, that equality before the law was not even presented once as an argument, and the argument that the law should protect all citizens regardless of their ethnicity was mentioned in only one case.[122]

In sum, the analysis indicates that case characteristics, protection of women's rights, and equality before the law were not central considerations and that legal constraints cannot sufficiently explain judicial decisions in cultural conflict cases.

2. The Factors that Did Affect Decisions

The research revealed a number of findings indicating that a central factor affecting the judicial decisions in cultural conflict cases was the conflict between different groups within a society.

i. Cultural Superiority and Protection of the Social Order

From the qualitative analysis of judicial accounts[123] of cases in which cultural background was used offensively or rejected, it appears that the two factors that drove the decisions were cultural superiority and protection of the social order.

The analysis revealed that judges based their decisions on the cultural superiority of the dominant groups (four out of thirty-two cases in which cultural background was used offensively or rejected). The fact that this kind of reasoning was found in cultural conflict cases is surprising from the judical point of view, since the question of which culture is better is not a legal one. Examples of reasoning based on cultural superiority are found in the following quotes from two bigamy cases. The judges wrote,

> The monogamous institution is considered—in all nations, states, and societies in which it exists—as one of the superior values of human culture. [124]

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[122] CrimA 7/53 Rassi v HaYoetz HaMishpati LaMemshala [Attorney General] [1953] IsrSC 7(2) 790, 796.

[123] Accounts are the way in which people organize views of themselves, of others, and of their social world and how they justify their decisions and behavior in front of others. The way people account for their behavior reflects acceptable explanation in their cultural and social context. *See* Terri. L. Orbuch, *People's Accounts Count: The Sociology of Accounts*, 23 ANN. REV. SOC. 455 (1997). An examination of judicial accounts enables the study of not only the common reasoning among judges but also the prevailing concepts in the juridical system.

[124] CrimA 112/50 Yosefov v. HaYoetz HaMishpati LaMemshala [Attorney General] [1951] IsrSC 5(1) 481, 494, *translated in* I SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 174 (1962).

> The Israeli legislator intended to give the gift of monogamy to whom the ban never applied to, seeing the monogamous way of life as a higher level and a more proper way of life and that there is a need to raise all populations to it.[125]

One expression of cultural superiority is assimilative policy. In two out of thirty-two cases in which cultural background was rejected or used against the denfendant,[126] the judges based their decisions on assimilative policy. A judicial decision that is based on an assimilative argument reflects a perception that the culture of the dominant group is a superior one since, according to the assimilative approach, the requirement is that minority groups abandon their cultures and assimilate to the dominant culture, which is perceived as better. Moreover, the concern of cultural superiority also appeared in all cases in which judges explained their decisions with melting-pot policy. It is reasonable to assume that behind the use of melting-pot reasoning stands the perception of cultural superiority.

The analysis also revealed that in cultural conflict cases, judges based their decisions on fear of social disorder (seven out of thirty-two rejection and cultural offense cases). One expression of this line of reasoning was the rejection of cultural arguments after describing the defendant as having taken "the law into his own hands." For instance, the judge in a blood revenge case wrote, "If it is decided, even once, that blood revenge is justified, or even can reduce murder to manslaughter, the country will be flooded with blood revenge and with people who take the law into their own hands."[127]

Viewing the defendant as a person who took the law into his own hands is somewhat surprising in the context of defendants who acted according to the cultural codes of their ethnic groups. The judges must have been aware that the defendant did not take the law to his or her own hands but obeyed a different set of rules. A good example of this contradiction is found in the following quote:

> In the Israeli courts, the following question has been raised a number of times: to what extent do the Arab special customs affect the criminality of an act . . . ? [T]he answer in all cases was the same: a person is not entitled to take the law in his own hands . . . .[128]

If the use of the expression "took the law into his own hands" is not due to a misunderstanding of the cultural norms behind the act, why did the

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[125] CrimA 596/73 Israel v. Mahamid [1973] IsrSC 28(1) 773, 776.

[126] These two case are included in the four cases of cultural superiority.

[127] CrimA 120/55 Jacob v. Israel [1955] IsrSC 9(2) 1051, 1052).

[128] CrimA 7/53 Rassi v HaYoetz HaMishpati LaMemshala [Attorney General] [1953] IsrSC 7(2) 790.

judges base their decisions on that? The phrase "taking the law into his own hands" expresses not only a fear of law violation but also a fear of disorder. What disorder does a cultural defense create? Why is the acceptance of a cultural defense more disorderly than the acceptance of provocation, necessity, or battered woman syndrome defenses? A cultural defense is regarded as chaotic since it asks to create a new order, one that recognizes other cultures—a social order in which the dominant culture loses its dominant status.

Judges also based their decisions on the claims that cultural practices violate the social order and social foundations. For instance, in a bigamy case, the judge wrote:

> There is no need to elaborate on the nature of the offense . . . "this offense undermines the proper public order in an enlightened society" . . . "monogamist marriage is one of the foundation of our social regime" . . . "especially the need to deter others from following his actions, otherwise a chaotic situation will be created regarding the marriage establishment in the state."[129]

The expressions the judge chose to describe the offense—"undermines the proper public order," "foundation of our social regime," "a chaotic situation"—sound like expressions courts would use when dealing with treason, with the murder of a prime minister, or another kind of challenge to the regime, but not with a debate over marriage patterns. What, then, is it about polygamy that is so dangerous to the social order? The answer to this question can be found in the following statement of a Supreme Court Justice in a cultural conflict bigamy case:

> I believe that for a heterogeneous population with different cultures, such as mandatory Israel, one can imagine that a specific law may be required for "order keeping" in one sector out of all the sectors in the country. It is hard to imagine otherwise. The meaning of the term "order" is not necessarily riot prevention. It includes also maintaining and protecting of certain way of life and cultural values that that special part of the public cherishes.[130]

From this quotation, it appears that the "order" that polygamy threatens is social order in which the values and conduct norms that are acceptable in the society are those of the dominant culture.[131] In other

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[129] CrimA 185/82 Goda v. Israel [1982] IsrSC 37(1) 88.

[130] CrimA 112/50 Yosefov v. HaYoetz HaMishpati LaMemshala [Attorney General] [1951] IsrSC 5(1) 481, *translated in* I SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 174 (1962).

[131] To analyze whether the source of the problem lies in the polygamy practice itself or in a cultural difference conflict, bigamy cases with no cultural background were examined. This examination revealed that statements regarding fear for the social order characterized cultural conflict bigamy cases and did not normally appear in non-cultural bigamy cases. It seems, therefore, that the danger in bigamy cases does not merely lie in the marriage to a second wife.

words, the request to recognize cultural differences was not rejected because of the danger in the practice itself; rather, it was rejected because a cultural defense challenges the existing social order in which minority groups have to act according to dominant culture.[132]

To summarize, two central considerations in cases in which cultural background was rejected or used offensively against the defendant were "cultural superiority" and "protection of social order"—both expressions of protection of the status of the dominant groups.

ii. Case Circumstances that Pose Little Threat

The qualitative analysis of the circumstances in which a cultural defense was accepted indicated that judges tended to accept a cultural defense when the case circumstances posed little threat to the dominant groups.

In the majority of cases in which a cultural defense was accepted by the court, the circumstances of the case posed little threat to the dominant group (five out of seven cultural defense cases). For instance, cultural evidence was considered as mitigating in cases of cultural similarity, namely cases in which the defendant's acts were not considered as deviating substantially from the cultural conduct norms of the dominant group. For example, in *Shlomo v. HaYoetz HaMishpati LaMemshala*, an Iraqi Jew immigrant charged with bigamy had appealed, with the consent of his first wife, to a religious court for a permission to marry a second wife due to his first wife's infertility. The religious court asked the wife to take some additional fertility tests, but she refused to do so, and the defendant married a second wife without the court's approval. In determining punishment, the judges considered the fact that the defendant came from a place were bigamy was allowed as a mitigating circumstance.[133] An examination of case circumstances indicate that the defendant's actions did not deviate drastically from the acceptable behavior of the dominant culture. The defendant's marriage to a second wife because of a first wife's infertility conforms to the dominant Ashkenazi culture, as the approach of

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[132] See Sarat & Berkowitz, *supra* note 31, for a similar explanation of the U.S. Supreme Court's decision to reject the cultural claim in the *Reynolds* bigamy case:

> The difference Reynolds pressed was disorderly not because it was either anarchic or savage. It was disorderly precisely because it challenged a prevailing institutional practice—monogamous marriage—and because it did not reflect an idiosyncratic belief, but rather the "legitimate" practice of an entire subculture. Rejecting polygamy was not a rejection of disorder, but was instead the violent gesture of one legal order against another.

Id. at 297 (footnote omitted).

[133] CrimA 287/58 Shlomo v. HaYoetz HaMishpati LaMemshala [Attorney General] [1958] IsrSC 13(1) 197.

the majority of Ashkenazim religious judges is to allow a second wife in cases of infertility.[134] Likewise, the fact that the defendant acted with the consent of his first wife fits the norms of the dominant group, as respect for the woman's wishes is considered a characteristic of Western culture.[135] The defendant's actions, then, did not dramatically deviate from the acceptable behavior in the dominant culture: he asked for the court's permission, stated that his wife was infertile, and acted with the consent of his wife. Acceptance of the cultural defense in cases presented as cultural symmetry, as explained above, does not threaten the dominant group for two reasons: first, the difference that poses a threat to dominant culture is eliminated; and second, the dominant culture continues to be the standard of proper behavior.

Other examples of non-threatening circumstances in which a cultural defense was accepted involved situations in which it was understood that the minority group had not had enough time to absorb the conduct norms of the dominant group, as in the case of new immigrants or when the cultural practice was handled by the court for the first time. In *Al Sayaad v. Israel*, a bigamy case, the defense claimed that the punishment inflicted by the lower court was too severe and that changes in bigamy punishment policy should be done gradually. The defense also reminded the court of the fact that Islam allows polygamy and that second and higher order marriages are mostly done with first wife's consent. The judges accepted the cultural argument because it was the first case since the change in bigamy punishment policy:

> We are aware of the severity of this offense, as the legislature decided on a five-year maximum penalty. Considering, however, the way of thinking and the way of life of the appellants and also the fact that we are, probably, dealing with the first cases of

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[134] Elimelech Westreich, *Hagant Maamad Hanisuin Shel HaIsha HaYehudia BeIsrael: Mifgash Bein Massorot Mishpatiot Shel HaEdot Hashonot* [*The Jewish Women's Marital Status in Israel: Interactions Among Various Traditions*], 7 PELILIM 273, 317-18 (1998) (Isr.). Mizrachim Jews who marry a second wife do so based on a religious ground. While Rabi Gershom Excommunication (a religious rule that forbids polygamy) is valid for Ashkenazi Jews, this rule does not apply for Mizrachim Jews, so marriage of more than wife is valid for them according to Jewish religious law. *Id*. The Israeli law forbids polygamy, but there is an exception that applies for Jews: a second marriage is allowed if it takes place according to a final ruling of a religious court and the verdict is affirmed by a body authorized by the Chief Rabanut. The said approval is granted in those cases not banned by Rabi Gershom, for example, a woman who has been infertile for ten years. *See* E. Shuchtman, *Maamad ha Isha be Dinei Nissuin ve Gerushin*, *in* F. RADAY, K. SHALEV & M. VALIBAN-KOBI, MAAMAD HA ISHA BA HEVRA VE BA MISHPAT 386 (1995).

[135] It seems that the issue of the first wife's consent was very important to the judges, as they have repeatedly emphasized it in their verdict. *See* CrimA 287/58 Shlomo v. HaYoetz HaMishpati LaMemshala [Attorney General] [1958] IsrSC 13(1) 197.

> the more severe punishment policy, we think that half of the sentence period imposed by the District Court will suffice.[136]

From this statement it is apparent that the judges considered the cultural background as a mitigating circumstance, but that approach resulted from the fact that this case was the the first instance of a severe punishment being imposed since a new policy was implemented. When a cultural defense is accepted in cases in which there is no expectation that minority groups have had the opportunity to absorb the conduct normes expected of them, the court does not recognize cultural diversity but merely shows some forgiveness. The overall message is that, over time, minorities should accept the monogamous way of life. First-instance cases, therefore, pose no threat to the culture of the dominant group as it continues to be the standard for proper behavior.

In summary, judges tended to consider the defendant's cultural background as a mitigating circumstance in cases that posed little threat to the dominant culture.

iii. Exclusion of Social and Political Issues

The qualitative analysis of cases in which judges disregarded the cultural differences in the decision shows that those were decisions of exclusion. Exclusion prevents discussion of social and political issues involved in cultural conflict cases. The analysis indicated that in the cases in which judges disregarded cultural background, the judges, whether consciously or unconsciously, constructed the legal situation in a way that cultural background was irrelevant.

The central way judges did this was by narrowly framing the relevant events so as to leave the cultural issue in the background story (thirty of thirty-five cases). In those cases, the cultural background was presented in either the factual description of the case, the statement of the defendant, or the description of the motive, but the judges did not refer to it in their determination of guilt or punishment. In *Watad v. HaYoetz HaMishpati LaMemshala*, in which the defendant committed a family-honor murder, the judges presented the family honor issue in the factual description of the case:

> [A]bout one and a half years before the incident, the deceased was suspected by the villagers of engaging in a sex act with her brother . . . the authorities intervened in order to prevent harm by her family or by other villagers and arranged for her relocation to the house of a dignitary at the village of Taibe.[137]

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[136] CrimA 434/69-424/69 Al Sayaad v. Israel [1969] IsrSC 23(2) 823, 825.

[137] CrimA 371/62 Watad v. HaYoetz HaMishpati LaMemshala [Attorney General] [1962] IsrSC 16 971, 972.

Even though the judges mentioned the cultural background in the description of the case, they did not refer to it as part of the relevant facts for determining guilt:

> We believe that, facing the evidence, there is no doubt that the appellant planned ahead the killing of the deceased; that he used the invitation to visit the Nimer family; that the presentation of the wedding gift to the young couple was just an excuse for the killing that he planned; and that he came to the house where she lived with her husband armed with a gun for the execution of that scheme. Those facts suffice to allegedly prove the elements of preparation and lack of provocation.[138]

The separation of the act from the cultural background that led to it is so large that it is possible to change the facts of the case without changing the logic that led to the decision (for instance, to substitute the family honor motive with a financial dispute between a brother and his sister).

The other way judges constructed the legal situation in order to make cultural background irrelevant was to shift the discussion away from the cultural issue by defining the legal issue in question in a way that the cultural background was not relevant to the decision (five out of thirty-five cases). For instance, in *Israel v. Jarbi*, the defendant was charged with committing the pretense of witchcraft[139] but claimed that he lacked the mental state of mind to intentionally deceive since he honestly believed in his powers and acted according to holy books. The judge interpreted the law prohibiting pretense of witchcraft in such a way that the cultural issue became irrelevant to the decision—she claimed that the defendant's belief that he had powers was not important for the decision:

> I believe that the mental state of mind of witchcraft pretense is embodied in the physical act as such, and that the "pretense" that is required for the existence of a witchcraft offense is derived from the specific character of the "witchcraft deed." In the case of witchcraft, pretense of witchcraft is equivalent to the deed itself. I believe that demonstration of control of mystic unnatural powers can be presented only via a "pretense deed."[140]

In cases in which cultural background was disregarded, the judges constructed the legal situation in a way that cultural background was irrelevant by either narrowly framing the relevant events, disconnecting them from the cultural context, or defining the legal issues in a way that cultural background was irrelevant. In other words, in these cases, judges chose from the various possible interpretive constructions[141] the ones in

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[138] *Id.*

[139] Israeli law forbids witchcraft defined as "pretending to perform an act of witchcraft with the intention of gain." Israeli Penal Law, 1977, § 417.

[140] CrimA 549/90 Israel v. Jarbi [1990] IsrDC 1992(3) 494, 519.

[141] The term "interpretive construction" refers to the conscious or unconscious process by which situations are reduced to substantive legal controversies. It refers both to the way

which cultural background was irrelevant to the decision. By choosing those interpretive constructions, judges excluded the cultural issue from the legal discourse.[142] According to Foucault, the discourse accepted in a certain period and discipline determines which ideas can be heard—and which cannot—and therefore limits what can be said, thought, or done.[143] The choice of a certain interpretive construction impedes or even prevents the discussion of the political and social issues that may emerge from a choice of an alternative interpretive construction.[144]

In the case of cultural conflict, the exclusion of the cultural issue prevents the discussion of the social and political issues raised by cultural conflict cases. In *Mansur v. HaYoetz HaMishpati LaMemshala*, for example, in which the defendant was charged with the dissolution of marriage without his wife's consent, the judges focused on an examination of the timing the religious court's verdict—whether it was given prior to or after the dissolution of the marriage by the husband.[145] By concentrating on the timing of religious court's approval, the cultural issue that the divorce was done according to Islam became irrelevant. The way the judges interpreted the legal situation in this case excluded the cultural issue, so that they did not need to discuss the political issues involved, such as the existence of a competing legal system.

The construction of the legal situation in a way that excludes the cultural issue prevents the need to discuss the political and cultural issues

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the factual situation is constructed and to the framing of the relevant rules used to handle the situations. *See* Mark G. Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 592 (1981). According to critical legal studies, there are a number of different possible interpretive constructions from which the judges may choose. David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 1-22 (David Kairys ed., 1982).

[142] One might claim that the judges did not refer to the cultural issue because it was obvious that cultural background was not a consideration. It appears, however, that this is not the correct explanation for disregarded cases, as there is no general agreement in Israeli courts or in the legal literature about the proper reaction to cultural conflict cases. The legal literature is divided on the issue: some argue that cultural background should be a consideration, others reject this idea, while still others claim that cultural background should be considered only in some circumstances. Similarly, there seems to be no general agreement in Israeli courts on the reaction to cultural conflict cases since there are, as the current research indicates, a number of different judicial reactions in cultural conflict cases: cultural defense, cultural offense, and rejection.

[143] Michel Foucault, *The Order of Discourse*, *in* UNTYING THE TEXT: A POSTSTRUCTURALIST READER 51-76 (Robert Young ed., 1981).

[144] Kelman, *supra* note 141, at 594; *see also* Foucault, *supra* note 143.

[145] CrimC 616/58 Mansur v. HaYoetz HaMishpati LaMemshala [Attorney General] [1985] IscDC 22 (1) 158.

involved in cultural conflict cases,[146] such as the existence of different value systems, which groups in society define the criminal law, and what part the courts play in the oppression of minority cultures. Hence, the exclusion of cultural issues from the legal discourse blocks challenges to the existing power relations in society. The difference between cases in which cultural background was disregarded and cases in which cultural background was rejected or used offensively against the defendent is not one of substance—all of them protect the status of the dominant groups in the society—but in the method of implementation: by explicit statements against minority cultures or latent exclusion of the cultural issue.

IV. SUMMARY AND DISCUSSION

The empirical examination of judicial decisions in cultural conflict cases and the factors affecting them indicate two important issues for future discussion and research on cultural conflict cases. First, it revealed that the judicial decision pattern is more complicated than the one presented in the literature—it includes, in addition to acceptance and rejection of cultural arguments, offensive considerations of cultural background and disregard of cultural background in the decision on guilt and punishment. Second, the findings indicate that the tendency of courts not to consider cultural background in mitigation is strongly linked to power relationships between groups within the society and not so much to lack of sufficient legal tools or a desire to protect liberal values, as is commonly assumed in the literature.

The research revealed that while the literature and public debate have mainly dealt with the question of cultural defense being accepted or rejected by courts, two other central judicial decisions patterns exist. First, the research indicated the existence of judicial decisions of cultural offense, namely cases in which judges regarded the cultural background as a consideration for a more severe punishment, as an indication of offense elements, or as a reason to reject a defense claim. Second, the research revealed the judicial decision of disregard, namely cases in which the judges did not refer to cultural background in the decision on guilt and punishment (even though they were aware of it). The research showed not

[146] One might claim that judges disregard cultural differences because they want to avoid taking a stand in sociopolitical issues in order to protect the legitimacy of the legal system, avoid public and professional criticism, or because they feared it might affect their chances of promotion. It seems, however, that the reason for disregarded cases does not rest in the desire to avoid taking a sociopolitical stand. If that were the case, it could be expected that judges would state that the issue of reaction to cultural differences should be dealt by the legislator rather than by the court. However, there has been only one verdict with such a statement. Moreover, in order to deal with cultural arguments without revealing their position in these sociopolitical issues, judges could rely on precedent.

only that those two judicial decisions patterns do exist but also that they are common in cultural conflict cases; in almost one-fifth of the cultural conflict cases, cultural background was considered offensively, and cultural background was disregarded in the decision in half of the cases. The finding that these two judicial decision patterns are widespread judicial decisions in cultural conflict cases suggests that those scenarios should gain more academic and public attention.

In almost one-fifth of the cultural conflict cases, cultural background was conconsiderd offensively against the defendant. This is an important finding because it is commonly believed that cultural evidence is considered only in mitigation. Though the possibility that the prosecution will raise cultural background offensively has occasionally been mentioned in the literature,[147] this use of cultural background has not captured public or academic attention, where the focus has continued to be on cultural defense. The finding that judges consider cultural background offensively in one out of five cases indicates that this judicial decision pattern of cultural offense should be a central issue in any discussion of cultural conflict cases.

Though further studies are needed to examine whether the consideration of cultural background offensively characterizes court systems elsewhere, it is reasonable to assume that this phenomena is not unique to the Israeli court system because of the the similarities between the Israeli legal systems and other Western legal systems.[148] There is also some evidence of cultural background being used offensively in the United States criminal court system. Berger and Hein found 2 cases, out of 181 criminal and civil cases, in which the prosecution raised cultural evidence offensively.[149] It is likely that the actual rate of the use of cultural background offensively is higher than reported in the Berger and Hein study, as the researchers examined how cultural evidence is raised before court but not how the cultural evidence was considered in the decision and because they referred to only two ethnic groups in American society, Hmong and Vietnamese.

Since the offensive use of cultural background against the defendant seems to be a common judicial practice in cultural conflict cases, there is a need to examine whether this kind of judicial decision is a legitimate one. While legitimate reasons, such as protection of women's rights, may inform the consideration of cultural background offensively, it seems that this is not the case. The examination of judicial reasoning indicated that courts'

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[147] Berger & Hein, *supra* note 37, at 53-54; Roberts, *supra* note 53, at 97.

[148] *See supra* Part II.

[149] Berger & Hein, *supra* note 37, at 52-53.

negative attitudes in cultural conflict cases are strongly linked to power struggles between groups in society. This raises questions regarding the legal and social legitimacy of considering cultural background against the accused. For instance, what are the moral justifications for promoting the culture of a dominant group at the expense of the individual? Is it the court's role to promote assimilative policy? Is cultural offense a form of discrimination?

The question of discrimination comes up because in cultural conflict cases the group affiliation of the defendant is a consideration in the decision of whether to convict or to inflict more severe punishment. One may claim, therefore, that the use of cultural background against the accused is discriminatory. On the other hand, one may argue that the use of cultural background against the defendant is not discriminatory because the allegedly criminal actions of defendants from both dominant groups and minority groups are judged according to their cultures. This may seem similar to the argument that cultural defense is not discriminatory since it allows all defendants to be judged according to their cultural code.[150] This claim, however, does not apply to cases in which cultural background is considered offensively, due to the vast difference between considering cultural background against the accused and considering of cultural background in defense of the accused.

The consideration of cultural background offensively and the consideration of cultural background defensively are, indeed, legally alike—in both cases cultural background is used to explain or contextualize actions of the accused in order to determine culpability and proper punishment. There is, however, a profound difference between cases in which cultural background is considered defensively and in cases in which it is considered offensively. In cases in which the background is considered defensively, the actions of the accused are interpreted in the context of the defendant's culture and judged (at least in principle) according to his or her cultural norms. In cases in which the background is considered offensively, the actions of the accused are interpreted in his or her cultural context, but the criterion according to which the behavior is judged is the culture of the dominant groups. The fact that the cultural background is considered without recognizing that cultural differences justify special treatment implies that the practice of cultural offense is discriminatory, and hence, these discriminatory aspects should be examined further.

This finding also has important implications for cultural defense advocates, defense attorneys, and legislators. They all should recognize that raising a cultural defense in court might be counterproductive as courts

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[150] *See, e.g.*, Sing, *supra* note 19, at 1877-83; Winkelman, *supra* note 19, at 155.

may consider cultural background offensively against the defendant. The awareness that cultural background may work against the defendant, for instance, may lead defense attorneys to avoid cultural defense arguments and, instead, to ask the court to ignore the cultural elements of the case altogether.

The use of cultural evidence against the accused can ironically support the argument of cultural defense advocates for admission of cultural evidence through existing defenses. When cultural background is considered offensively, cultural evidence is admitted as an indication of the defendant's culpability and for determining the proper punishment. Advocates can, therefore, challenge any refusal to consider cultural defense arguments by asking how the refusal of cultural evidence for mitigation purposes can be legally justified, while the same evidence can be considered an indication of culpability or for imposing a more severe punishment.

Another pattern revealed in the study that should gain more attention is the tendency of judges to disregard the cultural issue in the determination of guilt and punishment. While this judicial decision pattern was not referred to in the literature on cultural conflict in criminal cases and was not expected at the outset, the research indicates that this type of judicial response was widespread. In half of the cultural conflict cases examined, judges disregarded the cultural issue in the decision on guilt and punishment.

The qualitative analysis of cases in which cultural background was disregarded shows that that this was a decision pattern of exclusion. In cases in which cultural background was disregarded, judges excluded the cultural background by either defining the legal issue involved in a manner that made the cultural background irrelevant or framing the relevant events for the decision narrowly thus disconnecting them from the cultural context. This exclusion of the cultural issue prevents the discussion of social and political issues involved in cultural conflict cases, such as the existence of different value systems, which cultural group in society defines the criminal law, and what part courts play in the oppression of minority cultures.

This judicial decision is obviously troubling for advocates of the recognition of cultural background as a mitigating circumstance. In fact, they might be even more troubled by judges' decisions to disregard cultural background than by decisions to reject cultural defense arguments. It is easier to fight against rejection decisions, as they are overt and, therefore, open to legal and public criticism. It is, however, harder to confront decisions to disregard cultural backgound as they are latent and, therefore, less subject to criticism. These decisions are also more problematic because they exclude the cultural issue from the discourse and, hence, impede the

cultural defense view from becoming a prominent way of thinking among legal practitioners.

Interestingly, the judicial decision to disregard a cultural issue is also problematic for those who oppose the use of cultural defense. Whereas this judicial decision pattern does not recognize cultural background as mitigating circumstances, it lacks the condemnation of the cultural practice. This is problematic, for instance, for those who want to eliminate customs that violate women's rights and, therefore, are interested in a clear message from the court against these harmful cultural practices.

The judicial tendency to disregard the cultural issue is also important for the debate on the best way to raise cultural arguments: by using preexisting defenses or by establishing a separate cultural defense in the general part of the criminal code. It seems that the widespread tendency of judges to disregard cultural arguments, as was found in this research, supports the demand for a specific cultural defense. A formal, separate cultural defense will make it harder for the courts to ignore cultural arguments and will force them to take a stand on the cultural issue. An explicit position of the court in cultural defense cases, answering the question of under what circumstances cultural evidence should be recognized as mitigating, is, as explained above, of mutual interest to supporters as well of opponents of cultural defense.

The research findings also challenge the common explanation presented in the literature for courts' tendency to avoid considering cultural evidence as a mitigating circumstance. While the literature and public debate have mainly dealt with the issue as either a liberal dilemma or a legal issue, the research suggests that the proper framework for understanding courts' attitudes toward cultural diversity cases is as conflicts between groups within a society.

The literature has focused on an examination of the costs and benefits of cultural defenses, on identification of the right balance between conflicting values (for example, individual justice versus women's rights), and a discussion of the legal means of raising cultural arguments in courts. Those areas of interest indicate that the prevailing perception is that lack of sufficient legal tools, lack of understanding of the cultural difference issue, or the will to protect liberal values are the reasons for courts' reluctance to consider cultural differences as mitigating circumstances.

The research findings indicate, however, that those are not the main reasons that courts fail to consider cultural background as mitigation. The examination of judicial decisions in cultural conflict cases showed that legal constraints do not explain the decision to reject cultural defense arguments, to consider cultural backgound offensively, or to disregard the cultural issue. The analysis of judicial reasoning in cultural conflict cases also

indicated that protection of liberal values was not a substantial consideration. Judges rarely presented the protection of women's rights and the equality principle as the reasons for rejection of cultural arguments or in support of more severe punishments.

The research revealed a number of findings that indicate that courts' attitudes toward cultural conflict cases was affected by the conflict between different groups in society.[151] First, the qualitative analysis of judicial accounts indicated that the protection of the dominant groups' status was a central factor that affected the decisions to reject cultural defense arguments or to use of cultural backgound against the defendant. Second, from the qualitative analysis of cultural defense cases, it appears that judges tended to consider cultural arguments as mitigating when the case circumstances posed little threat to the dominant groups. Third, the examination of cases

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[151] One might suggest that the research findings could be also explained by the alternative paradigm to conflict perspective—the structural functionalist perspective. It appears, however, that the structural functionalist perspective can only partially explain the research findings, so the conflict perspective is a more suitable framework to explain judicial decisions in cultural conflict cases.

For instance, while it is possible to explain decisions that reject cultural arguments and decisions that use cultural background against the accused based on the structural functionalist perspective, this perspective fails to explain one of the research's central findings that the most common decision was to disregard cultural background. According to the structural functionalist perspective, the role of the law is integrative—to protect social cohesion, to present a framework for normative behavior, and to educate to accepted norms and values in the society. *See, e.g.*, ÉMILE DURKHEIM ET AL., THE RULES OF SOCIOLOGICAL METHOD (1938); NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (Elizabeth King & Martin Albrow trans., 1985); ADAM PODGÓRECKI, LAW AND SOCIETY (1974); Talcott Parsons, *The Law and Social Control*, *in* WILLIAM M. EVAN, LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56 (1962).

It is therefore difficult to explain using this perspective the finding that in half of the cases the decision was to disregard the cultural issue. The courts would have fulfilled their role according to structural functionalist perspective much better if they had chosen to reject cultural claims or to consider cultural background offensively.

Likewise, the findings regarding the reasons underlying the decisions in cultural conflict cases do not support the structural functionalist perspective. According to this perspective, the reason for the courts' negative attitudes towards cultural differences would be the will to instill common norms and values as a base for social cohesion. The research has shown, indeed, that judges reasoned their decisions in terms of melting pot and social order terms that suit the structural functionalist perspective and stress social cohesion and social order. Nevertheless, in-depth examination of the usage of those terms in the judicial texts does not support the structural functionalist perspective. First, in all cases in which judges explained their decisions with melting pot policy, they also expressed concern with cultural superiority. It, therefore, appears that behind the usage of melting pot reasoning stands the perception of cultural superiority and not a genuine fear that recognition of cultural diversity will undermine social cohesion. Second, the analysis of the cases showed that when the judges used the term "social order" they meant the protection of the norms and values of the dominant group. *See supra* Part III.C.

in which cultural background was disregarded showed that those cases were a judicial decision pattern of exclusion—an exclusion that prevented the discussion of the social and political issues involved in cultural conflict cases and that protected the existing power relations between groups in society.

These findings suggest that the lack of consideration of cultural background as a mitigating circumstance is linked strongly to power relationships between groups within a society. This Article suggests that judicial reaction to cultural conflict cases should be understood in the social-political context in which the courts operate. It seems that the suitable theoretical framework for addressing the issue of judicial decisions in cultural conflict cases should be the conflict perspective and not only as liberal dilemma or as a legal issue, as it is commonly presented in the literature.

This finding, that the tendency not to consider cultural evidence as a mitigating circumstance is related to power struggles in society, also has important implications for the course of action to be taken for those interested in promoting a cultural defense. If the lack of consideration of cultural background as a mitigating circumstance is rooted in a lack of understanding or in a lack of suitable legal tools, the solution could come from the legislature or in better training of judges. If, as the current research indicates, the reason for the lack of consideration is linked to the social-political structure, it will be not enough to drive for legal changes or to promote training for judges to bring change in courts' attitude to cultural conflict cases. It seems that courts will recognize the cultural defense only after a change in the social structures occurs.