THE INTEGRATION OF CULTURAL ARGUMENTS IN THE PROVOCATION DOCTRINE IN RULINGS OF THE ISRAELI SUPREME COURT

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Provocation can cause a reasonable person to kill, but it most certainly does not cause an unreasonable person to kill, as the unreasonable person will certainly react in an unreasonable manner.¹

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SUMMARY

The provocation doctrine is one of the ancient doctrines in criminal law. It can be found both in common law and in penal statutes in many countries. In Great Britain, the United States, and numerous other countries, provocation constitutes a circumstance, which, if it exists, reduces the criminal responsibility of the defendant from "murder" to "manslaughter." In Israel, the "absence of provocation" constitutes one of the required elements, together with the decision to kill and the preparation to kill, for premeditation to exist.2

The "provocation doctrine" consists of two cumulative components: Subjective Provocation and Objective Provocation. Subjective Provocation refers to the question of whether the defendant actually killed as a result of provocation. Objective Provocation refers to the question of whether a reasonable person, in the defendant's place, would have been likely to kill as a result of the provocation.

Since Israel is a multicultural state, the provocation doctrine serves as a platform for the integration of "cultural arguments." Cultural arguments have an influence over the requirements for "absence of provocation," a requirement in many forms of jurisprudence and in the mens rea requirement for the crime of murder.3

Two points of contact can be found between the cultural background of the defendant and the provocation doctrine: The first point of contact is the defendant's culture, which is liable to influence the intensity of the provocation—addressing the question of which of the defendant's characteristics, if any, should be taken into account to estimate the intensity of the provocation. It may be that a person who is a part of a minority culture will be provoked by words or actions that would not subjectively provoke someone who is not a part of that same culture.

In the second point of contact, we examine the defendant's capability of restraint—addressing the question of how a reasonable person would have acted in those same circumstances involving the same intensity of provocation.4 We must then ask which reasonable person we are speaking of: is he a reasonable person from the defendant's culture or a "general reasonable person," if such a person actually exists?

2 Section 301 (a) of Israel's Penal Code (1977) provides that:

For purposes of Section 300 [stating that "murder" is "premeditated homicide"], a person who killed another person shall be deemed to have killed him with premeditation, if he resolved to kill him and he killed him in cold blood without any provocation immediately before the act, under circumstances in which he was able to think and to understand the result of his actions, and after he prepared himself to kill him or prepared the instrument which he used to kill him.

For the history of this section, see Yoram Shachar, Premeditation and Legislative Intent, 2 MEHKAREI MISHPAT (BAR ILAN LAW REVIEW) 204 (1981) (in Hebrew).


4 Id.
For example, a person from a culture that is considered more "hot blooded" may be expected to respond to provocation differently than a "cold blooded" Englishman. Since the provocation doctrine recognizes the weaknesses of human nature, then in those cases where the defendant's cultural background altered his nature, the culture constitutes a material variable in estimating the degree of culpability of the defendant who killed following a provocative incident.

The aim of this Article is to examine the existing legal doctrine and speculate about the desirable one, regarding the recognition of the provocation doctrine in the rulings of the Israeli Supreme Court. In the first part of the Article, I shall address the definition of the terms "cultural defense," "culture," and "the principle of culpability," and I shall discuss the connection between all of the above as well as the recognition of the defendant's culture as part of the provocation doctrine. I shall devote the second part of the Article to reviewing the development of the provocation doctrine in the rulings of the Israeli Supreme Court, while also criticizing it. In the third part of the Article, I shall review and evaluate the question of the recognition of cultural arguments in the rulings of the Israeli Supreme Court. I shall conclude the Article by summarizing the discussion.

I. THE RELATIONSHIP BETWEEN CULTURAL BACKGROUND AND THE PRINCIPLE OF CULPABILITY AS JUSTIFICATION FOR RECOGNIZING CULTURAL ARGUMENTS AS PART OF THE PROVOCATION DOCTRINE

A. CULTURAL DEFENSE

Recognizing the cultural background of a defendant who belongs to a minority culture is known as "cultural defense." The term cultural defense originated in the academic legal literature, mainly in the United States, which focused on the ramifications of multiculturalism on the various fields of jurisprudence. Various definitions of the term "cultural defense" may be found in the literature, all of which express a similar idea where the cultural background of a defendant who belongs to a cultural minority may be used in his criminal defense proceedings. In general, the term is not solely restricted to the general defenses afforded under the penal code, but rather it extends more broadly to any kind of mitigation that may be awarded to a defendant.

\[\text{Id. at 935.}\]

\[\text{Norgrew & Nanda define "cultural defense" as follows:}\]

When persons socialized in a minority or foreign culture who regularly conduct themselves in accordance with their own culture's norms, should not be held fully accountable for conduct that violates...the law, if these individuals' conduct conforms to the prescription of their own culture. The intention of a cultural defense in a criminal case is to negate or mitigate criminal responsibility where acts are committed under a reasonable, good faith belief in their propriety based upon actor's heritage or tradition.

\[\text{JILL NORGREW, SERENA NANDA, AMERICAN CULTURAL PLURALISM AND THE LAW 175 (3d ed. 1996).}\]
Several ways exist to recognize the defendant’s culture in criminal proceedings. One is to recognize the defendant’s cultural background as a general defense to criminal responsibility. Another way is to recognize the defendant’s culture as a mitigating factor in sentencing.⑦ A third way is to integrate cultural arguments in the set of general defenses to criminal responsibility, ⑧ or as part of existing doctrines in criminal law, such as the provocation doctrine. In this Article, I shall examine the integration of cultural arguments in the provocation doctrine for the crime of murder, as emerging from the rulings of the Israeli Supreme Court.

B. CULTURE

Anthropologists first developed the term "culture" towards the end of the nineteenth century. Culture was first extensively defined in 1871 by the British anthropologist, Sir Edward Burnett Tylor. Tylor defined culture as the complex whole that includes the opinion, beliefs, artistic creations, law, morality, customs, and other attributes and practices acquired by a person who belongs to society.⑨ Later definitions of this term tended to clearly distinguish between the actual behavior and the values, beliefs, and abstract outlooks underlying such behavior.⑩ In other words, culture is not only the visible behavior, but also the common ideals, beliefs, and values that people use to interpret their experiences and that are also reflected in their behavior.⑪

Liberalism is based on the autonomy of the individual to shape his life by making free choices.⑫ According to some scholars,⑬ the function of culture is to form a pool of choices so that people can

⑩ William Haviland, for example, defined the term ‘culture’ as a set of rules or values, that realization by members of a particular society produces behavior that is considered in the eyes of its society as acceptable. See William Haviland, Cultural Anthropology 49–50 (8th ed. 1999). A similar definition is given by Robert Levine, who defined the term ‘culture’ as "[a] shared organization of ideas that includes the intellectual, moral, and aesthetic standards prevalent in a community and the meanings of communicative actions." Robert Levine, Properties of Culture: An Ethnographic View, in Culture Theory: Essays on Mind, Self and Emotion 67 (Richard A. Shweder & Robert A. LeVine eds. 1984).
⑪ Id. at n.10.
exercise their autonomy. Others regard culture as establishing a person's identity. Every person has an interest in the continued existence of the culture that shaped his personality, awareness, and daily practices. Defending culture is, in fact, defending an important value shaping the identity. Culture is intrinsic to the human condition, since it is an integral part of our lives from childhood, and the process of its transmission from one generation to the next is known as "enculturation." Standards and meanings are absorbed and assimilated in people through this process of enculturation, and in this way, culture creates our personality, establishes our identity and awareness, and influences our behavior.

When a person who belongs to a minority culture performs a cultural practice that constitutes a criminal offense, the need arises to examine the significance of that practice. The defendant's culture needs to be considered because the liberal state, including the legislator, the court and the prosecutor, do not correctly interpret the significance given to the cultural practices. Every practice has its own significance. The real significance given by the participants of a particular cultural practice may differ from the significance the liberal state gives to it. In order to understand the significance of the practice, it is necessary to understand the common cultural language. The cultural language is fundamental, as it is a language directed at specific behavior. Understanding these cultural narratives is a condition to be able to judge the way we lead our lives in a sensible manner. Given that some specific practices are based on real beliefs in the value protected in that practice, the Court must understand the significance associated with that same practice.


16 MAUTNER, supra note 12, at 376–79.

17 Id.

18 Id. at 376, 384.


20 An example can be found in the American case State v Kargar, 679 A.2d 81 (Me. 1996). This case involved an accused of Afghan origin who, after emigrating to the United States, was prosecuted for federal crimes relating to sexual assault of his minor son kissing his penis. The defendant explained that the act, in his culture, is an expression of affection for the child without any sexual connotation. The fact that the defendant was tried for, and convicted of, such an act in the first instance is an expression that the prosecutor and the court did not correctly interpret the meaning of that act. The gap between the "liberal interpretation" and "cultural interpretation" in fact may lead to the imposition of culpability and shame unjustly. Another example, presented in Mautner's book, is the practice of female circumcision. Professor Mautner notes in his book that Western feminists fought this phenomenon and saw it as a means of oppressing woman's sexuality. The Third World feminists and other scholars responded by saying that Western
Consequently, the Court must be exposed to the significance of that cultural practice in the eyes of the same culture engaging in the practice. In cases where the criminal act is a result of a cultural dictates, norms, or customs that are given positive significance, an understanding of the cultural motives and the significance and added value involved in the practice will all affect the level of the defendant's culpability. Since the provocation doctrine relies and is based on reducing culpability, then understanding the defendant's "cultural language" is essential in light of this principle.

C. THE PRINCIPLE OF CULPABILITY AS JUSTIFICATION FOR TAKING THE DEFENDANT'S CULTURE INTO CONSIDERATION IN THE PROVOCATION DOCTRINE

The principle of culpability is a fundamental principle in criminal law. According to this principle, there is no crime without culpability (nullum crimen sine culpa). Requiring culpability articulates the criminal code's insistence that an element of culpability be a requisite for any valid criminal conviction. Without mens rea, there is little justification for condemning or punishing an actor. According to Ashworth, "The essence of mens rea is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behavior.

feminists do not understand the meaning of "female circumcision" that takes place in cultures where it is practiced. It was claimed that "female circumcision" improves the hygiene and health of women, establishes her feminine identity, serves as a test of courage for a woman who has faced intense suffering, and strengthens resilience to the hardships of life. According to Mautner, while liberals tend to interpret the practice of "female circumcision" as an expression of women's sexuality oppression, in the groups where it exists, it has many different meanings, many of which are not related to sexual oppression by men, but to accepted values in liberal culture itself (courage, standing, suffering, and brotherhood). See Mautner, supra note 12, at 377–79.


22 See generally Francis Bowes Sayre, The Present Significance of Mens Rea in the Criminal Law, HARV. LEGAL ESSAYS 399 (1934); Paul R. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681 (1983). Modern codes typically follow Model Penal Code § 2.02(1) in providing that "a person is not guilty of an offense unless he acted purposely, knowingly, reckless, or negligently, as the law may require, with respect to each material element of the offense."

23 See e.g., the Model Penal Code § 2.02 comment at 23 (1985). "The only exception to this general requirement is the narrow allowance for offenses of strict liability in Section 2.05, limited to cases where no severer sentence that a fine may be imposed." Id. The Israel Penal Code § 19 (1977) requires that, "A Person commits an offense only if he committed it with criminal intent unless: (1) in the definition of the offense, negligence is stated to be the necessary psychological basis for its commission; or (2) the offense is of the category of offenses with enhanced liability."

and its consequences.”\textsuperscript{25} This approach is grounded in the principle of individual autonomy—that each individual should be responsible for his or her behavior.\textsuperscript{26} Individuals are regarded as autonomous persons with general capacity to choose among alternative courses of behavior.\textsuperscript{27} Given the alternative possibilities, an individual may properly be held responsible for conduct only if he or she could have done otherwise.\textsuperscript{28}

Culpability also has considerable weight in how society views the actual severity of the offenses committed. In general, if the defendant’s culpability were somehow reduced, there would be a relatively lesser social response or outcry compared to the case with a higher level of defendant culpability. For example, in homicide offenses, different levels of culpability create different societal demand for punishment.

According to the principle of alternative possibilities, a person will bear criminal responsibility for a specific action only if he could have avoided choosing the criminal act. Consequently, in cases where the enculturation process reduced the defendant’s capability of choice, this must be accounted for in determining his degree of culpability. Even if we accept the argument that, despite the fundamental role of culture, other courses of action were available to the defendant (apart from the criminal act), it is doubtful whether other courses of action were realistic. For example, in traditional Arab societies, family honor is a supreme value. When a person witnesses an affront to his family honor, his cultural baggage reduces the alternative courses of action. The choice of attacking someone who affronted his honor is a product of the cultural baggage he is carrying. Despite the theoretical existence of other alternatives, such as self-restraint or forgiveness, it is questionable as to whether any of them are realistic. In contrast, if a person coming from a Western culture witnesses the same affront to honor, the alternative courses of action available to him are more numerous, varied, and even realistic. In such circumstances, he may ignore that same act, exercise self-restraint, and give ground.

I do not claim that a defendant who acted by virtue of a cultural dictate lacks “free will.”\textsuperscript{29} People are autonomous and gifted with creative powers. In fact, my argument is that under certain circumstances, the enculturation process may actually limit the

\textsuperscript{25} Andrew Ashworth, Principles of Criminal Law 158 (5th ed. 2006).

\textsuperscript{26} Ashworth, supra note 25, at 25. The principle of individual autonomy has factual and normative elements. The factual element in autonomy is that individuals in general have the capacity and sufficient free will to make meaningful choices. The normative element is that individuals should be respected and treated as agents capable of choosing their acts and omissions, and that without recognizing individuals as capable of independent agency, they could hardly be regarded as moral persons. Id. at 25–26.

\textsuperscript{27} Ashworth, supra note 25, at 158.


\textsuperscript{29} See Rachel J. Littman, Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will, 60 Alb. L. Rev. 1127 (1997) (discussing “free will” and “determinism” as part of the provocation doctrine).
capability of choice and lead to non-rational decision-making. If the degree of culpability is derived from free will, then whenever the defendant’s culture limits his free will, the culpability of the defendant is also affected.

D. PROVOCATION DOCTRINE AS A PLATFORM FOR CULTURAL ARGUMENTS

A number of connections exist between the defendant's cultural background and the provocation doctrine. The defendant's culture is liable to influence the intensity of the provocation, which may cause the defendant to lose his composure. It is possible that a person who belongs to a specific minority culture will be provoked by words or acts that would not subjectively provoke someone who does not belong to that same culture. Furthermore, culture is also liable to influence the person's degree of self-restraint. For example, it may be expected of a person from a culture that is considered to be more "hot blooded" to respond to provocation differently than a "cold blooded" Englishman. In a similar way, it may be argued that the capability of self-restraint of a Muslim man regarding an affront to his honor is less than that of someone who is not a Muslim, to the same act. The sensitivity of an affront to honor is a product of the cultural norms planted in a person from childhood.

Even if we assume that the enculturation process has reduced the capability of the defendant's choice, and has therefore reduced his degree of culpability, the question still arises of whether it is appropriate to address the cultural background when dealing with murder, which is considered the gravest offense in penal laws.

In general, it may be argued that recognition of cultural arguments in the case of murder may reduce the significance of interests, rights, and values defended in the criminal, legislative, and international fields, such as the sanctity of life, the right to dignity, and defense against bodily injury. These are universal human rights, whose protection is requested in every liberal country supporting human rights. On the other hand, it may be argued that despite the importance of these protected rights, criminal law recognizes various "defenses," even when speaking of the crime of murder. For example, criminal law in specific cases exempts defendants from bearing criminal responsibility, including the crime of murder, if it transpires that the defendant committed the murder under circumstances of insanity or duress.  

30 Israel Penal Code § 34H defines Mental Competence, and § 34L defines Duress:

Section 34H Mental Competence: No Person shall bear criminal responsibility for an act he committed by him, if—at the time the act was committed, because of a disease that adversely affected his spirit or because a mental impediment—he lacked any real ability
(1) To understand what he did or the wrongful nature of his act; or
(2) To abstain from committing the act.

Section 34L Duress: No person shall bear criminal responsibility for an act, which he was ordered to commit under a threat, which posed danger of injury to his own or another person's life, freedom, bodily welfare or property, and which he consequently was forced to commit.
Under Israeli law, the legislator recognizes mitigating circumstances that may permit the court to give a murderer less than a mandatory life sentence. Section 300A of the Israeli Penal Code permits a number of mitigating circumstances to be taken into consideration, including if the act of killing was a result of ongoing abuse of the spouse, or if a grave mental illness limited the defendant's capability of understanding what he was doing.\footnote{Section 300A ("Reduced Penalty") of the Israel's Penal Code provides that Notwithstanding the provisions of section 300, a penalty lighter than that prescribed in it may be imposed, if the offense was committed in one of the following cases

(a) In a situation, in which because of a severe mental disturbance or because of a defect in his intellectual capability, the defendant's ability to do one of the following was severely restricted, even though not to the point of the complete incapacity said in section 34H:

(1) To understand what he was doing or that his act is wrong; or
(2) To refrain from committing the act;

(b) In a situation, in which, under the circumstances of the case, the defendant's act diverged by little from the scope of reasonability, as required under section 34P, for the application of the exceptions of self defense, necessity or duress under sections 34J, 34K and 34L.

(c) When the defendant was in a state of severe mental distress, because of severe or continued tormenting of himself or of a member of his family by the person whose death the defendant caused.} In each of these cases, Israeli law recognizes specific circumstances that may at least mitigate the sentence of a defendant who committed murder, and at most exempt him from criminal responsibility altogether. The common feature of these mitigations is that they all rely on mitigating the defendant's culpability, even when dealing with the crime of murder. Consequently, as a matter of principle, the criminal law recognizes and accepts arguments that indicate a lesser degree of culpability of the defendant, even in murder cases. Whereas a defendant's cultural background reduces their level of culpability in some cases, the acceptance of cultural arguments in murder cases does not constitute a deviation from the criminal law principles in general, or the principle of culpability, in particular.

Another question is whether it is normatively proper to recognize cultural arguments in murder cases. Regarding this question, I shall argue that it depends on the type of cultural argument advanced. If the cultural argument is of a "general defense," I believe that the importance of the sanctity of life may banish cultural arguments from the Court. An example of this is the case of an honor killing that was not committed following a provocative incident. It is clear that the act of murder for defiling family honor is a product of the inherent influence of the culture. After all, if the defendant had belonged to a different culture that does not sanctify the value of family honor as a supreme value, perhaps the defendant would not have murdered the victim who harmed this value.

However, in a democratic society that sanctifies human rights, the right to life and dignity, the defense against bodily injury
overcomes any cultural argument whatsoever. Culture is not immunity, and certainly not in its grave forms of expression, such as murder. It is possible that the proponents of cultural defense include someone who disputes my position, since it may be argued that the justification for cultural arguments is valid for every kind of offense, minor or grave. Alternatively, it may be argued that we should recognize the cultural background of a defendant only as a mitigating factor in sentencing.

It is important to emphasize that a mandatory life sentence is imposed for the crime of murder in Israel. Consequently, the Court has no discretion in sentencing defendants convicted of murder for any reason or motive whatsoever, unless the murder was committed in the circumstances as set forth in § 300A of the Israeli Penal Code, which specifies circumstances for a reduced sentence. However, the situation is different when the cultural argument is integrated in the provocation doctrine where the cultural argument is relevant, sincere, and real. The reason for the distinction between the two different approaches lies in the fact that, in accordance with the second approach, the mitigation of culpability (from murder to manslaughter) is associated with specific conditions that the legislator recognized a priori that may mitigate the degree of culpability of the defendant.

The defendant’s culture does not constitute a defense by itself. Furthermore, the mitigation of the degree of culpability (from murder to manslaughter) does not send a message that the act of murder, committed under the influence of the cultural background, is condoned. Since the provocation doctrine recognizes the weakness of human nature, then it should be noted wherever culture influences human nature and incorporate this into the principle of culpability.

One of the criticisms made against recognizing cultural arguments as part of the provocation doctrine is that it improves the situation of men who killed their spouses out of jealousy. The main counterargument is that some of those men who killed following provocation lacked the premeditation that is required for the crime of murder, and they consequently cannot bear such culpability that justifies convicting them for an offense having a higher degree of culpability than that which exists. It need hardly be said that the provocation doctrine does not exempt a person from criminal liability, but it reduces the offense from murder to manslaughter as a result of a lesser level of culpability.

An additional argument is that recognizing the defendant’s culture will undermine the deterrence effect preventing others from committing the same or a similar offense. However, it should be noted that deterrence cannot justify conviction when there is no culpability. Furthermore, general deterrence cannot justify a graver sentence than what is appropriate based on his culpability. A sentence greater than that fitting the offender’s culpability, in order to deter others, results in using the offender as a means to achieve the aim of deterring the public, which is an approach that is incompatible with the fairness and justice of the judicial system.

32 Renteln, supra note 14, at 32.

Another general argument against the application of cultural defense in criminal proceedings is that such application will create different standards for different groups and therefore undermine the principle of equality. Furthermore, this could damage the public order and even lead to anarchy, since every group will decide which standards it will observe and which it will ignore. It may be argued that recognizing the defendant’s cultural background, if this background influences his degree of culpability, actually observes the principle of equality and does not undermine it.

The assumption is that a defendant who belongs to a cultural minority is not identical in his personal characteristics to a defendant who belongs to the culture of the majority. If that different characteristic is relevant to evaluating the degree of culpability, then taking that different characteristic into consideration may well lead to a just result in the material sense of equality, even if this recognition does not create equality in its formal sense.

In short, the common denominator to the provocation doctrine, and to the cultural defense doctrine, is the recognition of the limited culpability of the defendant. Consequently, recognizing the defendant’s cultural background need not be alien to criminal law but is understandable in the light of this basic principle.

In the next discussion, I shall review the development of the provocation doctrine in the Israeli criminal law.

II. THE DEVELOPMENT OF THE PROVOCATION DOCTRINE IN THE RULINGS OF THE ISRAELI SUPREME COURT

Section 300 of the Israeli Penal Code addresses the crime of murder, and lists a number of alternatives to this offense, whereas § 300(a)(2) is the alternative for clear-cut murder that does not require less than premeditation. For a defendant to be convicted in Israel pursuant to this alternative, three elements must exist: "the decision to kill," "preparation," and "absence of provocation immediately prior to the act." If there is doubt these elements exist, the doubt shall apply to the defendant's benefit, who shall be convicted of manslaughter and not of the crime of murder.

Based on the precedent, the elements of "preparation" and "absence of provocation immediately prior to the act" serve as concrete tests that allow the decision to kill to be characterized as a decision that crystallized "calmly and with careful consideration." If provocation existed immediately prior to the act, it indicates the decision to kill was taken "while tempers flared" and not "in cold blood." Immediate provocation, such as annoying and provocative goading on the part of the victim or a third party prior to the act, could hinder the defendant’s self control so that he responded with

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34 JAMES G. CONNELL J. AND RENE L. VALLADARES, CULTURAL ISSUES IN CRIMINAL DEFENSES, §§ 7.41–7.43 (2003).
35 Sacks, supra note 33, at 542–54.
36 Section 300 of Israel Penal Code provides the following definition of Murder: If a person did one of the following, then he shall be accused of murder and is liable to life imprisonment, and only to that penalty...(2) he caused the death of any person with premeditation.
the act of manslaughter. In this mental state, before he managed to "cool off" and assess the possible result of his action, he could not regain his ability to control his desire. Apparently, this annoying behavior was liable to "drive one out of his mind" (even a reasonable person) and cause him to act towards the victim as the defendant acted.

The precedents specified two cumulative tests for provocation:

The subjective test, which presents the question: did the provocative behavior actually influence the defendant so much that he lost his self-control, and thus committed the lethal act without considering the results of his action?\textsuperscript{38} It is necessary to show that the defendant actually surrendered to a "flare of temper that occurred within him."\textsuperscript{39}

The second test, which constitutes a material test for the discussion in our case, is the objective test that presents the question: would a reasonable person, in the defendant’s place, have been likely to kill as a result of the provocation? Was the provocation so serious that it may be inferred that most people would have found great difficulty in not surrendering to its influence and would have consequently responded in the same lethal manner as the defendant did?\textsuperscript{40} Since we are speaking of cumulative tests, only if the answer to each of these questions is positive would the defendant be convicted of manslaughter instead of murder.

Next, I shall examine the development of the provocation doctrine in the context of multicultural Israeli society. In order to examine this issue, I shall go back to the period of the British mandate, before the establishment of the State of Israel, to a time when the Mandatory Supreme Court attempted to discover the relationship between the British provocation ruling and the Israeli provocation ruling. In the 1946 D’abit court ruling\textsuperscript{41} and also in the 1947 El Vazir court ruling,\textsuperscript{42} the Mandatory Supreme Court interpreted a reasonable person in the provocation ruling as reasonable for that race to which the defendant belongs. The Court explained that the reason for this statement lies in the difference between the existing conditions in Israel and those existing in Great Britain: in Great Britain almost all the residents belong to a single race, and it may be presumed that they all possess the same views regarding their duties and obligations vis-à-vis society, whereas in Israel there are different races, and even sub-groups within the races.\textsuperscript{43}

In the El Vazir court ruling, a reasonable person was interpreted to mean a graded reasonable person, whose reasonableness is a function of his racial association. In other words, the Mandatory Supreme Court adopted the approach of the classic objective test, but grafted upon it an additional, relative test, that of

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\textsuperscript{39} Benno, Pad 24(1) PD 561 [1970] (Isr.) (in Hebrew).

\textsuperscript{40} Benno, Pad 24(1) PD 561 [1970] (Isr.) (in Hebrew); see also Kedmi, supra note 38, at 600.

\textsuperscript{41} D’abit Case, Annotated Law Reports (ALR) 559(3) (1946).

\textsuperscript{42} El Vazir Case, Annotated Law Reports (ALR) 712(4) (1947).

\textsuperscript{43} Id. at 713–14.
racial association. Consequently, the origins of the cultural defense may be traced back to the mandatory Israeli law, when the Court at that time saw fit to recognize the test of a reasonable person from the same race as the defendant. This recognition, based on race, means it recognized the culture, values, and historical background of that person.

After the State of Israel was established in 1948, Israel inherited the Mandatory Criminal Code Ordinance ("MCCO") from the British; the issue of provocation continued to find expression in § 216(b) of the MCCO.44 The difficulty the Court has to cope with, when referring to the reasonable person test in the provocation issue, is how to apply the Mandatory Supreme Court’s hybrid test in light of the large number of races and sub-races comprising the population of the State of Israel.

In the Segal court ruling,45 Justice Zilberg criticized the fact that the very addition of racial and sub-racial differentiation into the objective test of provocation left no stone standing of the objectivity or generality of this test—it had in fact turned into a subjective test.46 The difficulty referred to by Justice Zilberg is a practical one, in light of the conditions existing after the establishment of the State of Israel, in that it is difficult to know the signs of a "race" or a "sub-race" to which the Mandatory Supreme Court alluded. However, he assumes that the intention was also to the country of origin and cultural surroundings of the defendant.47

Justice Zilberg, who was part of the dissenting opinion, said that the test to be employed in Israel with respect to provocation is "the individual subjective test that takes into account all the personal characteristics of the defendant, and even unusual ones amongst them."48 Justice Berenzon stated that when we obtain an objective test by means of the reasonable person, we must see before us such an Israeli person, with his good and bad merits, ailments and ills, characteristics and customs, and not rely on some ideal type of unreal person that philosophers [saw] and described in their imagination and vision.49 In other words, in order to answer the question of what constitutes provocation in Israel, we must look at the British court ruling, through the Israeli prism, that will reflect the background of the Israeli experience.50

Justice Berenzon, who authored the majority opinion, disagreed with Justice Zilberg and preferred the objective test of the reasonable person, but wished to introduce a certain degree of flexibility into that rigid test by saying that even the objective test is not fixed and therefore does not apply to all places and to all times. Justice Berenzon opposed the "racial theory" adopted by the Mandatory Supreme Court, while arguing that this theory could be

44 Criminal Code Ordinance (1936).
46 Id. at 409.
47 Id. at 410.
48 Id. at 410.
49 Id. at 432.
50 Id. at 432–33.
understood against a background of the actual conditions existing in the country and the official policy of the mandate government at that time. However, this policy is alien to the spirit of the State of Israel, whose major aspiration is to absorb Jewish exiles from the Diaspora and assimilate them into a single unified nation. Justice Berenzon also stated that the average, regular person in Israel is not similar to the average Englishman, and the latter is not similar to a regular West African villager.

Professor Yoram Shachar, when referring to the words of Justice Berenzon in the Seagal case, asks:

Who is the average, regular, person [in that part of Israel] where there have been gathered together the Englishman, the West African villager, the Pole, and the Yemenite, and contains a large Arab minority, part of which is rural and part urban? Can it be disputed that when the Segal court ruling was given in 1955 there was not a single typical person in Israel?

While Justice Zilberg’s difficulty in adding a racial element to the provocation test is a practical one, Justice Berenzon’s is a value-based one. As far as Justice Berenzon is concerned, from the moment that the country of origin and culture of a specific defendant are taken into account, together with his ethnic or racial association, we are abandoning the correct test: the typical Israeli person who was created in Israel, and only he must be used as a criterion in the provocation test.

Yoram Shachar also attributes the words of Justice Berenzon to the spirit of the time, in the language of the aspirations and hope for the future, for the creation of a single and united nation and the building of a new Israeli man, which can be seen in the court ruling in the Garame case. Yosef Garame emigrated from Yemen to Israel twelve years before the incident in question. The defendant, like others from the Yemenite community, believed in the superstition that demons and evil spirits exist in the world and have the power to harm humans. The defendant believed the words of the deceased that he was married to a demon, and that he had the power to bring disaster to him and his family.

This belief was based, *inter alia*, on the fact that both in Yemen and in Israel the deceased was known as a person who engaged in occult wisdom and healed sick people by means of witchcraft. Over the course of time, Garame’s fear increased that the deceased would cause harm to him and to his family unless he gave him money to appease him. One day Garame believed the deceased was mocking him and threatening his life. His heart suddenly quivered, and he grabbed a shovel and hit the deceased over the head.

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51 Id. at 434.
52 Id. at 33.
54 Id.
with it nine times, leading to the deceased's death. Garame was accused of premeditated murder, but the District Court convicted him of the crime of manslaughter and sentenced him to twelve years imprisonment. The Supreme Court reduced Garame's sentence to seven years imprisonment, after it ruled that he had committed the act while in a grave state of psychoneurosis accompanied by paranoid tendencies. 56

According to Professor Shachar's approach, the aspirations and hope for the creation of a single and united nation, and the building of a new Israeli man, were translated into a categorical demand, as in the case of Yosef Garame who came to Israel from Yemen a short time earlier. The demand directed at Garame was that he immediately place himself in the melting pot and emerge in the form of the typical Israeli man being created in Israel, a kind of equitable reasonable person who, though not existing, should exist, since if this is not the case he will not be saved from the image of the reasonable person in any of the meeting places of criminal responsibility that he is liable to encounter. 57

At the present time, after the "melting pot" task has been accomplished and where the importance of preserving different cultures has been recognized, the question arises whether court rulings given during the mandatory period should be restored to their former glory (while isolating the racial element) so that we may judge cultural elements as part of the doctrine of provocation. Professor Shachar notes that presently, the dissimilarity of some groups can no longer be rejected as a debt charged against the future. 58 "Things that were justified during the emergence of a new society are less justified when the society is maturing, and will certainly be even less justified as time goes by." The majority ruling in the Segal, that an objective test is required in addition to the subjective one, has been rooted in the court's ruling where the test of a reasonable person referred to a reasonable Israeli, without anomalies or exemptions.

Justice Shamgar, in the Siman Tov court ruling, 59 repeated the position taken in Benno. 60 In Benno, the correct significance of the objective test is the question of whether the provocation directed at the defendant was so serious, taking into account the circumstances, that it may be inferred that most people would have had great difficulty in not surrendering to its influence, and likely responded in the same lethal manner as the defendant. 61

Justice Shamgar noted that, in examining the defendant's behavior, the Court does not apply the criterion of an ideal imaginary person who fully meets the expectations regarding the proper and desirable form of behavior of a restrained cultured person. Instead, the Court examines the behavior of the defendant based on the theoretical criterion created on the assumption regarding the

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56 Id. at 940.
57 Shachar, supra note 53, at 83.
58 Shachar, supra note 53, at 84.
60 Benno, supra note 37.
61 Benno, supra note 37, at 580.
behavior attributed to a reasonable person. And for the purpose of formulating the criterion, the Court employs its experience of life and general knowledge. Justice Shamgar’s innovation in *Siman Tov* is the introduction of normative values—a hint of that desirable—into the objective test, as an expression of the special aim that the judicial policy is intended to serve. Justice Shamgar also repeats this approach in *Jundi*, where he notes that the legislator does not distinguish between a reasonable worker and a reasonable banker but sets the behavioral norm of the average reasonable person who is imaginary, representing a merging and integration of characters from whom the aforesaid academic norm is created.

According to Orit Kamir’s approach, the character of the reasonable person is a fictitious, imaginary, paradoxical and totally amorphous one, and a product of the clear-cut imagination of the members of the Supreme Court. This is a character that has been created with the logic of the declared ideology of the national, ethnic, and cultural melting pot, and in the shadow of the ethnocentrism of the ruling class. It therefore displays the ideal character of the desirable Israeli, in the light of the implicit vision of the Supreme Court judges.

Kamir distinguishes between the British reasonable person and the Israeli one. While the first exhibits an abstraction of a group of people who together represent the community from which they have been selected, and the use of which for comparison of the defendant’s behavior with that accepted in his society, the Israeli reasonable person is composed of pieces of the characteristics of fictitious people who represent the desirable values of Israeli society. The Israeli reasonable person does not represent one who is accepted in the defendant’s society, but always reflects the world view of a single social group, which comprises the Supreme Court judges.

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62 Siman Tov, 36(2) PD 253, 264 (Isr.) (in Hebrew).

63 Id.


65 Id. at 391.


67 Id. at 155–56. Kamir mentions a further distinction between “the English reasonable person” and the Israeli one. The decision on how a “reasonable person” is used in any given context is defined in the common law as “factual,” and thus outside judges’ professional expertise. Therefore, the juries’ decision about how a “reasonable person” would have acted under specific circumstances is not a legal decision but factual, and therefore does not obligate other courts or juries. In this way, a reasonable person can vary depending on time, place and the defendant’s societal conventions. On the other hand, in Israeli law, the determination of how the reasonable man would have acted is not a factual question, but a legal one. As a legal determination, it is within the court’s authority. Any such determination by the Israeli Supreme Court is a binding precedent on the lower courts and guides the Supreme Court itself. The reasonable man in Israeli criminal law does not change, in principle, from one place, time and procedure to another.
Kamir adds this desirable Israeli not only fails to have pretensions to represent different sectors of the population in different contexts, but also does not have pretensions to represent anyone. The social construct of the desirable Israeli fixes a bar for the desirable height of the common Israeli but fails to fit his dimensions.\textsuperscript{68}

The terms reasonableness and a reasonable person are not neutral and objective ones as they are seen to be: they contain political values that serve specific groups in society and harm other social groups.\textsuperscript{69} In \textit{The Politics of Reasonableness},\textsuperscript{70} Ronen Shamir examines how the doctrine of reasonableness developed and how the term reasonableness became a fundamental internal value by the judges themselves. He argues that the term reasonableness suffers from vagueness and internal contradictions. While reasonableness is presented as a judicial characteristic resulting from the intelligence and professionalism of the judge, the Court also said that a reasonable person is the Court itself.\textsuperscript{71} According to his approach, the Israeli courts use the doctrine of reasonableness to systematically discriminate against Arabs and religious Jews.

Justice Aharon Barak also admits that reasonableness is a vague term, used by most of those who use it in a “circular” manner so as not to give it real meaning.\textsuperscript{72} I shall also point out that the difficulties of the doctrine of the reasonable person that raises questions and incredulity become even more pronounced when we attempt to apply it to cases where the defendant does not belong to the culture of the majority, i.e., he does not belong to the society where the reasonable person is supposed to reside.

Who is the reasonable person? To whom shall we compare the actions of the defendant? Is the reasonable person one who belongs to the culture of the majority, or is the reasonable person one who belongs to the culture of the minority? Is he the reasonable Mexican, Chinese, Arab, ultra-orthodox Jew, or simply the Israeli? This question is accentuated as part of the objective test of the provocation doctrine.

According to the objective test, the Court must ask whether a reasonable person would have likely lost his composure, in light of that same provocative incident, to such an extent that he would have responded as the defendant did. Limited and pedantic application of this test, without taking into account the culture of the defendant (“a reasonable person from the culture of the defendant”) strengthens the claim that defendants belonging to minority cultures are discriminated against in criminal proceedings, and the test of the reasonable person, \textit{inter alia}, perpetuates this discrimination.

\textsuperscript{68} \textit{Id.} at 156.
\textsuperscript{69} OMER SHAPIRA, \textit{JURISPRUDENCE: INTRODUCTORY CHAPTERS 435–36 (2007) (in Hebrew).}
\textsuperscript{70} Ronen Shamir, \textit{The Politics of Reasonableness, 5 THEORY AND CRITICISM 7 (1994) (in Hebrew).}
\textsuperscript{71} SHAPIRA, \textit{supra note 69, at 436. See infra note 90.}
\textsuperscript{72} AHARON BARAK, \textit{PURPOSIVE INTERPRETATION IN LAW 249 (2003) (in Hebrew).}
Omer Shapira notes that "recourse to the reasonable person is only a disguise for a specific person: the enlightened person who belongs to the enlightened public." In this context, Shapira's following questions and speculations are very relevant:

What really lies behind the expression "the enlightened public" in whose name the Court speaks? If there exists an enlightened public that is found in light, then there must also exist an unenlightened public that is found in darkness. And who belongs to the "dark" side of the public? Those different minorities, such as the Arabs or the ultra-orthodox Jews, who are regarded as a threat to the enlightened social order.73

In my opinion, strict adherence to the doctrine of reasonableness, and to the test of the reasonable person, without accounting for identity, culture, or personality, socially and personally harms those same cultural minorities. It further expresses the problematic and strict adherence to a doctrine with dimensions deliberately small so that others who are different from "us" cannot enter it.

The Court's position in recognizing the defendant's cultural background as part of the provocation doctrine means shutting the door on it and leaving it outside the bounds of the Court. It may be assumed that the Court would fear recognizing cultural arguments, since in this way they are liable to undermine the judicial policy of the Court. The aim of the Court is to encourage the population to become Israelis of a single, very specific, kind that Supreme Court judges see as ideal.

Recognizing the defendant's culture might create a dichotomy that is unacceptable to the Court. Therefore, the Court wishes to dismiss it the same way it dismissed Garame's belief in demons and warlocks almost fifty years ago. At that time, the Court used the "melting pot" concept to dismiss Garame's beliefs, while today it would be dismissed by the modern (un)reasonable (super)man.

Professor Shachar is undecided and asks:

If the reasonable person does not kill because of provocation, what is the point of repeatedly asking in which circumstances he will kill because of provocation, and what is the point of trying to compare him to all those defendants who claim that they did in fact kill because of provocation? Has the time not come to say, after 34 years in which he served in this passive role, that the reasonable person in Israel never murders, and that it would be better for us to leave him alone without disturbing his peace every time that a killer who lost his self control wishes to be compared to him?74

He asked this question, and it was answered by the former Chief Justice of the Supreme Court, Aharon Barak six years later in the Azualus case where the reasonable person was roused from his

73 SHAPIRA, supra note 69, at 437.

slumbers. In Azualus, the defendant shot and killed his wife and neighbor when he discovered they were having a romantic relationship. Azualus had suspected the relationship for some time, since there were rumors of it, although his wife and the neighbor denied it. Nonetheless, it affected Azualus’ family life so much he left home. His wife sued for divorce. On the day of the incident, Azualus went out to find his wife and found her in the neighbor’s car. Later on, when the neighbor hugged Azualus’ wife in front of him and kissed her on the mouth, with the intention of clarifying the relationship between them, Azualus lost his composure, drew a gun he routinely carried, and shot both of them dead. The district court found him guilty of murder, and Azualus appealed to the Supreme Court with the argument that he had been provoked shortly before the act. The Supreme Court accepted this argument after it ruled he acted under the influence of the provocation.

Justice Barak noted he was prepared to examine the existing precedent while limiting or cancelling the objective test. However, he believed the court ruling in Azualus was not the appropriate place to do so, since this case also met the objective test. He said the blood of the common Israeli man or woman was liable to boil, when they see their partner in an act of betrayal. Ultimately, the Court accepted the provocation argument and convicted Azualus of two acts of manslaughter instead of murder.

Reality demonstrated without doubt that, if during the period of existence of the State of Israel, the reasonable person lost his tranquility about three times. Apart from being abstract, fictitious, paradoxical, and amorphous, as he is called in the legal literature, we now also know that he is made of Teflon.

Chief Justice Barak's ruling in Azualus left much requiring further study, including the question about limiting or cancelling the objective test. It again raised the dilemma of whether it is justified, for the sake of the social value or the sanctity of life, to introduce an objective dimension into the term personal criminal responsibility in

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75 CrimA 3071/92 Azualus v. The State of Israel 40(2) PD 573 (Isr.) (in Hebrew). For full discussion see Kamir, supra note 66. See also CA 30/73 Shmulevitch v. The State of Israel 27(2) PD 598 [1973] (Isr.). In the case of Shmulevich, the defendant shot his estranged wife after he went to her new boyfriend’s apartment. The court relied on the traditional English law, which states that when a person discovers his wife's betrayal, it may provoke him and cause him to kill her. While the English ruling referred to an event in which a husband finds his wife having sex with another person, Justice Haim Cohen expanded that ruling and applied it to an act of adultery. Justice Haim Cohen stated that the fact that the defendant arrived at his wife’s new boyfriend’s apartment and found her in her nightgown caused a trigger that would boil the blood of the ordinary Israeli husband.

76 CrimA 3071/92 Azualus v. The State of Israel 40(2) PD 573, 580 (Isr.) (in Hebrew).

77 This was seen first in Shmulevitch and again in Azualus. Later, there was another case where the Supreme Court recognized a killing under provocative circumstances, in CA 8332/05 Issakov v. The State of Israel (unpublished decision, 27.7.2007) (Isr.) (in Hebrew).
murder—a dimension generally alien in its nature to personal criminal responsibility.  

Two professors point to the internal contradiction in the ruling that a person who has been subjectively provoked and committed an act of homicide after loss of self-control may still be regarded as a premeditated murderer if the objective test was not met (i.e., even if in actual fact he had no *mens rea* of premeditation as required to convict of murder). According to this criticism, the test for evaluating provocation must only be personal and subjective, not general or objective, since any integration of the objective element is alien to offenses of criminal intent, as it is a characteristic of negligent offenses only.

In the further criminal hearing of *Bitton*, which was heard by seven justices in the Supreme Court, the question arose whether the existing precedents should deviate from the objective test. Chief Justice Barak presented the Feller and Kremnitzer’s interpretation of the word “provocation,” according to which it was unjust, offensive, insulting, and surprising behavior. These definitions, according to Barak, set a low threshold for provocation. The solution, in his opinion, was to raise the threshold by using an objective test. In other words, the defendant will not be liable for murder only if the provocation passes both the objective and subjective tests.

An additional question by Chief Justice Barak addressed how the subjective characteristics of the killer are part of the objective test. In his opinion, the objective test developed in the Israeli rulings, which does not account for subjective characteristics of the killer, is too extreme. Consequently, he believed a number of subjective characteristics may be recognized while formulating criteria for the objective standard and locating ”stopping points,” as is customary in most judicial methods, which would be appropriately done by the legislator.

Judge Beinish, the presiding Chief Justice of the Israeli Supreme Court, noted that the court ruling is liable to erode the existing precedent to some extent in light of the approach that strives to make the objective consideration subjective. In the current jurisprudence, such erosion is likely to lead to excessive subjectivity in the rulings, as it depends on the personal approach of each judge. According to Chief Justice Beinish, when accounting for the social value protected by the objective consideration, the Court must maintain judicial restraint and preserve the stability of the precedent.

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81 *Id.* at ¶ 46–47.

82 *Id.* at ¶ 63.

83 *Id.* at ¶ 68.

84 See *id.* (discussing the ruling of Chief Justice Beinish).
It may be shown that the importance of Bitton lies in its challenge of the provocation doctrine, as it currently exists in criminal law. It calls for reform of the ruling as part of a comprehensive and substantive reform to homicide law in general, and to murder in particular. In this ruling, the Supreme Court passed the reins to the legislator and expected to see a change in the judicial situation.

It seems that the time has indeed arrived to reform Israeli's murder law. After Chief Justice Barak fired the first shot in Bitton, and after Chief Justice Beinish voiced the call for judicial restraint, the legislator is expected to take the reins and advance judicial proceedings in reforming murder law. If the legislator does not express an opinion, there is a possibility that, over time, we shall observe an erosion of the existing precedents in court rulings and the first appearance of subjective elements in the objective test.

III. THE INTEGRATION OF CULTURAL ARGUMENTS IN THE PROVOCATION DOCTRINE IN THE RULINGS OF THE ISRAELI SUPREME COURT.

A. NON-RECOGNITION OF CULTURAL ARGUMENTS AS PART OF THE PROVOCATION DOCTRINE IN ISRAELI LAW

The Court in Segal unambiguously rejected the test of the racial theory that was accepted in the period preceding the State of Israel's establishment. That theory had deep roots in the courts' rulings and established the objective test in a strict and conservative manner without taking into account the different communities, religions, sectors, and cultures in Israeli society. The reason was the Court's refusal to create a dual standard, or even a number of standards, for different people. If cultural dissimilarity were dismissed as a debt charged against the future, these defendants would assimilate themselves to the expected social "melting pot." Over time the metaphor of the melting pot disappeared, but there remained the same value-based rhetoric of the desirable, uniform Israeli, who, rather than being a product of the melting pot, was a product of the Supreme Court's aspirations.

The Supreme Court defined (and continues to define) desirable norms of behavior that are not those of the common Israeli, but rather represents a "fantasy" of the desirable Israeli. When the Court addresses the regular, average, or typical Israeli, it does not intend to recognize different kinds of people, just as it does not intend to recognize different standards or the fact that different persons who belong to different cultures are perhaps provoked differently by "triggers" that make it likely they will respond in a different way.

In Tuma, the court addressed verbal provocation between two persons of Arab origin. Tuma's counsel argued that Tuma, as an Arab, could be influenced by certain provocations to a greater extent than a Jew. However, the Court, which decided Segal, ruled that Tuma's specific religious or ethnic community had no affect on the objective test.

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86 Id. at 151.
The Azam case\(^{87}\) dealt with a brawl in an Arab village, where the Azam slit the deceased's throat after a protracted quarrel that included cursing and blows exchanged between the parties. Justice Beisky ruled that the objective test does not permit classifying the provocation by specific sectors of the population or by sensitivity to customs of particular communities, such as an affront to a woman's honor.\(^{88}\)

The court in *El-Cazan* \(^{89}\) addressed the case where two members of the Muslim community were involved in an incident where the victim called El-Cazan "a son of a bitch," cursed him, and threw a shoe at him, a harmful and insulting act in the Muslim community. The Court refused to consider these facts as provocation.

The Katish case\(^{90}\) involved an Arab who attempted to murder his mother and her second husband after his mother left his father and married this other man. Katish did not claim provocation but appealed the gravity of the sentence (eight years imprisonment) to which the district court sentenced him. Katish argued that, from his standpoint, his mother violated the honor of his father and family by following another man whom she loved and abandoning her seven children. The Court said Katish’s viewpoint was not unique to him but instead perpetuated by the society in which he lived and by the tradition of the community to which he belonged.\(^{91}\) Consequently, Katish’s advocate argued that Katish acted like his own people, and the act he committed was no more than that expected from him. Justice Heshin rejected Katish’s arguments and ruled that the viewpoint of an appellant, like that of his community, was improper and could not be accepted.\(^{92}\)

Justice Heshin adopted a pure value-based approach, according to which he set up the protected value in the crime of murder and derived the Court’s role as a normative framework for preserving and sanctifying this value. However, two major difficulties exist in Justice Heshin’s decision. The first is his view on punishment: that a criminal sentence is a deterrence, and the Court’s voice will resonate from one end of the country to the other so everyone will know that anyone who tries to kill can expect a very long prison sentence.\(^{93}\)

However, in the same court ruling, Justice Heshin stated that deeply rooted customs in some communities would not be easily uprooted, even if everyone agrees that they ought to be.\(^{94}\) An additional difficulty lies in the value-based consideration that is implicit in his ruling. Justice Heshin wished to say that the

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\(^{87}\) CrimA 139q86 Azam v. The State of Israel 41(3) PD 343 [1987] (Isr.) (in Hebrew).

\(^{88}\) *Id.* at 349.


\(^{91}\) *Id.*

\(^{92}\) *Id.* at 99.

\(^{93}\) *Id.*

\(^{94}\) *Id.* at 98.
replacement of these deeply rooted values by other values is a virtually impossible task, and it is neither the Court's job nor responsibility to educate people as to how they are supposed to behave.

If this is true, then the value-based consideration is reduced to sending the message that anyone who kills or injures someone else will receive a severe sentence. This message is problematic given the target audience. In cases of "honor killing," the message will fall on deaf ears since we are speaking of such a deeply rooted practice, and it is doubtful anyone will be deterred by this message. However, if the message is intended for the entire public, then it is unnecessary since this practice is not usual amongst the general public but only amongst a specific community or sector. I therefore wonder to whom the Court intended to receive its message. This is one of the difficulties in sentencing defendants who belong to minority cultures.

In Taha Najar, the Supreme Court addressed the question of the objective test for provocation and examined the reasonableness of the criterion in the context of the defendant's Bedouin community. This case was one of the few that addressed the defendant's culture in depth and in the context of provocation precedent. In fact, the Court asked the same question it has asked more than once: what is a civilized person?

Taha Najar belonged to the Bedouin community and stabbed his forty-eight-year-old sister, Samia, eleven times with a knife (ten times in her back and once in her hand). Apparently Samia, who was unmarried and lived with her unmarried sisters in their mother's home, intended to travel alone for a holiday in Egypt. Taha Najar opposed the journey, convinced that this was "unacceptable behavior" according to the customs of the Bedouin community as it would be a journey made by an unmarried woman, and attempted to persuade her not to go.

On the day of the act, Taha Najar went to Samia's home and demanded that she forgo the planned trip. When she refused to do so, Taha Najar went to his home, grabbed a knife, returned to her home, and when she persisted in her decision, stabbed her to death.

The District Court in Nazareth convicted Taha Najar of murder, after ruling that evidence established premeditated murder, the decision to kill, and the element of preparation. Further, the Court said the sister's wish to travel to Egypt did not constitute subjective or objective provocation. To summarize, Taha Najar argued the provocation resulted from the affront to the family's honor, and especially to his personal honor after the deceased, as he claimed, had told him that he was not the father of his children.

The defense produced evidence by Sheikh Atrash A'akal, who argued that family honor is one of the most sensitive subjects amongst the Bedouins, especially in the Bedouin tribe. No Bedouin will accept an affront to his family honor, especially when speaking of sexual offenses. In his view, a journey made alone by a Bedouin girl is one of the bright lines regarding family honor that no member of the

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95 Id. at 99.
Bedouin tribe would dare to cross. At the end of his testimony, he stated:

No one in the Bedouin society justifies the murder, but we fall inside the gap that exists between our mentality and customs, and the Israeli law, that is in our opinion a very honored and fair law, and we believe in it, but we are paying the price.\textsuperscript{97}

The Haifa district court ruled that the defendant was not subjectively provoked. Supreme Court Justice Rubinstein added that even if the defendant had been provoked subjectively, this does not mean a civilized person, in response to an insult expressed during a confrontation, would be liable to lose self-control and go so far as to stab his own sister to death.\textsuperscript{98}

The importance of \textit{Taha Najar} is how it identified a civilized person. Justice Rubinstein asked, "Who is this 'civilized person' whose temperament we examine as part of the objective test? Does this term include individual in different groups and cultures who murder because of family honor?" Justice Rubinstein quotes Justice Shamgar's statements in \textit{Jundi}, according to which the character of the reasonable person was created and formed by the Court; therefore, the Court does not have to accept averages of behavior or perverse practices of specific groups or persons of specific origin or temperament, and it is not entitled to include in these characteristics in the fundamentals of a desirable cultural norm.\textsuperscript{99}

Justice Rubinstein added the following:

With all due respect, in my opinion, the words of Chief Justice Shamgar are as relevant today as they were then. Indeed, in such variegated and multi-cultured society as Israeli society there will be fields in which regard will be paid to the various different types of the population. However, it is not appropriate to give this significance in criminal law, and certainly not its serious manifestations, and especially not when speaking of the taking of someone else's life against a background known as family honor. The consideration is first and foremost one of values: the sanctity of life...However, a lot has been written regarding the dilemmas presented by the cultural relativity approach. On the one hand, it is argued against the creation of universal values of morality and of human rights that this may make various groups in the population subservient to "enlightened" Western culture, as a symptom of the concept that does not recognize pluralism and multiculturalism. On the other hand, the debate that gives a place – legitimate as such – to the history and culture unique to each group, is liable to represent a magic formula, that sometimes blurs the real meaning, and permits

\textsuperscript{97} \textit{Id.} at 156–57.

\textsuperscript{98} \textit{Id.} at 1139, ¶ 4(6)(1).

\textsuperscript{99} \textit{Id.} at 1139 (citing CrimA 402/87 Jundi v. The State of Israel 42(3) PD 383 [1988] (Isr.) (in Hebrew)).
exploitation of that same relativity in order to reserve for itself values that fail to match the basic human rights that have been formulated at the present time; ‘Honor Killing’ is one of them.100

We can see there is a rigid approach by the Supreme Court not to recognize the defendant’s culture or consider it as part of the provocatio doctrine in the crime of murder. Such an approach confirms the value of the sanctity of life and sends a clear message that the Court will not recognize the cultural background, whatever its influence, on the act of homicide. Consequently, the Court chooses the "easy" path, since it does not pretend to address substantive questions and issues such as the principle of culpability, the principle of equality, individual justice, and the right for a fair trial. Such an approach does not weigh the various justifications for taking into account the defendant's culture in criminal proceedings in general and the provocatio doctrine in particular.


In Chakula,101 the Supreme Court heard the appeal of a defendant who was convicted of murder in the Tel Aviv District Court Tel Aviv where members of the Ethiopian community were involved. Chakula hit his wife over the head seven times with an axe, causing her death. No one disputes he caused her death, but his defense counsel advanced several arguments, one of which referred to the fact that, in the act of killing the wife, the principle of "absence of provocatio" did not exist.

The wife allegedly had a relationship with someone who was the wife's lover, which the defense argued provoked Chakula to commit the act. Purportedly, this provocatio was accompanied by humiliating remarks the wife made to him prior to the homicide. The Court did not accept this argument because the provocatio was not made immediately prior to the act. Chakula introduced an expert on the Ethiopian community who claimed members of the Ethiopian community are "hot blooded," and their exasperation threshold is very low, especially in respect to relations between a married woman and a man other than her husband. The conclusion from this, based on Azualus, is that the temperament and exasperation threshol of "the common Ethiopian" is different from that of "the common Israeli," and is thus more likely to lead a husband killing a wife who went astray.

Justice Heshin, when referring to this argument, said Not only did the expert not testify to that which the appellant's advocate wished to put in his mouth, but if we had accepted this argument, even in part, we would have turned the criminal law here into complete chaos. We reject this concept of "the common Ethiopian" out of hand. A Jew who emigrated from

100 Id. at ¶ 3–4.
Ethiopian and lives in Israel is an Israeli in all respects, and the question of whether or not he was provoked is one of the circumstances of the matter. Indeed, it is possible that the culture of an immigrant to Israel will be influenced by the place from which he came to Israel, but the question of whether or not someone was provoked relates to the specific circumstances. This expert who appeared in the Court was not present during the act of homicide, and evidence regarding the character of a "common Ethiopian" is irrelevant as long as it is not directed at the person standing trial before the Court. In this matter, this expert has told us nothing.\textsuperscript{102}

Even though the court did not recognize the cultural defense or provocation in \textit{Chakula}, the innovation of the court in this matter cannot be ignored. Justice Heshin accepted that it is possible that the defendant’s cultural background may influence how he is provoked; however, since the expert’s testimony only discussed the Ethiopian community in general, and did not address the specific defendant being tried, the expert witness did not effectively explain how the culture dictated his reactions to certain provocative acts in committing the crime.

In \textit{Bitton}, Chief Justice Barak addressed the question of whether it was appropriate not to consider the subjective characteristics of the killer as part of the objective test.\textsuperscript{103} Barak noted that the Supreme Court ruling determined that personal or sub-group characteristics of the killer shall not be considered as part of the objective test, but the Court is capable of changing this ruling.\textsuperscript{104} According to Chief Justice Barak, the proper objective criterion is that which takes into account a number of characteristics that are subjective to the killer, but not all of them. However, this change should be made by the legislature as part of an overall reform to the structure of the homicide offenses and to the crime of murder in particular.\textsuperscript{105}

Chief Justice Barak added that the objective test in Israel, which does not account for the subjective characteristics of the killer, is too extreme and that, in the overall balance, the view of those demanding the recognition of subjective considerations should prevail.

The difficulty lies in determining the criteria for "subjectivising" the objective standard. This may be overcome by means of determining criteria as is customary in most systems of jurisprudence, but it would be better for these criteria to be formulated by the legislator.\textsuperscript{106} In fact, Chief Justice Barak left an opening for taking subjective characteristics into account as part of the objective test of provocation. The Court noted that it could deviate

\textsuperscript{102} Id. at 127.
\textsuperscript{103} Further Criminal Hearing 1042/04 Bitton v. State of Israel ¶ 66 [not published, Nov. 27, 2006] (Isr.) (in Hebrew).
\textsuperscript{104} Id.
\textsuperscript{105} Id. at ¶ 67 of Chief Justice Barak’s ruling.
\textsuperscript{106} Id. at ¶ 68 of Chief Justice Barak’s ruling.
from the precedent that refused to consider the personal and subgroup characteristics.

CONCLUSION

In the first part of the Article, I addressed the principle of culpability as the major reason for taking into account the cultural background of a defendant who belongs to a minority culture as part of the provocation tests. The Israeli Supreme Court’s strict approach, where it refuses to consider the defendant’s culture as a potential factor in the provocation doctrine, ignores the principle of culpability in a place where a comprehensive discussion of this issue is needed. This strict approach is problematic since it is so narrow: it is one-dimensional in that it places the public interest on a scale but does not account for the subjective culpability of the defendant, which is the real justification for the provocation doctrine.

Cultural background is an integral subjective character that affects a defendant’s culpability. If the legislator would agree to recognize the weakness of human nature as part of the provocation doctrine, courts could no longer ignore the defendant’s culture since it forms an integral part of that same humanity. A person who belongs to a specific minority culture is more likely to be provoked by acts or words, which may not provoke a person who belongs to a different culture.

It seems the Supreme Court dismissed the defendant’s cultural background as part of the provocation doctrine because of three principal fears. First, the fear of what social message is conveyed to that same cultural community and to society in general. Second, the fear that a message of forgiveness, consideration, or recognition for the act of homicide in a specific minority culture, while the majority culture regards the sanctity of life as a supreme value and will not forgive such an act. Third, the fear of sending a message that the blood of victims from a specific culture is less red than the victims who belong to the majority culture. Furthermore, a person who kills his victim after an incident of provocation will not bear the mark of shame of a murderer and serve a mandatory life sentence but rather will be released from prison after only a number of years. This result is incompatible with holding the sanctity of life as a supreme value in the State of Israel. It is even likely to lead to a slippery slope as such recognition is likely to remove the bar of the restraint expected from members of a specific culture when they encounter a provocative situation.

We should keep in mind that the court is not required to accept norms or values of minority cultures and justify their existence, but it might (or might not) find the defendant’s anger excusable, and it might (or might not) find his degree of anger sufficiently understandable. The provocation defense is about

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107 Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 996 (2002). Dressler refers to the facts of the Stewart-Gibson case in Australia where Stewart, a member of an Aboriginal tribe, spoke about tribal secrets in the presence of women and young men in violation of tribal norms. Another tribesman, Gibson, unsuccessfully sought to stop Stewart from violating the norm and, when he failed to do so, killed Stewart. Gibson was tried before a jury of non-Aboriginals. Dressler argues that characteristics of the defendant (other than
human imperfection and, more specifically, impaired capacity for self-control.\(^{108}\)

I am convinced that it is only possible to overcome these fears and difficulties as part of a substantive reform in manslaughter and murder offenses in general. Some of these solutions are proposed by Chief Justice Barak in *Bitton*, and by Justice Matza in *Melisa*.\(^{109}\) Such reform may include distinctions between different kinds of murder offenses, or it may be that specific murder offenses will not obligate a mandatory life sentence, but rather a maximum sentence of life imprisonment. This solution, as indicated by Justice Matza in *Melisa*, makes the objective test of provocation redundant, since a person committing murder after provocation will be convicted of premeditated murder, and his sentence will be determined while taking all the circumstances into account, including the gravity of the provocation immediately prior to the act, the limitations of the defendant, and the relative magnitude of his moral failure in comparison with that expected from a person who has a typical temperament and has basic moral recognition of the sanctity of life.\(^{110}\)

As part of this solution, it will be possible to arrive at a just and proper result, and match the sentence to the degree of the defendant’s culpability, whenever the cultural background is considered an integral and inherent component to the question of culpability, without fearing the social message sent to the general public and to the cultural community to which the defendant belongs. Such a defendant will bear the mark of shame of a murderer, and his sentence will be determined only after taking into account all the circumstances, interests, and principles.

This middle path allows the Court discretion to arrive at the proper, correct and just result. Considering the cultural background of the defendant as a relevant factor in provocation and restraint is not significantly different from considering the personal characteristics of the defendant: in each analysis, we recognize the existing weaknesses in human nature to which we are all subject.

The values to which the Court refers are proper, and without doubt, the country would become chaotic were it not for the protection given by the Court against harming these values. However, it appears the Court has adopted too extreme of an approach given the inflexibility of the objective element in the provocation doctrine out of

\(^{108}\) Id. at 978.


\(^{110}\) Id. at 614. See also *Further Criminal Hearing 1042/04 Bitton v. State of Israel* ¶ 68 [not published, Nov. 27, 2006] (Isr.) (in Hebrew).
a fear that its elimination or reduction would remove the self-restraint to which each of us is obligated.

The worst scenario is that the law will recognize that "release of restraint" as something natural that forms part of the weakness in human nature. It is necessary to point out that we are not speaking of giving an overall exemption from criminal responsibility, but rather a specific mitigation to a defendant whose judgment, or more correctly his lack of judgment, in the act of homicide was sincere, true, and perhaps unavoidable, and is the result of external and internal factors influencing his personality. At present, such mitigation has no place in the Court apart from the light sent by Justice Heshin in the Chakula case.\footnote{CrimA Chakula v. The State of Israel, Takdin Elyon 00(2) PD 126 [2000] (Isr.) (in Hebrew).}