Sociocultural diversity is not grounds for exemption from criminal responsibility

La diversidad sociocultural no es una causal de inimputabilidad

A diversidade sociocultural não é causal de inimputabilidade

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Abstract This article analyses the criminal law treatment of culturally motivated conduct in Colombia and argues that 'sociocultural diversity' should not serve as grounds for exemption from criminal liability. Based on a doctrinal, historical and comparative analysis of Law 599 of 2000, its background, certain comparative references and the relevant case law — in particular, the provisions of Judgment C-370 of 2002 and its implications, including Article 33A — three main findings are identified: (a) the label of 'non-imputability' is conceptually inappropriate, because in such cases there is no incapacity, but rather a distinct worldview; (b) the rule of precedence established by the Court requires that, where there is an insurmountable error of prohibition conditioned by culture, the response should be acquittal and not a declaration of non-imputability; and (c) the current regime lacks coherent legal consequences, as it is not permissible to 'cure' a culture, and furthermore, educational or dialogue-based measures imply a judgement of censure. As an alternative, it is proposed to bring the phenomenon back into an ordinary framework of imputation and culpability whose guiding principle is pluralism: depending on the case, the conduct should be understood as a permissible risk derived from the social role in a multicultural society or be excused when the perpetrator's determination, although contrary to the hegemonic norm, is not incompatible with the fundamental values of pluralistic coexistence. The article is

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organised into an introduction, methodology, conceptual framework, historical-critical analysis, proposal and discussion.

Keywords
Criminal responsibility; socio-cultural diversity; lack of criminal responsibility; error of law; indigenous peoples

Resumen Este artículo analiza el tratamiento jurídico-penal de conductas culturalmente motivadas en Colombia y sostiene que la "diversidad sociocultural" no debe operar como causal de inimputabilidad. Con base en un análisis dogmático, histórico y comparado de la Ley 599 de 2000, sus antecedentes, algunos referentes comparados y la jurisprudencia relevante (en particular, el condicionamiento de la Sentencia C-370 de 2002 y sus desarrollos, incluido el art. 33A), se identifican tres resultados principales: (a) la etiqueta de inimputabilidad es conceptualmente impropia, porque en estos casos no se constata una incapacidad sino una cosmovisión distinta; (b) la regla de prelación fijada por la Corte impone que, cuando exista error invencible de prohibición culturalmente condicionado, la respuesta sea la absolución y no la inimputabilidad; y (c) el régimen vigente carece de consecuencias jurídicas coherentes, pues no es admisible "curar" una cultura y aun las medidas pedagógicas o de diálogo implican un juicio de censura. Como alternativa, se propone reconducir el fenómeno a un esquema ordinario de imputación y culpabilidad cuyo criterio rector sea el pluralismo: según el caso, la conducta deberá entenderse como riesgo permitido derivado del rol social en una sociedad multicultural o ser disculpada cuando la determinación del autor, aunque contraríe la norma hegemónica, no sea incompatible con los valores fundamentales de la convivencia pluralista. El artículo se organiza en introducción, metodología, marco conceptual, análisis histórico-crítico, propuesta y discusión.

Palabras clave
Culpabilidad; diversidad sociocultural; inimputabilidad; error de prohibición; indígenas

Resumo Este artigo analisa o tratamento jurídico-penal de condutas culturalmente motivadas na Colômbia e sustenta que a "diversidade sociocultural" não deve operar como causal de inimputabilidade. Com base em uma análise dogmática, histórica e comparada da Lei 599 de 2000, seus antecedentes, alguns referenciais comparados e a jurisprudência relevante — em especial, o condicionamento da Sentença C-370 de 2002 e seus desdobramentos, incluído o artigo 33A —, identificam-se três resultados principais: (a) o rótulo de inimputabilidade é conceitualmente impróprio, porque, nesses casos, não se constata uma incapacidade, mas uma cosmovisão distinta; (b) a regra de precedência fixada pela Corte impõe que, quando exista erro insuperável de proibição culturalmente condicionado, a resposta seja a absolvição e não a declaração de inimputabilidade; e (c) o regime vigente carece de consequências jurídicas coerentes, pois não é admissível "curar" uma cultura e, ainda, as medidas pedagógicas ou de diálogo implicam um juízo de censura. Como alternativa, propõe-se reconduzir o fenômeno a um esquema ordinário de imputação e culpabilidade cujo critério reitor seja o pluralismo: conforme o caso, a conduta deverá ser entendida como risco permitido derivado do papel social em uma sociedade multicultural ou ser desculpada quando a determinação do autor, embora contrarie a norma hegemônica, não seja incompatível com os valores fundamentais da convivência pluralista. O artigo organiza-se em introdução, metodologia, marco conceitual, análise histórico-crítica, proposta e discussão.

Palabras-Chave
Culpabilidade; diversidade sociocultural; inimputabilidade; erro de proibição; povos indígenas

Introduction

The coexistence of culturally diverse groups within the same territory repeatedly gives rise to conflicts between socially entrenched norms of behaviour and the prohibitions of the dominant criminal law. In constitutionally pluralist societies, such as Colombia's, these conflicts cannot be addressed merely as 'deviations' from a pattern established by the majority of society, but rather as structural frictions inherent to an order that recognises the legitimacy of distinct worldviews and the need to ensure spaces for coexistence. The problem arises when conduct inspired by divergent cultural norms is criminally relevant under the majoritarian legal system: what, in such cases, legitimises punitive intervention, and what justifies – if it is accepted – the absence of punishment or even of security measures?

In Colombia, the positive response has included a particularly problematic provision: Article 33 of the Criminal Code provides for non-criminal liability "on grounds of socio-cultural diversity". The Constitutional Court examined this provision and declared it constitutional on the basis of two key interpretations: (a) that non-imputability does not stem from incapacity, but from a different worldview, and (b) that, where there is an unavoidable error of prohibition arising from such cultural diversity, the consequence must be acquittal rather than a declaration of non-imputability. However, although this qualification sought to avoid discriminatory effects and undue burdens, it left open a fundamental doctrinal difficulty: if incapacity does not always exist, the error of prohibition covers a large part of the cases and a measure need not be imposed in all instances, what leads us to continue considering sociocultural diversity as grounds for non-imputability in criminal law?

This article addresses this issue and focuses on the rationale behind the absence of punitive intervention – including both criminal penalties and security measures – in cases where sociocultural diversity is invoked. Based on the aforementioned, the general objective is to clarify and dogmatically reconstruct the meaning and scope of this argument in Colombian criminal law. Regarding specific objectives, the article seeks to: (a) describe the legislative and jurisprudential developments that led to the incorporation of sociocultural diversity in the category of non-imputability and to its constitutional conditioning; (b) to identify the conceptual problems and legal consequences arising from treating the phenomenon under a label traditionally associated with deficits in understanding or self-determination; and (c) to propose an alternative approach to resolving culturally motivated cases within an ordinary framework of criminal liability and culpability, guided by pluralism and its limits.

In order to achieve the established objectives the methodology employed for this research is presented; the conceptual framework adopted to present our arguments is outlined; the legislative and jurisprudential recognition and the evolution of socio-cultural diversity as grounds for non-imputability in Colombia is analysed; a proposal is put forth to reconfigure the doctrinal treatment of this phenomenon within the substantive theory of crime; and, finally, some concluding remarks are offered for discussion.

Methodology

The research is based on a historical and comparative doctrinal analysis. Historical normative sources are reviewed, such as previous criminal codes and the legislative background of the current Colombian Criminal Code (Law 599 of 2000), as well as rulings of the Constitutional Court and the Criminal Chamber of the Supreme Court of Justice, which outline the legal framework for non-imputability due to socio-cultural diversity in this country. Certain foreign case law and legislation (from the continental European tradition) is also analysed relating to culturally motivated offences, as well as literature regarding the error of prohibition conditioned by cultural factors, within the framework of the – sometimes forced – coexistence of multicultural groups that are not fully integrated. As regards culpability and grounds for exclusion, the author draws on doctrinal and jurisprudential definitions that explain how the definition of non-imputability is intertwined with the evolution of the concept of criminal culpability.

Conceptual framework

In general terms, legal pluralism can be understood as the assertion that two or more legal systems can coexist within the same territory (Torres, 2013, p. 399). With regard to the specific issue of socio-cultural diversity, acceptance of this premise has historically led to the question of how the prevailing legal system should treat those who orient themselves according to a worldview which, whilst respected, is opposed to that of the hegemonic society.

For states organised in accordance with the principle of legal pluralism, it is an established principle that two or more peoples may coexist within the same territory and, moreover, that each may enact its own legal system (Bolaños, 2001, pp. 10 ff.; Carnevali, 2007, pp. 9 ff.; Cerezo, 2007, pp. 106 ff.; Hurtado, 2010, pp. 124 ff.[1]). Consequently, there is a possibility that the regulations governing the same factual situation may be contradictory in each case (Gutman, 2009; Maglie, 2007, 2012). As Meini puts it:

> Cultural pluralism describes the coexistence – whether peaceful or not – of two or more culturally distinct groups within the same space (within the same 'normative context') which, from a formal point of view, is governed by the laws of one of those groups. Cultural diversity becomes relevant to criminal law when a conflict arises, in the sense that the behaviour is carried out by someone whose cultural norms differ from those underlying formal law and is criminally prohibited within the normative context in which it takes place. (Meini, 2007, p. 18)

1 In Anglo-Saxon legal doctrine, critically: Goldstein, 1994–1995, p. 140, esp. p. 163, who describes the cultural defence as a "mockery" of victims' rights and "illogical" from the standpoint of protecting the migrant population.

From this perspective, the traditional debate tends to centre on whether or not it is legitimate to attribute culpability to someone who, despite having infringed the mainstream legal system, does not share the value system on which it is based because they do not form part of the dominant society (Becerra, 1997, pp. 18 ff.; Strijbosch, 1991, p. 666; van Broeck, 2001, p. 5). As Carnevali (2007) rightly observes: "… it is nonetheless paradoxical that criminal laws are imposed on individuals who, in many cases, do not even have the right to vote and therefore do not contribute to the creation of the law, which, moreover, is completely alien to them" (Carnevali, 2007, p. 17; similarly, Bayona, 2023, p. 863).

However, framed in this way, the question of the significance of sociocultural diversity for criminal law would be far too broad. It could lead to discussions ranging from political philosophy—concerning the state's legitimacy to create laws—to public policy considerations regarding the integration of communities into democratic processes. Therefore, in order to better define the specific point that this paper will address, it is advisable to clarify a few points before proceeding.

The first step is to acknowledge that, traditionally, socio-cultural diversity has been the subject of more theoretical than practical interest in continental European legal theory (although it must be acknowledged that the migratory phenomena of recent decades have sparked a practical interest in the matter) (Bernardi, 2003, passim; Brandariz & Fernández, 2010, pp. 271 ff.; Carnevali, 2007, pp. 1–4; Ferré, 2008, p. 33; Olaizola, 2018, p. 1; Sánchez-Ostiz, 2012, pp. 41 ff.; Terradillos, 2007, pp. 177 ff.; Torres, 2013, p. 403; Zaffaroni, 2002, p. 739). In contrast, in Latin America, this is an issue that has always warranted special consideration in criminal justice, largely due to the presence of indigenous communities and ancestral peoples within the territories of the various countries (Olaizola, 2018, pp. 12–13, esp. note 36).

In this regard, the way in which the Chilean Public Defender's Office manual begins its analysis of this issue is highly revealing: "The Chilean State is therefore multicultural, because members of indigenous peoples belong to different 'nations' that predate Spanish colonisation" (Chile, 2010, p. 14). This idea reflects, in one of its most striking expressions, the subtle (but by no means insignificant) difference between those who approach this issue from the perspective of its historical significance for the formation of a distinct cultural identity, and those who do so from the current context of migration flows of certain peoples towards developed countries. Anyone delving into these matters in greater detail than is intended here would do well not to lose sight of this distinction when considering, in their proper context, the conclusions reached by some Latin American authors, in contrast to those drawn in the European context.

In this paper, we will address the issue of the criminal law treatment of socio-cultural diversity in the Latin American context (specifically, in Colombia). Therefore, although several references to foreign works are used, the ideas expressed and the conclusions proposed have been conceived from the specific perspective of a society with a marked tradition of pre-Columbian multiculturalism, which is reflected in the still significant presence of populations with divergent ancestral customs coexisting within the same territory.

Additionally, before proceeding, it would be advisable to distinguish the discussion on socio-cultural diversity from other debates which, although they may be related, do not deal with exactly the same subject. For example, presenting the issue in very general terms as a clash of belief systems may lead the reader to think of another phenomenon: that of crime committed out of conviction. However, generally speaking, the issue of sociocultural diversity is discussed in terms more associated with the inability or impossibility of behaving in accordance with the prohibitive norm than with deliberate opposition to the current legal system. Whilst there is nothing to prevent a socio-culturally diverse person from committing a crime out of the conviction that the regime from which they differ must be overthrown, the truth is that the cases commonly referred to under this label evoke the idea of distance or alienation rather than that of confrontation (Olaizola, 2018, pp. 10–12; Sellin & Marx, 1984, p. 28).

Furthermore, socio-cultural diversity does not exactly coincide with the issue of social exclusion. In such cases, the discourse tends to be much more laden with considerations regarding the state's failure to provide its citizens with the basic conditions for coexistence, shared responsibility in the face of crime, and the illegitimacy of punishment in contexts of institutional absence or inadequacy (Cigüela, 2019, pp. 389 ff.; Coca & Irarrázaval, 2023, pp. 93 ff.; Díaz-Aranda, 2014, pp. 180–181; Jakobs, 2003, pp. 71 ff.; Orozco, 2022, pp. 165 ff.; Pawlik, 2023, pp. 11 ff.; Silva, 2013a, pp. 715 ff.; Yacobucci, 2021, p. 277). It is said, for example, that

> (…) In comparative criminal law, certain indicators arising from social, educational, employment and economic deprivation are recognised; as these factors affect the normal process of integration and socialisation, they are capable of influencing an individual's willingness to comply with the law. (Yacobucci, 2021, p. 276)

and also, that "these arguments sought to shift part of the individual's blame onto society for failing to provide them with a space for personal development" (Narváez, 2013, p. 12). As Cigüela (2024) explains, "exclusion highlights a failure on the part of the State (and of society) in its duty to respect principles—particularly that of equality—which characterise the social and democratic rule of law" (Cigüela, 2024, p. 3; similarly, Cuesta, 2004, p. 241). Socio-cultural diversity, on the other hand, is not always associated with an institutional deficit and, in fact, its existence is partly due to the active intervention of public authorities to preserve it. Of course, it may be the case that social exclusion is of such magnitude that it leads to socio-cultural diversity and, in turn, that socio-cultural diversity leads to certain groups being excluded from mainstream society, but the two concepts do not necessarily converge (Supreme Court of Justice, Criminal Cassation Chamber, 2019).

Something similar can be said of repeated behaviour: one may well be prepared to tolerate occasional breaches of the general rule, resulting from the provision of the necessary space for the maintenance of socio-cultural diversity, but the conclusion may be quite different when faced with recurrent opposition to the prevailing system (e.g., the case of someone who, by not participating in society, is unfamiliar with the concept of private property, versus that of someone who resolutely orientates their life within the dominant society in accordance with their particular opposition to

that concept[2]) (Cuesta, 2004, pp. 231-232; Meini, 2007, p. 50). Such scenarios could well trigger a shift in perspective from diversity towards opposition, with the punitive consequences that this entails[3]. The fact that socio-cultural diversity and crime of conviction share the common feature of the perpetrator's divergence from the norm means that the distinction between these forms of behaviour is not so clear-cut. Thus, for example, there are those who consider that even the bona fide repetition of a socio-culturally divergent custom may undermine its compatibility with the dynamics of the dominant society, rendering it intolerable to the latter, even when pluralism is taken into account (Carnevali, 2007, p. 23; Silva, 2006, p. 118; Tamarit, 2013, pp. 3-4). This distinction stems from the fact that those who act in accordance with their own socio-cultural norms are simply behaving in line with their worldview, without seeking to alter the dominant norm; their conduct is understood as an expression of coexistence rather than confrontation, and should therefore not be subject to criminal censure. The criminal by conviction, on the other hand, does not act in accordance with a socio-cultural vision different from the hegemonic one, but rather, as part of the latter, they seek to change some of its tenets through channels other than those enshrined within it for that purpose; this is what explains the judgment of criminal censure in their case.

Having clarified these points, we will now address the following question in depth: what is the basis for the absence of criminal intervention – in the form of punishment or even security measures – in cases where socio-cultural diversity is recognised?

Socio-cultural diversity as grounds for non-criminal responsibility

In Colombia, article 33 of the Criminal Code provides that "a person is not criminally liable if, at the time of committing the unlawful act, they lacked the capacity to understand its unlawfulness or to act in accordance with that understanding (…) due to socio-cultural differences". This provision was examined by the Constitutional Court and, in order to bring it into line with the principles underpinning the 1991 Constitution (particularly pluralism), the Court ruled:

2 A recurring example of the difference between diverse and hegemonic cultures is that of entering the age at which women become sexually active; discussed in Valle y Agüero San Juan, 2009, pp. 34 y ss.

3 In this regard, Roxin's distinction between an error regarding the validity of the rule and crime of conviction is fundamentally sound (Roxin, 1997, pp. 867–868 and 873). As he vividly puts it: 'And to the offender by conviction in his right mind who pays no heed to a prohibition, the rule speaks to him, even if he does not listen!' (Roxin, 2017, p. 20). Undoubtedly, the socio-cultural diversity inherent in a pluralist society may lead to tolerance of certain breaches of the hegemonic legal order resulting from attempts to preserve the special legal order. But that very desire for coexistence between the two legal orders must lead to the exclusion, from the scope of application of this concept, of deliberate opposition to the validity of a society's constitutional order by those who simply do not participate in it for reasons other than their sociocultural diversity. Such cases are better suited to the defence scenario described by Jakobs (2008), in which "it is not necessary to require more than the recognisability of conduct that undermines the given legal order (or, in the case of base motives: that undermines it in a qualified manner)" (p. 133; similarly Jakobs, 2012, p. 204), for, as Silva rightly points out, "for the error of prohibition to be excluded, it is sufficient that the unlawfulness be known, without any need for the subject to also intend the unlawfulness of their conduct" (Silva, 1987, p. 652).

> To declare the term "socio-cultural diversity" in article 33 of Law 599 of 2000 (Criminal Code) to be constitutional, subject to the following two conditions: i) that non-imputability does not stem from an incapacity but from a different worldview, and ii) that in cases of invincible error of prohibition arising from that cultural diversity, the person must be acquitted and not declared non-imputable, in accordance with the provisions of this judgment. (Constitutional Court, 2002)

The key legal issue that the Court had to address in the decision in question arose from the apparent potential for discrimination that could be inferred from a reading of article 33, since a general declaration of non-criminal liability in all cases involving socio-cultural diversity could lead to the exclusionary treatment of a section of the population. The fact is that if a non-indigenous citizen commits an unavoidable error of prohibition, they should be acquitted on the grounds of lack of culpability; conversely, if an indigenous person's divergent worldview leads them to commit the same error, a literal reading of the provision would require them to be declared not criminally responsible and subject to the consequent imposition of a security measure. To avoid this, the Constitutional Court clarified that, regardless of whether or not a defendant is from a diverse background, any personally unavoidable error of prohibition must lead to the exclusion of culpability and, therefore, to acquittal.

Under the constitutional framework established by the Court, the concept of non-accountability on grounds of sociocultural diversity does not stem from an individual's inability to understand the dominant norm and behave in accordance with it; rather, as part of a sociocultural environment that is diverse yet compatible with a multicultural conception of the State, the individual is recognised as having the freedom to define themselves in a manner different from that imposed by the dominant norm.

Although this decision represented a significant step forward in ensuring the appropriate criminal-legal treatment of this complex phenomenon, following this ruling, sociocultural diversity has remained an unusual basis for non-criminal liability that does not meet the legal definition of this concept, nor does it entail the legal consequences ordinarily imposed in such cases. Below is a brief overview of the history of this debate in Colombia, followed by an examination of some of the main issues that remain in the current state of the discussion.

The inclusion of 'socio-cultural diversity' as grounds for non-imputability is the result of a complex historical and doctrinal process. Before Law 599 of 2000 expressly enshrined it as grounds for non-imputability, legal doctrine and case law had begun to address these cases from the perspective of psychological immaturity. This was because some 20th-century criminal codes –those of 1936 and 1980– made no explicit mention of indigenous peoples or other diverse populations. Consequently, their legal treatment came to resemble that of individuals with mental disorders and, in particular, associated them with a mental incapacity stemming from cultural backwardness.

At the beginning of the last century, the 1936 Criminal Code included exceptions –in articles 23 and 29– to the general principle of criminal liability set out in article 11 for all residents of the

national territory, based primarily on mental disorders and intoxication[4]. Although the legislature did not refer to them as such, legal scholars have interpreted these exceptions as grounds for excluding culpability and criminal responsibility (Arenas, 1964, pp. 176 ff.; Estrada, 1975, pp. 96 ff.; Gaitán, 1963, pp. 128 ff., 164 ff.; Mesa, 1962, pp. 239 ff.). Within this legal framework, the absence of explicit cultural grounds led to the indigenous person being equated with someone who was alienated, immature or of 'feeble-minded' (Pérez, 1959, p. 210[5]), reinforcing a paternalistic and discriminatory approach. Similarly, case law treated indigenous people as incapable of navigating the law, generally taking the view that the legislation of 'civilised' people was not designed for them[6].

The 1980 Criminal Code also failed to include an explicit reference to cultural diversity. On the contrary, it retained the grounds for non-criminal liability centred on psychological immaturity and mental disorder (Criminal Code, Decree-Law 100 of 1980, Art. 31), which meant that attempts had to be made to classify the situation of indigenous people under one of these categories. In fact, on this occasion, the legislation even expressly provided for the "indigenous person not criminally responsible due to psychological immaturity" (Art. 96) as a subject of the special measure of "reintegration into their natural environment". Thus, during the period in which this code was in force, the Supreme Court of Justice largely maintained the paternalistic and psychologistic approach it had developed under the previous legislation (Supreme Court of Justice, Criminal Cassation Chamber, 1984). However, even then a significant shift in thinking was evident which, decades later, would take concrete form in the concept of socio-cultural diversity:

> If one seeks to treat every uncivilised indigenous person as psychologically immature, one falls into a distorted view of reality; for the fact that an indigenous person's cultural development differs from that of so-called civilised man does not in any way justify asserting that the former is immature in the strict sense of the word. It is simply a matter of two different worldviews and, ultimately, the existence of two distinct value systems, neither of which

4 Colombia. Law 95 of 1936. Art. 11: "Any person who commits an offence under criminal law shall be liable, except in cases expressly provided for in this Code (…)"; Art. 23: "No liability shall arise where the act is committed: 1. Due to (…) a state of hypnotic or pathological suggestion (…) [or] due to ignorance that the act is prohibited (…)", and Art. 29: "Where, at the time of committing the act, the perpetrator is in a state of mental derangement or chronic intoxication caused by alcohol or any other substance, or suffers from a serious mental disorder, the penalties set out in Chapter II of Title II of this Book shall apply".

5 In contrast, Reyes, 1964, pp. 351–352: '(…) he is an individual who turns to crime driven by mechanisms of social maladjustment; he has lived within a unique civilisation and, when confronted with ours, he readily clashes with its traditional principles (…). Such reasons – and not the fact that he is of unsound mind – lead us to consider him not criminally responsible (…)".

6 Particularly noteworthy is the Supreme Court's judgment of 14 May 1970 (CSJ), M. P. José María Velasco: "Our laws, which are designed for the modern world, do not apply to it unless they expressly take account of its specific circumstances". The current Criminal Code lacks the legal and conceptual frameworks to address the situation of savages. It does, however, have them for normal, civilised people. (…) Section 1 of Act 89 of 1890 is unequivocal in its provisions. It establishes a special regime for savage criminals and, broadly speaking, divides them into three main categories: savages, semi-savages and civilised people. General legislation applies only to the latter. (…) "The drafting committee for the 1936 Code was unaware of its existence [but] there is no contradiction whatsoever between the provisions of the Penal Code and Act 89 of 1890, by virtue of the exclusion of certain matters." Cfr., reserved judgement regarding the position taken by Justices Luis Carlos Pérez and Luis Enrique Romero Soto, who, despite sharing "several views on the primitive mentality" of indigenous peoples, refrained from denying them an "ethical personality" altogether".

> should be given precedence, except as a result of imposition by those who hold the real levers of power. (Supreme Court of Justice, Criminal Cassation Chamber, 1984; Reyes, 1987, pp. 200-201)

Nevertheless, it was not until the turn of the century, with the enactment of the 2000 Criminal Code (Law 599 of 2000), that a reference to socio-cultural diversity was included in substantive criminal law for the first time. This reflected the views of various voices which, as early as the 1980 Code, had been calling for explicit recognition of this highly complex legal phenomenon. In particular, following the paradigm shift brought about by the 1991 Constitution, which enshrined socio-cultural pluralism as a cornerstone of the Colombian State, the silence of criminal legislation had become untenable.

However, the current wording of article 33, which includes the concept of 'socio-cultural diversity', was not originally envisaged in the bill submitted to Congress in August 1998. On the contrary, the history of this expression lies hidden within the reports, committee papers and debates that accompanied the bill as it made its way through the legislative process to become law. Along this path, one can observe the shift in thinking that would mark the evolution of the legal-criminal approach, from the traditional concept of incapacity to the form it takes today. It is therefore worth briefly reviewing the main 'milestones' that led to the current system.

The explanatory memorandum for what would become Bill 040/98 (Senate) – 238/99 (House of Representatives), which was subsequently enacted as Act 599 of 2000, does not say much on this matter. It merely states that "g) With regard to criminal non-imputability, the current provisions are retained. However, a new element giving rise to this category is enshrined: 'socio-cultural maladjustment'" (Congressional Gazette, 1998, p. 6).

Although the initial wording of article 33 was groundbreaking in introducing this new basis for non-criminal liability and was undoubtedly revolutionary at the time, it was not long before several voices were raised in opposition to the term used, on the grounds that it ran counter to the pluralism that inspired the 1991 Constitution. Those who thought thusly were not mistaken: whilst the proposed text represented progress in recognising the need for a new legal framework, from its very inception, the provision reproduced certain historical biases that would lead to the very same discriminatory treatment it was intended to overcome.

Consequently, as early as the first reading in the Senate committee, the term 'maladjustment' was replaced by socio-cultural 'non-adaptation'. As the legislators explained, this was because

> (…) The first expression does have a somewhat negative connotation in everyday language. By contrast, the proposed expression simply refers to an individual who does not understand the values of a particular culture, but who is by no means at a disadvantage in relation to it. (Congressional Gazette, 1998, p. 66)

This change was reflected in the proposed wording of article 33 (which was amended to read 'psychological immaturity, mental disorder or socio-cultural non-adaptation') and was brought into line with article 73 on measures ('reintegration into one's own cultural environment'), where 'maladjustment' is also replaced by 'non-adaptation' to ensure consistency throughout the text[7].

However, the wording that was ultimately adopted stemmed from the debate that took place within that committee. Consequently, the first instance in which the term 'socio-cultural diversity' appears in writing is in the text approved by the First Committee of the Senate (Congress Gazette, 1999, p. 3). According to the account given in the report for the second debate before the Senate plenary, this change was motivated by the idea of replacing a label that suggests a deficit ("maladjustment" / "inadaptation") with one that positively acknowledges difference ("diversity") and emphasises otherness without pathologising it. Given the historical significance of the considerations expressed therein, and as they constitute the authentic explanatory memorandum of the current legislation on this point, they are cited *in extenso*:

> Justification. Article 1 of the National Constitution establishes the pluralistic nature of our political and legal system, which obviously refers not only to the political aspect, but also, amongst others, to the cultural aspect. This is evident from the provisions of articles 7 and 246, the former establishing, as a fundamental principle, the recognition and protection of the nation's ethnic and cultural diversity; and the latter, the principal instrument for the protection of ethnic diversity: the autonomy of indigenous jurisdiction.
>
> However, it is clear and self-evident that the protection of cultural diversity does not only encompass that afforded to different ethnic groups, but extends to the broader scope of cultural diversity. (…).
>
> Consequently, the proposed framework is not intended solely to address issues arising from the conflict between indigenous cultures and what might be termed the 'majoritarian' culture, but also to address any other issues that require the necessary recognition of (…) 'socio-cultural diversity'.
>
> In practical terms, we are dealing here with the legal-criminal concept known as 'lack of criminal responsibility', which, under article 33 of the draft bill, is defined as the inability to understand the wrongfulness of one's behaviour.
>
> (…)

7 It is worth noting that the report in question expressly invokes Judgment T-496 of 1996 (Constitutional Court, judge Carlos Gaviria) to warn that the cultural distinctiveness of indigenous peoples cannot be equated with "psychological inferiority" or "mental disorder", and that legal language must not perpetuate stigmatising labels such as "cultural mental retardation". The jurisprudential reference operates as the constitutional foundation for a significant semantic and evaluative shift: abandoning the category of "maladjustment", laden with connotations of inferiority, in favour of "non-adaptation", which is more descriptive and less pathologising, according to the judge. This is something that the Constitutional Court (CC) continues to uphold today, nearly three decades later (cf. CC, Judgment SU-512 of 2024).

> It is true that the Constitutional Court has stated that "the prosecution of an indigenous person on the grounds of non-criminal responsibility is not only inappropriate, but also incompatible with the philosophy of the 1991 Constitution" [sic]; however, this should not be understood as arising from the regulations currently in force, since article 96 (3) of Decree 100 of 1980 addresses the issue of the non-imputability of indigenous persons based on the perspective of psychological immaturity. The reason for this is that, under the current Criminal Code, there are only two categories that give rise to non-imputability: mental disorder and psychological immaturity (Article 31 ibid.).
>
> (…)
>
> However, it must be made clear that the principle of non-criminal liability in such cases only applies when the offences in question are attacks on legal interests closely linked to fundamental rights relating to human dignity and which form part of the core of the system of values, for otherwise it is obvious that we would be faced with situations in which any individual who has not had the opportunity to access the values of the culture (Article 70 of the Constitution) might find themselves, in which case it is appropriate to consider this an error within the terms of article 32(8) and (9) of the draft.
>
> We would be dealing with what might be termed a 'culturally conditioned' error, which can be recognised in the case of an individual immersed in the mainstream culture, but which, for reasons of the principle of equality, must also be recognised in cases of socio-cultural diversity. Note how the bill, in article 9(2), explicitly established the possibility of recognising grounds for exemption from liability for those not criminally responsible. (Congress Gazette, 1999, pp. 15-16)

The text, which sets out the 'legislative intent', in addition to the arguments expressed therein in the first person, is full of references to the case law of the Constitutional Court. In this respect, it can be said that, at its core, this change was a constitutional initiative. Congress expressly stated that it was following the lead of important judgments such as T-254 of 1994, T-496 of 1996 and C-139 of 1996, which reflected the shift in the constitutional paradigm of 1991 and were among the first to develop the implications of the adoption of socio-cultural pluralism in criminal legislation. However, as will be seen, in the Constitutional Court's view, this interpretation by the legislature itself was not unambiguous in the drafted text and, for that reason, it needed to be clarified through a ruling of conditional constitutionality.

In Judgment C-370 of 2002, the Constitutional Court identified several problems with the traditional application of the category of non-imputability to people from different cultures. In its analysis, it began by acknowledging the 'pejorative bias' inherent in the concept of non-imputability, which has historically been associated with individuals with impaired capacities. Applying this label indiscriminately to people solely on the basis of their cultural affiliation implies a "judgement of

inferiority" against their culture, treating it as inferior or deficient, which is diametrically opposed to the constitutional principles recognising the equality and dignity of all those living in the country (Article 70 of the Constitution). In this regard, it warned that the criminal-legal approach adopted by the legislature in 2000 ran the risk of leading to a form of "criminalising cultural diversity" (Constitutional Court, C-370 of 2002). In the Court's view, rather than recognising the validity of other worldviews, the criminal justice system treated them as a pathology or a condition requiring intervention, thereby contravening the State's duty to protect the nation's cultural heritage.

In order to bring the legal text into line with the constitutional principle of socio-cultural pluralism, the Court ruled that it should be interpreted in accordance with two guiding principles (Constitutional Court, C-370 of 2002). Firstly, that in such cases, non-criminal responsibility does not imply incapacity, but rather a different worldview. This sought to mitigate pejorative bias by establishing that a declaration of non-imputability on these grounds does not mean that the person is 'incapable', but rather that the judge finds that they possess a different worldview. In this scenario, any measures taken are not intended for curative or rehabilitative purposes, but exclusively for protection and guardianship. Secondly, this provision must be interpreted on the basis of the primacy of error of prohibition, which gave rise to a rule of precedence: when the perpetrator acts under an invincible error regarding the unlawfulness of their conduct, arising from their culture, the correct legal remedy is acquittal, with non-imputability remaining a residual concept for other cases.

This ruling marked a transformation that went beyond constitutional case law. The line of reasoning, which had begun very early on with judgments T-254 of 1994, T-496 of 1996 and C-139 of 1996, and was subsequently consolidated by C-370 of 2002, would be developed through numerous judgments in the years that followed (Constitutional Court, judgments C-591 of 2005; T-778 of 2005; T-126 of 2009; T-617 of 2010; T-002 of 2012; T-097 of 2012; T-921 of 2013; C-463 of 2014) and, even today, supplemented by some recent decisions that have followed the path already trodden (e.g., Judgment SU-512 of 2024). As a result, it can be said that the legal system currently provides for three different avenues for dealing with criminal matters involving socio-culturally diverse individuals (Supreme Court of Justice, Criminal Cassation Chamber, 2023[8]): special jurisdiction – e.g., over indigenous peoples – which supersedes the jurisdiction of the ordinary courts; exemption from criminal liability on grounds of socio-cultural diversity; and acquittal on the grounds of an unavoidable error of law arising from cultural diversity.

A recent development in this evolution is Law 2197 of 2022, which added article 33A to the Criminal Code. This provision introduced the requirement to implement "educational measures and dialogue" in cases where a person is found not criminally responsible due to socio-cultural diversity or not guilty due to a culturally conditioned error of law. These measures are in line with the Constitutional Court's call, dating back to 2002, for the use of "forms of intercultural dialogue" as an alternative to criminalisation to promote understanding between cultures (Constitutional Court,

8 This ruling sets out three requirements for a finding of non-imputability on grounds of socio-cultural diversity, citing directly Ruling C-370 of 2002: (a) a lack of understanding of the unlawfulness of the act or an inability to form such an understanding (distinguishing cases involving a mistake as to the law from those of non-imputability); (b) belonging to a culture with its own environment; and (c) that culture possessing recognised authorities.

C-103 of 2023). Although a sub-paragraph of that article provided that such measures could not be applied in cases of recidivism, that provision was declared unconstitutional by Judgment C-014 of 2023, for violating the constitutional principles of culpability and ethnic and cultural diversity; as, in the Court's view, it created a "regime of strict liability and criminal law based on authorship" that denied the possibility of assessing the specific circumstances and the mental state of the individual at the time of committing a new offence. With this ruling, the Court reiterated, more than two decades later, that the considerations of the primacy of pluralism and respect for divergent self-determination that inspired Ruling C-370 of 2002 and shaped the current interpretation of the positive law remain just as valid.

As can be seen, the current legislation is the result of a transition from a paternalistic model – which equated indigenous people with psychological immaturity – towards a model of legal pluralism in which cultural diversity is not viewed as a disability, but as a distinct form of self-determination. Despite all its advances, the current model is not without its problems. The main issue is that socio-cultural diversity is the only grounds for non-imputability that does not meet the positive legal definition of the term. Equally significant is the fact that it does not entail the consequence that a declaration of non-imputability would ordinarily entail: the imposition of a security measure.

Regarding the first point, it is clear that non-imputability on grounds of socio-cultural diversity does not stem from the fact that the perpetrator "at the time of committing the typical and unlawful act, lacked the capacity to understand its wrongfulness or to act in accordance with that understanding" (which is the definition of non-imputability given in article 33 of the Criminal Code). Since, in these scenarios, it is the person's divergent worldview that prevents them from understanding the wrongfulness of their actions, it is clear that this should not be validly considered a form of non-imputability, because these are not cases in which the person has a reduced capacity to understand the wrongfulness of their behaviour, or a reduced capacity to adjust their conduct in accordance with that understanding. In such situations, the person's judgement regarding the lawfulness of their conduct is based on a socio-cultural framework that differs from the dominant one, leading them to regard as lawful that which, from the perspective of the prevailing culture, is unlawful insofar as this different understanding does not stem from an incapacity on the part of the person engaging in the conduct, but rather from the (socio-cultural) frameworks within which they construct it. It could therefore be argued that this corresponds more closely to that which prevailing legal doctrine typically addresses through the concept of 'error of prohibition'. However, if these hypotheses do not fit the definition of non-imputability set out in the Colombian Criminal Code, their place within criminal theory should be different.

On the other hand, under current legislation, the standard consequence in cases where a person is found not criminally responsible is the imposition of a security measure aimed at protecting society, as well as the treatment, supervision and rehabilitation of the person concerned (Criminal Code, 2000, Art. 5). However, as noted earlier, the Constitutional Court has established a radically different regime of consequences for those deemed not criminally responsible on grounds of socio-cultural diversity. To begin with, Ruling C-370 of 2002 made it clear that a person cannot be 'cured'

or 'rehabilitated' of their culture, as this would constitute an attempt at homogenisation contrary to the Constitution; on the contrary, state intervention pursues 'exclusively, in these cases, the aim of protecting and safeguarding those who are culturally diverse'. For this reason, it also declared the security measure of 'reintegration into one's own cultural environment' (Constitutional Court, Judgment 591 of 2005) (Penal Code, 2000, Art. 73) to be unconstitutional, which meant that, for two decades, there was no clear legal consequence for such cases in Colombia, as the other measures provided for in general terms – admission to a psychiatric institution, admission to a correctional facility and probation (Criminal Code, 2000, Art. 69) – are not compatible with the aforementioned constitutional considerations.

To fill this gap, article 33A was incorporated into the Colombian Criminal Code, which provides for "educational and dialogue-based measures", on the basis of which regulatory provisions would be issued which, in the opinion of the Constitutional Court, would enable the practical implementation of these measures (Constitutional Court, Judgment C-103 of 2023). Regardless of whether such regulations are ever produced – to date, they have not been – the question is whether, in a country that constitutionally recognises multiculturalism, a person should be penalised for regarding their conduct as lawful in accordance with the socio-cultural norms of their community, when these do not correspond to those of the dominant culture. For, although the educational measures and dialogue envisaged by this provision may appear to be non-intrusive mechanisms, their condescending nature does not detract from their punitive character. Consequently, their imposition entails a censure of the interpretations a person makes regarding the lawfulness of their conduct based on socio-cultural guidelines that are constitutionally recognised as legitimate.

The Constitutional Court's ruling that the provision of article 33A of the Colombian Criminal Code—which stipulated that these security measures should not be applied to those 'not criminally responsible due to socio-cultural differences' who re-offended against the same legal interest—was unconstitutional, does little to clarify the matter either. To begin with, the decision is based on the assumption that the provision in question violated the principle of culpability, which implies acknowledging that those not criminally responsible act with culpability and are therefore criminally liable. These conclusions are incompatible with the widely held majority view, which understands criminal accountability as the first element of culpability (leading to the absence of culpability when accountability is absent), and affirms the criminal irresponsibility of those deemed not criminally accountable. If, with regard to those deemed 'not criminally responsible due to socio-cultural diversity', it is necessary to bypass the finding of culpability as a prerequisite for declaring them responsible, then they are being treated as persons from whom it is expected that they will adapt their conduct to the requirements derived from prohibitive rules; that is to say, they are being treated as criminally responsible.

It would seem, therefore, that in Colombia today, the criminal treatment of socio-cultural diversity generally does not fall within the definition of the concept of non-imputability, nor does it have clear legal consequences. These difficulties highlight the inadequacy of approaching the legal treatment of socio-cultural diversity through the lens of non-imputability, and underscore the need to reassess the place occupied by the study of this phenomenon within substantive criminal law theory.

Proposal

Any analysis of culpability always presupposes a prior determination that the conduct in question is blameworthy, in the sense that it can be classified as typical and unlawful, as wrongful, or as objectively attributable to its perpetrator. Based on this framework, the first thing to be analysed in relation to the behaviour exhibited by those often referred to as 'not criminally responsible due to socio-cultural diversity' is whether such behaviour can be classified as creating a legally reprehensible risk that materialised in a breach of a prohibitive rule.

Assessing whether such actions are compatible with acceptable risk is based on the assumption that those who carry them out do so in the course of fulfiling a social role; this is the criterion used to determine whether or not a particular behaviour forms part of acceptable risk. This initial clarification is important because it allows us to rule out the possibility of considering these individuals as not criminally responsible, since this latter condition should not be equated with a social role (Reyes, 2024, pp. 257–258). Whilst a kleptomaniac is not expected to behave in accordance with their condition as such (taking possession of another person's movable property is not a permissible risk derived from their 'role' as a kleptomaniac), it can be said that a person belonging to a socio-culturally diverse community—as opposed to the majority—is expected to behave in accordance with their social role. In such cases, as in all those relating to this first level of behavioural analysis, there are limitations arising from concepts such as special knowledge and the principle of trust.

Given that socio-cultural diversity is permissible within the limits that allow for the existence of a multicultural state, an initial response to the problem under consideration is that behaviours that fall within these parameters and conform to the norms inherent to the worldview of their socio-cultural context should be regarded as manifestations of permissible risk.

However, there may be situations in which their behaviour is considered to create a legally objectionable risk, leaving open the question of whether it can be regarded as an act constituting a breach of a prohibitive rule. This would be the case of someone who – contrary to the norms of their socio-cultural environment – fails to seek authorisation before marrying a second person, conduct which in their environment is reprehensible as civil disobedience, but is not criminally punishable as bigamy. In scenarios such as this, the issue is not whether that conduct forms part of the permitted risk, but whether the legally reprehensible risk created by the perpetrator materialised in the outcome (breach of the norm in force within the dominant socio-cultural environment). For those of us who consider that knowledge of the prohibition forms part of the realisation of the risk in the result (Reyes, 2024, pp. 253 et seq., 2026, pp. 93–95), the invincible ignorance of the rule that, in the dominant culture, penalises bigamy (the error of prohibition) would eliminate objective imputation due to the absence of the second of its requirements. Those who, in accordance with the majority view, continue to regard knowledge of the prohibition as one of the elements of culpability, would also resolve this case by recognising an error of prohibition, except that this would not eliminate objective imputation but rather culpability.

There remains a final category of cases in which the conduct of a person belonging to a non-dominant socio-cultural community may be regarded as creating a legally reprehensible risk that materialises in the outcome. In such scenarios, it remains to be assessed whether their conduct—which is 'unjust' or 'objectively attributable' to them—warrants censure from the perspective of culpability.

Mayer rightly argued that culpability is a judgement concerning 'the perpetrator's relationship with the cultural norms at stake', such that 'the question of culpability can only be resolved by taking these relationships into account' (Mayer, 2000, p. 125). If this is the case – as indeed it appears to be – the solution to this final group of cases of so-called 'non-imputability due to sociocultural diversity' should find its positive content in the affirmation of pluralism as a cultural norm, which requires the respective behaviour to be compatible with life in society[9]. Based on this perspective, the absence of punishability in these cases would not stem from a deficiency in the individual, but from a characteristic of society. Put another way: the absence of punishment in cases of conduct arising from socio-cultural diversity should be grounded in the recognition that the way in which the perpetrator has defined themselves is not incompatible with a pluralist society.

This means that a person may well be aware of the prohibition imposed by the dominant society (which would allow one to form an objective judgement of culpability in relation to it[10]) and yet, in certain contexts, to be allowed to behave in accordance with their own values. The absence of punishment in such cases is not a concession by the dominant culture in the face of the individual's inability to conform to its norms. Rather, it is an affirmation that the principles by which that person guides themselves in their interaction with others, even if they do not coincide with those recognised as dominant by our legal system, must be compatible with the way in which a pluralistic society functions[11]. For this reason, socio-cultural diversity is not a phenomenon that should be studied by constantly resorting to error. Nor, however, should it be resolved, as has already been explained, by declaring the individual not criminally responsible. On the contrary, this basis for exemption from criminal responsibility – in cases where it applies – is based on an assessment of whether or not the decision taken by the perpetrator is compatible with the general norms governing life in society.

9 On the interaction between culture and society — with regard to the compatibility or otherwise of the determination of wrongfulness with life in society as the foundation of culpability — it is instructive to read Mayer alongside what Dundes provocatively and very succinctly argues (2004, p. 14): "Culture differs from society in that culture is an abstraction, whereas society is the aggregate of individuals within the community. This means that culture is invisible and society is visible".

10 This is because knowledge of the prohibition forms part of the assessment of objective culpability, specifically in the analysis of whether the risk materialised in the outcome, and not, as the majority of legal scholars have held, of the assessment of guilt or personal culpability. In detail: Reyes, 2024, pp. 253 y ss.

11 This is similar to what Meini has argued (2008, p. 41): "Full respect for cultural diversity therefore entails acknowledging that it is not even reasonable to expect someone who lives by a different set of values—one just as legitimate as our own—to understand why something we consider unlawful is, in fact, unlawful." However, the solution based on the 'error of prohibition' advocated by that author prevents greater closeness. We, on the other hand, believe that the issue is not that one cannot be expected to understand the values of the other, but rather that, regardless of whether one understands them or not, society affirms itself through the recognition of those differences. For this reason, the approach proposed here is more in line with what the author himself, in a later publication, put it as follows: "Non-imputability on grounds of cultural diversity does not imply any defect, unless one is prepared to regard as a defect the fact that the legal system does not intend its criminal laws to be binding on those from outside its own culture." Far from being a flaw, it is a virtue. Even if the individual, in accordance with their psychological makeup, possesses the capacity to understand the unlawful nature of the act, it is possible that, in the specific case, such understanding may be ruled out simply because they come from a different culture.

In other words when the perpetrator's conduct stems from an affirmation of the pluralism upon which society is organised, it can hardly be said to be incompatible with that pluralism. The absence of intervention by the *ius puniendi* in such cases does not stem from any incapacity on the part of the individual, nor from the assumption that those who do not participate in a society necessarily disregard the values that govern it, but rather from the recognition of the rules that characterise a pluralist society. Indeed, in states that recognise legal pluralism, it must be accepted that, at least to some extent, the rules governing one section of the population need not be observed by everyone[12]. It follows based on the above that there will be some divergent decisions that must be accepted by society as an expression of this principle; that is to say, there will be occasions when a person's decision, despite formally contravening the dominant norm, will not be incompatible with life in society.

This suggests that, with regard to those who are socio-culturally diverse, the same dogmatic framework must apply as for any other citizen (Wanderer & Connors, 1999, p. 870): only if their conduct can be criticised from the perspective of objective imputation, and if their actions prove incompatible with the principles governing life in society, is it legitimate to consider the intervention of criminal law in light of the aims it pursues. This does not mean, of course, that all behaviour motivated by socio-cultural diversity must be tolerated (beyond the limits commonly accepted in Anglo-Saxon legal doctrine regarding the *cultural defence* exemption; *vide* Carnevali, 2007, pp. 16 and ss.; Dundes, 2004, pp. 185 and ss.; Goldstein, 1994, pp. 140 et seq.; Kroslak, 2009, pp. 9 and ss.; Lambelet, 2001, pp. 982 and ss.; Maguigan, 1995, pp. 36 and ss.; Merle, 2006, pp. 7 et seq.; Olaizola, 2018, pp. 1-30; van Broeck, 2001, pp. 7 and ss.; Wanderer & Connors, 1999, pp. 830 and ss.). A society may well be prepared to accept that a person be put to death by stoning, provided that person belongs to a community governed by a different culture, but never one of its own members (not even when that member has offended someone from that community) (Constitutional Court, judgments T-496 of 1996; SU-510 of 1998; T-552 of 2003; T-617 of 2010; T-685 of 2015; T-196 of 2015; T-438 of 2020). Another society, in turn, may consider that female genital mutilation is, in any case, incompatible with the essential core of the principles governing life in any society (Carnevali, 2007, p. 20) and always intervene (regardless of the cultural background of the perpetrator or the victim) (Asua, 2004; Herrera, 2002; Pérez del Valle, 2012, pp. 98 et seq.; Sanz, 2014; Silva, 2013b, pp. 1–5; Vázquez, 2010, pp. 33 et seq.).

In this last group of cases, the specific scope of the exclusion of criminal liability on grounds of socio-cultural diversity will depend on the extent to which a society is willing to tolerate breaches of its own legal system. What is at stake in this discussion is not an individual aspect of the perpetrator, but the very way in which life in society is conceived. Therefore, it is not correct to analyse this from the perspective of non-imputability; rather, this issue must be addressed in such a way that

12 This is something that has already received some recognition in case law. Cf. Constitutional Court, Judgment T-778 of 2005: "As established by case law, it is necessary to make cultural exceptions to general rules (…)". Supreme Court of Justice, Criminal Cassation Chamber, 2023: "(…) in some cases, the special conditions of an indigenous culture may affect the analysis of the elements of the rule", among others. For a detailed discussion of the debate between legal relativism and the acceptance of a universal legal grammar: Silva, 2002, pp. 85–87.

it expresses not only a judgement on the individual, but also – and perhaps to a greater extent – a judgement on the way in which the law operates in each society.

In short, the assessment of the criminal relevance of the behaviour of a socio-culturally diverse person differs in no way from that carried out in relation to any other criminally responsible individual. The analysis must begin with objective imputation, taking into account their role within a multicultural society, and culminate in verifying whether the perpetrator has defined themselves in a manner that is not incompatible with a pluralistic society, which is what the judgment of culpability ultimately amounts to.

Discussion

The findings of the preceding analysis enable us to frame the issue in simpler terms and, in doing so, to clarify what does – and what does not – explain the absence of punitive intervention in cases of culturally motivated behaviour. In short, the Colombian legal system currently presents an ambiguous picture, with a dogmatic response and a practical approach that remains unstable. This instability is evident in four key areas:

Firstly, the term 'non-accountability due to socio-cultural diversity' is conceptually misleading. Non-accountability, in its traditional understanding, presupposes a significant deficit in understanding or self-determination; by contrast, the constitutional framework itself is based on the premise that there is no incapacity here, but rather a different worldview. The language of non-imputability, even when attempts are made to redefine it, continues to carry connotations of 'disability' and tends to turn cultural difference into pathology. The consequence is an internal tension: a category designed for the 'incapable' is used to describe cases in which the problem is not a deficiency on the part of the individual, but a conflict of norms within a pluralistic society.

Secondly, the jurisprudential rule regarding the primacy of culturally conditioned, unavoidable error clarifies that a significant proportion of cases must be resolved by acquittal, not by lack of criminal responsibility. This reduces lack of criminal responsibility to a residual category, but forces us to recognise that the core of the phenomenon cannot depend exclusively on error. In other words: there are cases in which the individual may be aware of the hegemonic prohibition and, even so, the pluralist order may require tolerance of certain divergent determinations; and there are others in which invincible ignorance removes blame. Confusing these two levels prevents clear conclusions from being drawn and leads to erratic solutions.

Thirdly, the system has revealed a problem with regard to legal consequences. If it is not permissible to 'cure' a culture, and if the security measures generally provided for do not address this phenomenon, the category of non-imputability leaves the judge without a coherent set of responses. Article 33A attempts to fill this gap by introducing "educational and dialogue-based measures", but the crucial point is that – however non-invasive they may seem – such measures continue to function as a punitive reaction and, therefore, entail a form of censorship against interpretations of

legality constructed on the basis of cultural norms that the constitutional order itself recognises as legitimate. The problem is not merely "which measure to apply", but whether any measure should be applied at all when the basis for non-punishment is not incapacity, but the pluralistic structure of coexistence.

Fourthly, these findings lead to a key theoretical conclusion: the most consistent way of explaining the phenomenon is not to artificially extend the scope of non-imputability, but rather to address it within an ordinary framework of imputation and culpability, guided by the principles of pluralism and its limits. In practical terms, the analysis can be organised along three lines of inquiry, which also clarify the findings and avoid ambiguities:

1. Permissible risk (objective attribution): where the conduct falls within the margins of tolerance typical of a multicultural society and is consistent with the perpetrator's social role within their community, no criminally reprehensible risk is created (Reyes, 2024).

2. Unavoidable error of law: where the conflict arises from a blameless ignorance of the prevailing legal rule, the prevailing legal doctrine and Colombian case law exclude culpability; however, this scenario could also lead to an acquittal on the basis of an objective assessment of criminal liability if it is considered that the perpetrator's knowledge of the prohibition is one of the prerequisites for the risk to materialise in the outcome (Reyes, 2026).

3. Excuse on grounds of compatibility with pluralism: even in the remaining cases, where an injustice exists and the perpetrator is fully aware of the prohibition, punitive intervention by the State should depend on whether or not its specific determination regarding the perpetrator is compatible with the fundamental values that define pluralistic coexistence. Here, the reason for non-intervention lies not with the individual, but with society: to what extent does pluralism require tolerance of certain breaches of the hegemonic order that are the result of determinations inherent to a divergent worldview (Díaz Arana, 2025).

This framework offers two key advantages in terms of the clarity of the findings. On the one hand, it prevents the debate from swinging between 'error' and 'non-imputability' as if they were interchangeable labels: each approach corresponds to a different rationale for non-punishment. On the other hand, it allows us to pinpoint precisely where the limits of tolerance (the core of fundamental values) should be discussed, without pathologising the perpetrator or automatically turning the cultural conflict into a subject for compulsory treatment.

Finally, it is worth highlighting the scope of the proposal. The article does not advocate unrestricted tolerance of all culturally motivated behaviour: pluralism has its limits, and the relevant discussion concerns how those limits are justified and applied in specific cases, avoiding both the criminalisation of difference and the abandonment of the protection of fundamental legal rights. To that extent, an immediate agenda for further work – which follows from the findings – is to refine criteria for (a) identifying when a practice may be interpreted as a permissible risk; (b) determining the invincibility of error in intercultural contexts; and (c) defining, with justifiable standards, the core incompatibilities that warrant criminal intervention.

Conflict of interest

No conflict of interest arose during the conduct of this academic research. We declare that we have no financial, professional or personal ties that could influence the design of the study, or the interpretation and publication of the results obtained. Furthermore, we confirm our compliance with ethical standards and principles of scientific integrity, in accordance with the guidelines established by the academic community and by this journal.

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