ROMA TRE
UNIVERSITÀ DEGLI STUDI

DOTTORATO IN DISCIPLINE GIURIDICHE

CORSO DI DOTTORATO IN DISCIPLINE GIURIDICHE

Curriculum Sistemi Punitivi e Garanzie del Cittadino

XXX Ciclo

DIRITTO PENALE

Multiculturalism and Criminal Law:
criminal responsibility and indigenous peoples in Brazil

Coordinatore:
Chiar.mo Prof. Giuseppe Grisi

Tutor:
Chiar.mo Prof. Mario Trapani

Dottorando:
Leandro Santos da Guarda

Summary

Introduction

How can cultural diversity be accommodated in the structure of criminal law? This is the central argument of this doctoral thesis. For over four years, I served as an attorney at the National Indian Foundation - FUNAI, the Brazilian agency entrusted with supporting the rights of indigenous peoples and the demarcation of their territories. This experience was determinant on my formation as a lawyer, and brought me into closer contact with issues related to the connection between legal systems and indigenous peoples' ways of life. The criminal defence of indigenous defendants, in particular, led me to undertake this research on the issues related to multiculturalism and legal system.

However, this inquiry inevitably introduced me to other questions beyond the traditional structure of criminal law, such as, for example, whether it is possible to acknowledge this cultural diversity in Brazilian criminal law or if alternative approaches are necessary. Also, issues that are beyond the strict limits of law became essential to my investigation. In this regard, for instance, the anthropological and sociological investigation of the concepts of culture and cultural identity and their

connection to the notion of human behaviour in the perspective of criminal law.

My particular work experience opened up this interdisciplinary experience. At FUNAI, I was in daily contact with the Agency's experts and anthropologists and, as a consequence, with anthropology itself. However, perhaps the most determinant stimulus was the direct interaction with indigenous individuals and indigenous peoples, which made me realize that I was so much part of the dominant culture that I could not see them at first as anything but "the Other". This background led me to study cultural diversity in a broad context, so that the query about multiculturalism was a natural path. Indeed, the otherness stresses similarities and differences and this is the basis of the construction of the idea of multiculturalism, and pluralism in general.

In fact, the idea of otherness is fundamental not only regarding the policies and theories cultivated to deal with differences, but it is also relevant in the process of construction of identity itself, either in individual or collective perspectives. In this sense, the confrontation with similarities and differences is the mechanism through which ethnicity, religious identity and national allegiances are built; a similar process to the one I experienced, which made me more aware of my relative dominant position regarding indigenous peoples in the broad national context. Actually,

as we will explore in the first chapter, unveiling this dynamic of building identities is essential to understand multiculturalism beyond empty claims of cultural recognition.

My analysis of multiculturalism is in regard to the Western democracies for two reasons: first, it was in the central democracies that the multicultural theory was developed; second, Brazil, and Latin America in general, have the liberal democracies of the developed countries as models. This analysis has the aim to make possible the comparison with the position of the indigenous peoples in the contemporary Brazil. Indeed, multiculturalism underscores the cultural differences within nation states. The notion of multiculturalism was greatly developed by the migration movements after the 60s, which increased the cultural diversity within the borders of these countries, but at the same time put into evidence the differences already present before this new social context, also highlighting the indigenous peoples' cultures and favouring their demands for recognition.

In this context of cultural fragmentation, multiculturalism, alongside cosmopolitanism, is a popular theme among intellectuals in political theory, sociology, philosophy and so on. Furthermore, in the light of the multicultural challenges, the debate concerning cultural diversity entered the law. In this vein, in my research, I

investigate, from a comparative perspective, how liberal constitutional democracies are dealing with the multicultural issues, in order to analyse the influence of the notion of multiculturalism in criminal law.

However, multiculturalism has been used in law (theory and practice) without a deep reflection about the meaning of the term and its consequences in law. We cannot just take for granted the multicultural reality in order to consider it within criminal law; in that, the fact that we have a phenomenon of cultural diversity is not a sufficient reason to conclude that cultural elements have to be considered in criminal law. The prior question is to search for a better understanding of multiculturalism itself, and the key to this comprehension is the investigation of the notion of cultural identity and its influence on human behaviour. Indeed, to understand multiculturalism, it is essential to explore the relation among ethnicity, religious identity and nationality, which are intrinsically related to the idea of culture.

The notion of culture is also the nexus of multiculturalism and criminal law. Thus, in the second chapter, my aim is to examine the dynamics between law and culture, their intersections and reciprocal influences. I do not expect to be able to give answers to the problems showed in this part, but only to acknowledge the importance for the jurist of being conscious of this fundamental dynamic. In

this regard, I will explore the misunderstandings that emerge from applying a static view of culture to the law, and how anthropological knowledge and its tools are indispensable for a proper consideration of the cultural element.

Indeed, as I mentioned the question of cultural diversity in criminal law is the central argument in my doctoral research. From a dogmatic perspective, the main issue is whether criminal law should recognize cultural motives or not. And, in the case of recognition, what should be the proper location of these motives in the criminal law structure (mens rea, actus reus, justifications, excuses, mitigation).

"When in Rome, do as the Romans do" is the expression recalled by S.M. Poulter to illustrate the prevalent inflexible approach regarding the cultural practices of the Others in criminal law. The expression has its origin in a counsel attributed to Saint Ambrose, the influential 4th century Bishop of Milan, in response to the indignation of a Christian woman when she discovered that Christians in Milan did not follow the custom of fasting on Saturdays, the norm in Rome. The Bishop advised that one should keep the custom of the Church in the place where one lives at the time: "when in Rome, do as the Romans do; when elsewhere, live as they live elsewhere."[1] Indeed, either regarding

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[1] Poulter, Sebastian. English Law and Ethnic Minority Customs. London, Butterworths, 1986. p. v.
Alison Dundes Renteln (In: The Cultural Defense. New York: Oxford

people in “diasporas” or people conquered by colonization, this has been the common approach. They should, with some exceptions, adapt to the dominant legal system.

The approaches that defy this “When in Rome” perspective represent an attempt to overcome the rigid characteristics of modern criminal law, which is linked to the Enlightenment notion of the nation-state and liberal logic of universal individualism. Actually, it is exactly this idea of universalism that is challenged by multiculturalism, so that we should question up until what point the universal values are a reflexion of the background of the majority culture. Other alternative solutions exist, beyond efforts to find a place for cultural diversity within the structure of criminal law; those, however, are not the focus of this work.

Having this framework of multiculturalism and the discussion about the relation between culture and law as a direction, my research project hypothesis is that the Brazilian model of national unity, through the idea of miscegenation, has been decisive in the way the criminal justice system sees the autochthonous peoples. The first sign of this pattern is the lack of any reference to native peoples in the three Brazilian Penal Codes (1830, 1890, 1940) and the latest reform (1984). The second indication is the

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University Press, 2004, p. 221) makes reference also to other examples of analogues proverbs. In France, "You must howl if you are among wolves.". A Bantu proverb says "The visitor of the monkey eats what the monkey eats.". And also a Sudanese one: "in the village of the one-eyed, close one eye.".

lack of criminal liability for the indigenous that have not been “integrated", meaning acculturated. And the third one is the common refusal to any consideration of cultural motives while applying the law to the indigenous individuals already “integrated”. That is, either the indigenous defendant is liable and the national law is fully applied regardless or he (or she) is not held criminally accountable.

Thus, in the third chapter, taking into account the history of the formation of Brazilian identity, I will explore the matter of Brazilian indigenous people in the national criminal law. In this regard, I will analyse how the Brazilian Penal Codes treated the question along Brazilian history, considering the conflict between the followers of the Classical and the Positivistic Schools. After this historical process, I will focus on the current discipline, referring mainly to the Higher Courts’ precedents and the international law context.

Actually, as we will explore in the third chapter, the biased ideas of the Positivistic School fit the context of intolerance in regard to indigenous peoples, present throughout the history of Brazil. However, these ideas were “imported” without taking into account the specific reality of Brazil, distorting the already problematic Positivistic perspective. This process reveals a lot in regard to the Brazilian paternalistic approach towards indigenous peoples.

Thus, in order to explore how cultural diversity could be accommodated in the structure of Brazilian criminal law, I investigate beforehand the cultural diversity in a broad and interdisciplinary context. Departing from multiculturalism, I will make an account of how the liberal democracies are dealing with the contemporary cultural diversity challenges, a path that leads to the discussion of the idea of cultural identity, specifically ethnic and religious identities confronted with national culture. In this way, considerations about the concept of culture in relation to cultural identity and human behaviour are indispensable, leading me to the anthropological perspective. This is, in reality, the link between multiculturalism and criminal law. That is, the influence of cultural allegiances in human behaviour. In this perspective, we will explore the relation between culture and law, focusing on criminal law structure.

After this broad outlook, I will come back to the initial question: indigenous peoples' cultural diversity in relation to the Brazilian criminal justice system. In this revisit, my aim is to demonstrate how multiculturalism can disclose mistaken ideas about the Brazilian national identity and about the formation of the country, in order to consider how these ideas are reflected in the Brazilian criminal law. In addition to this multicultural perspective, in the third chapter, I will use the considerations developed

in the second chapter regarding the relation between law and culture to complement this disclosing of unfounded notions about indigenous peoples that are rooted in Brazilian criminal law practice. Concluding, with this investigation, I intend to contribute to the demystification of both a criminal law isolated from culture and a reified view of cultural identity, in order to better account the particular challenges that indigenous peoples pose to Brazilian criminal law justice system.

I - Multiculturalism

1. Origin and meanings

In 1903, the civil rights activist, historian and sociologist W.E.B Du Bois affirmed that "the problem of the twentieth century is the problem of the color-line."[2] Looking back to the twentieth century, we have no doubt that his prediction was confirmed. In 2004, more than one century later and contrary to early prognoses of cultural uniformization,[3] Tariq Modood[4] claimed that multiculturalism is "a prime candidate for 'Themes of the Twenty-First Century". Although differing in essence, these two questions are more intertwined than a first glimpse would suggest. Colour and ethnicity seem to remain as defining concepts as

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[2] Du Bois, W.E.B. The Souls of Black Folk. 1903. Actually, the concept was first introduced in a lecture at the third annual meeting of the American Negro Academy in 1900 (cf. Du Bois, W.E.B. The Problem of the Color Line at the Turn of the Twentieth Century: The Essential Early Essays. US: Fordham University Press, 2014. Accessed August 1, 2017. ProQuest Ebook Central).

In the second part of this work, I will explore also how W.E.B. Du Bois contributed to the discussion of cultural conflicts.

[3] I am referring to the notion that globalization would lead to gradual cultural uniformization producing the *global village*, as exposed in the next paragraphs.

[4] Modood, Tariq. Multiculturalism. Cambridge: Polity, 2013. Second edition, p. 13

we face a reality of cultural diversity and cultural conflicts, emerging mainly from global migration flows.

However, in line with early prognoses of cultural uniformization, some authors believe that the relevance of these kind of cultural attachments is only a temporary phase. They argue that, as a result of globalization, we are becoming culturally more similar. In this regard, Modood's statement, whereby he predicts a future in which cultural diversity will intensify, represents a counterview to this belief of an inevitable uniformity. In fact, globalization and particularism are increasing side by side. In Christian P. Scherrer[5] words:

> "Today the globalization process [third wave] is far from having achieved a degree of homogenisation and having produced the *global village*. Conspicuous and ongoing contradictions prove that there is no homogenous linear dynamic. It seems that an equally powerful process of fragmentation permanently counteracts the process of globalization, with both being at odds with the key political actor of modern times: the nation-state."

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[5] Scherrer, Christian P. Ethnicity, Nationalism and Violence: Conflict Management, Human Rights, and Multilateral Regimes. Aldershot: Ashgate, 2003, p. 7.

Actually, the reaffirmation of the "ethnic minorities" can be seen as a structural rather than merely conjectural question: a result of the uncertainty characteristic of the "liquid modernity." Being associated with an ethnic community could provide a sense of security similar to that once found in a traditional social organization or within the Welfare State.[6]

In this context of reacting to uncertainty, the transnational connections of the ethnic and religious communities are also part of the appeal of this ethnic reaffirming. There is no longer a territorial limitation to ethnic and religious bounds. The contemporary phenomenon of migration "juxtaposed with the rapid flow of mass-mediated images, scripts, and sensations" creates a transnational public sphere for the diasporas.[7] As a consequence of this boundless ethnical and religious ascription, physical separation from the local community no longer means cultural detachment.

Cultural identity is a safe harbour, mainly for "diasporas" or people subjugated by colonization, "one prominent exception to the apparently relentless process of disintegration of the orthodox type of communities."[8] But it

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[6] In this regard, cf. Bauman, Zygmunt. Community: seeking safety in an insecure world. Cambridge: Polity, 2001, p. 144.

[7] Cf. Appadurai, Arjun. Modernity at Large: Cultural Dimensions of Globalization. University of Minnesota Press, 1996, in particular, p. 4.

[8] Bauman (2001), *id.*, p. 89

is not only that. Multiculturalism is an emotional subject that "reaches into our past and our present, into the core of ourselves."[9] In fact, although it has gained prominence recently, it has an inherent significance that I will discuss later in this work.

I would add that multiculturalism does not reach our past and present only, but captures also our future. Multiculturalism has a strong forward-looking aspect. The different perspectives on the future of cultural diversity underline the discussion about multiculturalism. The conviction in the increase or reduction (or at least stabilization) of cultural diversity reflects directly on the viewpoints on the issue and, as a consequence, on the solutions (or policies) regarding it. The same, *mutatis mutandis*, applies to criminal law: the rules and the decisions, in accordance with the conception of deterrence, are enacted with a view to future actions. Thus, it is in looking to the future that multiculturalism is more relevant to criminal law.

The term multiculturalism was first coined in the 60s in Canada as an alternative to the country's historic bicultural approach (Anglo-French).[10] In the 70s, it entered the political language, due to the adoption in the United

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[9] Bissoondath, Neil. Selling Illusions: The Cult of Multiculturalism in Canada. Toronto: Penguin Books, 1994. p. 6.

[10] Cf. Therborn, Göran. Società multiculturale. Alfabeto Treccani. 2014. [Kindle version]. Retrieved from Amazon.com Loc 10.

States, Canada and Australia of a more tolerant and pluralistic policy regarding immigrants.

Nowadays, multiculturalism is referred to as (i) the reality of diversity, (ii) the policies that aim at dealing with the issue and (iii) the analytical and descriptive theories of the concept.[11] Comprehending these different meanings is essential to avoid inaccurate conclusions.

The reality of multiculturalism is a fact of contemporary life, evident in the context of post 1960s mass migration. Following the black cultural reaffirmation, the presence of immigrants brought cultural diversity to the fore, resulting also in an awakening to the indigenous peoples' segregation. In fact, multiculturalism challenges the notion of nation uniformity.

As William H. McNeill reminds us, "the ideal of an ethnically unitary state was exceptional in theory and rarely approached in practice."[12] In this period, when the nation-state is in crisis and we talk of a post-Westphalian era, it is important to bear in mind that the ideal of ethnic uniformity was already controversial at the rise of modern European countries. Two well-known examples can provide us a glimpse of the problem: the sharp analysis of Eugen Weber,

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[11] In this regard, separating the political and philosophical dimensions, cf. Kukathas, Chandran. Liberalism and Multiculturalism: The Politics of Indifference. Political Theory, Vol. 26, No. 5 (Oct., 1998), in particular, p. 686.

[12] McNeill, William H. Polyethnicity and national unity in world history. Toronto: University of Toronto Press, 1986, p. 4.

demonstrating the construction of the modern French culture ("Peasants into Frenchmen")[13] and the famous quote from Massimo d'Azeglio, one of the architects of the Italian Unification “We have made Italy. Now we must make Italians."[14]

Under the surface of this misconception of unity, there is an oversimplification of complex realities. Distorted ideas of nationality, ethnicity or religious identity create “a unified ideological construct called French culture or European civilization or the Muslim way of life."[15]

Multicultural diversity is indisputable in contemporary Western society.[16] However, it is not always easy to distinguish between multiculturalism as a factual reality and the policies related to it. They are intertwined, in such a way that they continuously influence each other: more pluralistic policies that concern immigrants, for instance, usually represent an increase of diversity, a more diverse society tends to pursue more pluralistic policies and so on and so forth.

In the United States, for example, the Immigration and Nationality Act of 1965 overthrew the system of national-origins quotas, resulting in a shift in immigration patterns.

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[13] Weber, Eugen. Peasants into Frenchmen : the modernization of rural France, 1870-1914. London : Chatto & Windus, 1977.

[14] Hobsbawm, E. J., and Ranger, T. O. The Invention of Tradition. Cambridge: Cambridge University Press, 2012, p. 267.

[15] Modood, *id.*, p. 86.

[16] In the New World, due to the historical reasons of the formation of these “nation-states”, there has always been, in general, a more evident cultural diversity, even if overshadowed by policies of forced uniformization. In the Old World instead, the idealized ethnical unity has been more challenged only recently due to migration flux.

The perspective of a uniform American culture through the "melting pot" process, by which individuals would eventually lose the distinctive characteristics of their cultures, acquiring the characteristics of the majority culture (in a kind of Anglo-conformity), gave way to the “salad bowl” philosophy. From this new approach, each ingredient (individuals or groups) is mixed together to make a single dish, i.e., the nation, whilst maintaining their distinctive characteristics.[17] Nowadays, the majority of immigrants moving to the U.S. come from Asia and Latin America. Prior to the Immigration and Nationality Act, immigrants were mostly Caucasians from Europe, and differences among them were less evident or simply ignored. The revision of the policy made a more diverse reality possible.

It is not a coincidence that those pluralistic policies as well as the multicultural theory were born in the United States, Canada and Australia. All three of these nations came to being through a diversity of cultures: autochthonous peoples and various groups of immigrants, although at first mostly Caucasians.

In addition to this diversity *ab initio*, the civil rights movements carved out space for every identity. "The 1960s were a time for asserting the singular character of

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[17] Cf. Hendricks, Cindy; and Nickoli, Angela M. Multicultural Issues and Perspectives. In: Hendricks, James E. (ed.). Multicultural perspectives in criminal justice and criminology. p. 3.

human race."[18] It was since then, at least, that people became "more aware of the harm suffered by ethnic and cultural minorities laboring under discriminatory practices or inequities which have developed over decades, if not centuries."[19] This process evidently included migrants and indigenous peoples.

Europe, on the other hand, has practically no indigenous peoples and began to see an increase in immigration at a later period. Accordingly, only by the end of the 1980s and the beginning of the 1990s did the question of cultural diversity gain relevance in the Old World.

However, it may be that Europe's social contingencies were not the sole reason for which the multicultural question gained less attention in the continent. Enrico Caniglia claims that the European societies were, from the 19th century, identified through the ideal of distributive society,[20] which left the ethnical and racial identities in second place.

In fact, as mentioned above, the inception of the United States, Canada, and Australia is characterized by diversity. We could also add that, because of this configuration, the socioeconomic conflicts there were interlaced with issues of recognition. In failing to achieve fundamental reforms to

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[18] Modood, *id.*, p. 1.
[19] Kukathas (1992), *id.*, p. 105.
[20] Caniglia, Enrico. Il multiculturalismo come forma sociale del postmoderno. In: Multiculturalismo o comunitarismo? A cura di Enrico Caniglia e Andrea Spreafico. Roma: Luiss University Press, 2003, p. 25.

accommodate groups facing disadvantage on the basis of race and ethnicity, the 1960s movements could have erected "culture" as the discourse for seeking justice and equality. Culture thus became a central element in the identity politics that emerged at that time.[21]

Whereas in Europe, also as part of its social formation, the focus was on distributive issues. The Welfare State and citizenship entitlement could be pointed to as the European antithesis of the recognition policies.[22] In other words, the demands for recognition somehow substituted the socioeconomic distributive conflicts, although empirically they were intertwined.[23]

However, only by the end of the 1980s was multiculturalism effectively established in political theory.[24] Since then, following also the growth of migration, multiculturalism has been the object of several analyses with the concept of multiculturalism varying depending on

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[21] In all this regard, Cowan, Jane K.; Dembour, Marie-Bénédicte; and Wilson, Richard A. Culture and Rights: Anthropological Perspectives. Cambridge: Cambridge University Press, 2001, p. 2.

Continuing in this analysis (*ibid.*): "The emphasis on 'culture' - ideas, beliefs, meanings, values- emerged in the context of the social movements of the 1960s and 1970s as part of a radical questioning of what was derisively dubbed 'the System'. To take the US, where such developments were most prominent, the ensuing ethnic and Native American movements followed the lead of Black activists in criticizing the melting-pot ideal and celebrating their differences from the Anglo-Saxon majority. In the identity politics which have ensued, culture holds a central place. Discourses of identity have appropriated the old anthropological sense of this term as the shared customs and worldview of a particular group or kind of people."

[22] In this sense, cf. Caniglia, *id.*, in particular, pp. 26-27.

[23] Cf. Caniglia, *id.*, p. 28.

[24] Liberalism, Community and Culture (1989) of Will Kymlicka is considered the first clearest starting point in anglophone political theories of multiculturalism. In this sense, cf. Modood, *id.*, p. 20.

the different approaches. Traditionally, there is always an attempt to answer how a nation-state should deal with cultural differences, notably those that emerged from the migration flows of the 60s and the decades that followed.

Modood argues that we have both a narrow and a broad definition of multiculturalism. The narrow one would be related to the consequences of immigration (and colonization, I would add). The broad view considers all politics of identity: afrocentricity, ethnicity, women's rights, LGBT rights and so on. These two meanings, he continues, cannot be entirely separated from each other, in the sense that the narrower could be considered as a part of the broader.

I would, instead, distinguish between pluralism and multiculturalism. Pluralism lies at the heart of the multicultural problem,[25] but the latter has particular issues that cannot be solved only with the plural approaches existent. In fact, minority practices of a cultural, ethnic or religious minority are "embedded in a way of life".[26]

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[25] In this sense, Raz, Joseph. Multiculturalism: A Liberal Perspective. In: Ethics in the Public Domain. Oxford: Clarion Press, 1995, p. 171.

[26] Parekh, Bhikhu. Minority Practices and Principles of Toleration. In: International Migration Review 30.1 (1996): 251-84, Web., p. 251.

2. Theories

So far we have been discussing multiculturalism as related to its first two meanings, i.e., multiculturalism as cultural diversity itself and as the policies related to it. I will now focus on its third and last meaning: the theories of multiculturalism.

As mentioned before, in order to cope with the new multicultural reality, different theories have arisen from the 1980s onward. The dichotomy between liberalism and communitarianism is looked to as the main aspect to distinguish the different approaches. We could talk of a hard or soft multiculturalism depending on the direction adopted, whether inclined to a liberal or to a communitarian approach.[27]

Associated to this dichotomy, it is common to identify the principles of equality and liberty as the distinguishable characters of each approach. However, they are not indisputable concepts and they work in a kind of pendular

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[27] In this sense, Dias, Augusto Silva. O multiculturalismo como ponto de encontro entre Direito, Filosofia e Ciências. In: Multiculturalismo e Direito Penal. Coimbra: Almedina, 2014, p. 19, *in verbis*: "Considerado como filosofia ético-política, o multiculturalismo está longe de ser uma concepção unitária. Este referente alberga uma série de perspectivas e de teses. Podemos extrair desse conjunto duas tendências fundamentais. Uma tendência de cariz comunitarista que denominarei multiculturalismo em sentido forte e outra de raiz liberal que denominarei multiculturalismo em sentido fraco."

tension. As R.M. Hare's[28] remarks, we can say that equality and liberty are "hurrah-words": although the prescription to pursue liberty and equality in our society seems self-evidently right, "it is entirely unclear what in particular it tells us to do."

In fact, the concept of equality is relational. The value of equality presupposes a plurality of persons and is conditioned on the criteria of justice, i.e., the criteria to establish the situations in which two persons are equals. In history, we have had different approaches to equality: equality before the law, equality of opportunities, *de facto* equality, etc. Liberalism also represents a conception of equality. Although some claims that liberalism is a face of inequalitarism, in reality it does admit the equality of all, but only in some things, i.e., human rights.[29]

In this regard, multiculturalism represents a challenge to an absolute idea of equality, compelling an account of the Aristotelian face of the concept of equality, so that like cases are treated alike and different cases differently.[30] Actually, the concept of equality itself is

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[28] Hare, R. M. Liberty and Equality. In: Essays on Politically Morality. Oxford: Clarendon Press, 1989, p. 122.

[29] Cf. Bobbio, Norberto. Eguaglianza e libertà. Torino: Einaudi, 2009, pp. 1-36.

However, according to Fraser (Fraser, Nancy. Scales of Justice: Reimagining Political Space in a Globalizing World. Cambridge: Polity, 2008, pp. 32-33), only recently political philosophers have moved away from the perspective of "equality of what?" towards questions about "equality among whom?".

[30] Cf. Truffin, Barbara; Arjona, César. The Cultural Defense in Spain. In: Multicultural Jurisprudence: Comparative Perspectives on the

defined according to cultural values, i.e., upon cultural understandings of equality.[31]

Likewise, liberty is also a relative concept. Liberty for one person to do one thing may be inconsistent with liberty for another person to do something else.[32] The conflict is inevitable. How can we determine what liberties people should have and what are the criteria to establish equality? This discussion is essential to the multicultural theory.

The contrast between liberalism and communitarianism can be analysed also through the dichotomy between organicism and mechanism (or holism vs. individualism). The former relates to communitarianism and the latter to liberalism.[33] In this direction, we can analyse this dichotomy from the perspective of the two major strands of thought that dominated the political theory and that are variants of mechanism and organicism: monism (or naturalism) and pluralism (or culturalism).[34]

Cultural Defense. Edited by Marie-Claire Foblets and Alison Dundes Renteln. Oxford and Portland: Hart Publishing, 2009, p. 118.

[31] Cf. Post, Robert. Law and Cultural Conflict. In Chicago-Kent Law Review, 2003, p. 499.

[32] Cf. Hare, *id.*, p. 124.

[33] Based on the lesson of Bobbio, this approach is present by Ermanno Vitale (cf. Vitale, Ermano. & Bovero, Michelangelo. Liberalismo e multiculturalismo una sfida per il pensiero democratico, Bari: Laterza, 2000. P. 23), *in verbis*: "tutto il corso del pensiero politico occidentale è dominato da una contrapposizione fondamentale - una vera e propria 'grande dicotomia' - tra teorie organicisitiche (olistiche) e teorie individualistiche (atomistiche)"

[34] Cf. Parekh, Bhikhu. Rethinking Multiculturalism: Cultural Diversity and Political Theory. Cambridge, Massachusetts: Harvard University Press, 2002, pp. 10-11.

Parekh argues that the theory of nature, structure, inner dynamics and the role of culture in human life are either ignored or misleadingly accounted for in these two strands. The monist theories, founded on the belief of one true or rational way of understanding human beings, consider human nature unchangeable and "unaffected in its essentials by culture and society."[35]

Culturalism or pluralism, on the other hand, argues that human beings are culturally constituted, varying from culture to culture, sharing in common only the minimal "species-derived properties" from which nothing of moral significance can be deduced. Culturalism, however, would split humankind into different cultural units, resulting in "naturalizing culture, seeing it as an unalterable and ahistorical fact of life which so determined its members as to turn them into a distinct species."[36]

From another perspective, Ferrajoli[37] says that the true contrast that divides our societies is not absolutely between liberalism and socialism (communitarianism), i.e., between the value associated to liberty and that associated to equality. For him, there is no opposition between these values, but instead complementarity. The real contrast is on the notion of power and its relationship to liberty.

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[35] Parekh, *ibid.*
[36] Parekh, *ibid.*
[37] Ferrajoli, Luigi. Principia iuris. Teoria del diritto e della democrazia. Roma: Laterza, 2007, p. 430.

One could add further that the main difference in the various multicultural approaches lies in how liberalism itself is viewed. In other words, if one emphasizes individual autonomy, one will ultimately view variations within groups with complete indifference. On the other hand, if one believes in the importance of difference itself and, as consequence, believes that the principle of equality could only be truly realized through policies that protect those differences, we have an alternative perspective on liberalism, even if under the same principles.

In fact, there are various ways to conceive philosophical liberalism, which poses the question of the possibility of a unified liberal conception.[38] This might be the main obstacle when seeking to compare the different theories of multiculturalism.

Domenico Melidoro,[39] for example, argues that the different notions of multiculturalism are connected to the way liberal values, mainly individual autonomy and equality, are considered in the analysis of cultural belonging. In

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[38] Cf. Maffettone, Sebastiano. Liberalismo, multiculturalismo e diritti umani. In: Boudon, R., Caniglia, E., & Spreafico, A. Multiculturalismo o comunitarismo? Roma: Luiss University press, 2003, p. 214.

[39] Melidoro, Domenico. Multiculturalismo: una piccola introduzione. Roma: Luiss University Press, 2015, in particular p. 25: "Allora, in sintesi, si può dire che a partire dal liberalismo, si possono distinguere tre versioni di multiculturalismo. La prima ritiene che liberalismo e multiculturalismo siano pienamente compatibili, e che non vi sia contraddizioni tra liberalismo e accomodamento della diversità culturale. La seconda sostiene che il multiculturalismo richiede di andare oltre i principi liberali tradizionali. La terza, infine, in ragione della fedeltà al valore della tolleranza liberale, nega ogni legittimità al riconoscimento della diversità culturale all'interno di uno Stato liberale."

this way, he identifies three main branches of multiculturalism: i) the multiculturalism of liberal autonomy; ii) the multiculturalism of recognition and inclusion; and iii) the multiculturalism of indifference.

Modood[40] claims that multiculturalism "presupposes the matrix of principles, institutions and political norms that are central to contemporary liberal democracies; but multiculturalism, as we shall see, is also a challenge to some of these norms, institutions and principles." Joseph Raz[41] claims that multiculturalism is the third liberal approach to the problem of minorities, following the classical attitude and policy of "toleration" and the second approach of individual rights against discrimination. Indeed, multiculturalism is "a child of liberal egalitarianism but, like any child, it is not simply a faithful reproduction of its parents."[42]

2.1. Kymlicka (autonomy)

In the introduction to this section, it was mentioned that the Canadian philosopher, Will Kymlicka, is considered the starting point of political theories of

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[40] Modood, *id.*, p. 7.
[41] Raz, *id.*, pp. 172-3.
[42] Modood, *id.*, p. 7.

multiculturalism. This would be reason enough to explore his theory, but it is also important to analyse his way of thinking as it represents a relevant branch of multicultural theories that are based on the idea autonomy. He explores the contradictions and misunderstandings of multiculturalism in liberal theory, concluding that, from the perspective of liberal autonomy, multiculturalism and liberal thinking are compatible.

Although Kymlicka[43] recognizes a variety of ways through which minorities become incorporated into political communities, his theory is based on two broad patterns of diversity. First, “multination states”, in which "cultural diversity arises from the incorporation of previously self-governing, territorially concentrated cultures into a larger state". Second, “polyethnic states”, characterized by a cultural diversity originated from individual and familial immigration.

A multination state, as the noun says, would be a state formed by more than one nation, "where 'nation' means a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture. A 'nation' in this sociological sense is closely related to the idea of a 'people' or a 'culture' - indeed, these concepts are often defined in terms of each

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[43] Kymlicka, Will. Multicultural Citizenship. Oxford: Clarendon Press, 1995, p. 10.

other.".[44] In this context, the smaller cultures form "national minorities".

In the case of polyethnic states, the source of cultural diversity is immigration. "A country will exhibit cultural pluralism if it accepts large numbers of individuals and families from other cultures as immigrants, and allows them to maintain some of their ethnic particularity".[45] In this context, Kymlicka refers to them as "ethnic groups" in contrast to the conception of national minorities.

Regarding the nature of the incorporation, Kymlicka distinguishes[46] at least three different forms of group-specific rights. National minorities claim various forms of autonomy or self-government to ensure their survival as distinct societies whilst ethnic groups, instead, "typically wish to integrate into the larger society, and to be accepted as full members of it".[47] They, in general, do not have the aim of becoming a separate and self-governing nation, but rather seek to "modify the institutions and laws of the mainstream society to make them more accommodating of cultural differences".[48] The group-specific rights related to ethnic groups would be polyethnic rights regarding the

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[44] Kymlicka, *id.*, p. 11.
[45] Kymlicka, *id.*, p. 14.
[46] Kymlicka, *id.*, pp. 26-33.
[47] Kymlicka, *id.*, pp. 10-11.
[48] Kymlicka, *ibid.*

expression of their cultures[49] and special representation rights in order to balance the political representation.

Kymlicka also recognizes other forms of cultural pluralism. These two categories (multination and polyethnic states) are only general patterns, though essential for the comprehension of his notion of multiculturalism that "the historical incorporation of minority groups shapes their collective institutions, identities and aspirations".[50] However, this double categorization oversimplifies the differences between the two patterns. Some aspirations are indeed common to both groups, which blurs the distinction.

According to Modood most of Kymlicka's theory is directed towards "justifying special support or differential rights in relation to language and indigenous people,"[51] insinuating that his theory would be insufficient to address immigrant issues. Yet in relation to Kymlicka's notion that the traditional freedom of worship is enough to protect the needs of religious minorities, Modood[52] claims that this seems to be a certain blindness, a "secularist bias", which drives apart ethnicity and religion in the multicultural theory.

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[49] Kymlicka (*id*, p. 31) highlights that the polyethnic rights are not equivalent to the policies directed to ensure the effective exercise of common rights of citizenship, such as anti-racism policies and forms of public funding of their cultural practices.

[50] Kymlicka, *id.*, p. 11.

[51] Modood, *id.*, p. 25.

[52] Modood, *id.*, pp. 29-33.

We enter now the core of Kymlicka's discussion about the compatibility of multiculturalism with liberal theory. He claims that, in all liberal democracies, one of the major mechanisms for accommodating cultural differences is the protection of the civil and political rights of individuals such as freedom of association, religion, speech, movement, and political organization. These rights would be sufficient for the protection of many of the legitimate forms of diversity in society. Despite some criticism towards liberalism, he believes that individual rights can be and are typically used to sustain a wide range of social relationships.[53]

However, notwithstanding the fundamental role of these individual rights, some forms of cultural difference can only be accommodated if their members have certain group specific-specific rights. It is a sort of “differentiated citizenship”.[54]

But how to balance these group-specific rights with a liberal commitment to the freedom and equality of all citizens? Kymlicka's answer[55] is presented through the differentiation of two kinds of claims: internal and external protections. The first involves the claim of the group against its own members and is intended to protect the group from the destabilizing impact of internal dissent. The second

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[53] Kymlicka, *id.*, p. 26.
[54] Kymlicka, *ibid.*
[55] Kymlicka, *id.*, pp. 34-37.

involves the claim of a group against the larger society and is intended to protect the group from the impact of external decisions. He argues that, although liberals should endorse certain external protections, in order to promote fairness between groups, they should reject internal restrictions which limit the autonomy of group members. He claims that liberals "can only endorse minority rights in so far as they are consistent with respect for the freedom or autonomy of individuals."[56]

2.2. Recognition and inclusion

One of the most important philosophers of multiculturalism is Charles Taylor, the Canadian author of *The Politics of Recognition*,[57] an essay based on the idea that liberal principles are not sufficient to respond to the challenges that cultural diversity presents.

According to Taylor's theory, our identity would be partly shaped by recognition or its absence, often by misrecognition. Sustaining that recognition is a vital human need, he affirms that non-recognition or misrecognition "can

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[56] Kymlicka, *id.*, p. 75.

[57] Taylor, Charles. The Politics of Recognition. In: Multiculturalism. Examining the politics of recognition. Edited by Amy Gutmann. Princeton, New Jersey: Princeton University Press, 1994.

inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."[58]

However, in his view, what is now generally taken for granted, would have been utterly incomprehensible about two centuries ago.[59] What shift in our way of thinking made the assertion of identity and recognition inevitable?[60] Taylor suggests two changes that together resulted in this new perspective.

First, the collapse of social hierarchies, which led to the substitution of the notion of honour, intrinsically linked to inequalities, for the universalistic and egalitarian concept of dignity, shared by all human beings or citizens.[61] This equal recognition has taken various forms over the years and has, since the sixties, returned in the form of demands for equal status of cultures and genders.

The second change was the new understanding of individual identity that emerged at the end of the eighteenth century. Actually, Taylor[62] says that we should speak of an "individualized identity", because it is particular to oneself, a notion that has arisen along with the ideal of "authenticity". From this moment, "the source we have to

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[58] Taylor, *id*. p. 25.
[59] Taylor, *id*. p. 26.
[60] This inevitability must be taken with a grain of salt. Indeed, as I am going to discuss later in this work, the issue has to be considered from a perspective of the concept of identity itself. It is innocuous to discuss the presumed need of recognition without a better reflection on the meanings and limits of the identity conception.
[61] Taylor, *id*., pp. 26-27.
[62] Cf. Taylor, *id*., pp. 28-31.

connect with is deep within us," in opposition to the previous moral view, where being in touch with some source - God, for example - was considered essential to full being.

He traces the origin of this ideal of "being true to oneself," and to one's particular way of being, back to Rousseau first, then to Herder. Rousseau was the first to articulate the notion that human beings are endowed with an innate moral sense that could be reached through an intimate contact with oneself.[63] On the other hand, Herder was the early articulator of the ideal of authenticity: the idea that each of us has an original way of being human.[64]

In the public sphere, Taylor connects the two changes just described to two apparently contradictory kinds of contemporary politics. The politics of universalism, comes from the perspective of the equal dignity of citizens. On the other hand, the ideal of identity is the basis for the politics of difference. For Taylor, the idea that everyone must have the same rights and guarantees is a limited or

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[63] Taylor (*id.*, p. 29) argues that this attitude was in a sense already present in the culture. Rousseau was, however, the first to articulate it, even giving a name to this: "le sentiment de l'existence". Cf. Rousseau, Jean-Jacques. Les rêveries du promeneur solitaire. édition critique par Frédéric S. Eigeldinger. Paris: Champion, 2010, pp. 97-98, *in verbis*: "Le sentiment de l'existence dépouillé de toute autre affection est par lui-même un sentiment précieux de contentement et de paix, qui suffirait seul pour render cette existence chère et douce à qui viennent sans cesse nous en distraire et en troubler ici-bas la douceur. Mais le plupart des hommes agités de passions continuelles connaissent peu cet état et ne l'ayant goûte qu'imparfaitement durant peu d'instants n'en conservent qu'une idée obscure et confuse qui ne lui en fait pas sentir le charme."

[64] "Jeder Mensch hat ein eigenes maß, gleichsam eine eigne Stimmung aller seiner sinnlichen Gefühle zu einander", cited by Taylor, *id.*, p. 30.

older perspective of the politics of universalism, which leads to the conclusion that the attribution of differentiated rights is an unfair favouritism. Yet such a view ignores the evolution of the meaning of the principle of universalism alongside the new understanding of the human social condition. There is also a universalistic basis for the politics of difference, in that everyone should be recognized for his or her individual identity.[65]

In short, the notion of a universal dignity grounds a politics of non-discrimination quite blind to difference, while the need for recognition of distinct identities forms the very basis of a politics of difference. For the defenders of the first approach, the second one violates the principle of non-discrimination. On the other hand, an application of difference-blind politics would negate identity, "forcing people into a "homogeneous mold."[66]

However, if we are discussing “individualized identities”, why is social recognition necessary? It seems that an apparent contradiction comes to light. Taylor claims

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[65] Cf. Taylor, *id.*, pp. 38-39. Yet, for a better understanding of this contradiction, it is important to highlight Taylor's warning about the nature and objective of the politics of difference (*id.*, p. 40): "Reverse discrimination is defended as a temporary measure that will eventually level the playing field and allow the old 'blind' rules to come back into force in a way that doesn't disadvantage anyone. This argument seems cogent enough - wherever its factual basis is sound. But it won't justify some of the measures now urged on the grounds of difference, the goal of which is not to bring us back to an eventual 'difference-blind' social space but, on the contrary, to maintain and cherish distinctness not just now but forever. After all, if we're concerned with identity, then what is more legitimate than one's aspiration that it never be lost?"

[66] Cf. Taylor, *id.*, p. 43.

that, although in the end it is a personal achievement, the development of the individual identity is not an isolated process. Indeed, it is just the opposite, a dialogical process. One negotiates it "through dialogue, partly overt, partly internal, with others." And that is why the idea of personal identity gives a new relevance to recognition, i.e., one's own identity would be conditioned by his or her dialogical relations with others.[67]

In anticipation of the debate on identity, I would like to touch on Appiah's theory here. He distinguishes two dimensions of individual identity: the personal and the collective dimensions. The collective dimension is the intersection of its own collective identities (i.e., religion, gender, ethnicity, race, sexuality) and the personal dimension consists of other social or moral features that are not themselves part of a collective identity. The nexus between the individual identity and those collective dimensions are the focus of Taylor's discussion. In other words, the issue for Taylor is the importance of the collective identities to the affirmation of the individual identity.[68]

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[67] Cf. Taylor, i*d*. p. 34

[68] Cf. Appiah, Kwame Anthony. Comment on "Multiculturalism: examining the politics of recognition". Edited by Amy Gutmann. Princeton, New Jersey: Princeton University Press, 1994, pp. 150-152.

It is important to note that he clarifies that this distinction is rather more sociological than logical. He claims that in each dimension we are talking about properties that are important for social life, but only the collective identities are considered social categories. There are features (e.g., witty, clever, charming) that are

This ideal of identity alongside the ideal of dignity are, for Taylor, the grounds for the discussion on the politics of recognition. We have already alluded to the rise of the ideal of authenticity. Now, I would like to introduce Taylor's conception of the two ways in which the politics of dignity has emerged in Western thought, one he associates with Rousseau and the other with Kant.

According to Taylor,[69] Rousseau begins to examine the importance of equal respect and its connection to freedom, opposing a condition of freedom-in-equality to one characterized by hierarchy and dependence on the other. He remarks that Rousseau's theory consists of three inseparable elements: freedom (non-domination), the absence of differentiated roles and a very tight common purpose.

Proceeding with his analysis of Rousseau's theory, he sustains that the deviations from the second and the third elements resulted in different kinds of homogenizing tyranny and systems that offer little margin to recognize difference. The alternative model, under the banner of Kant, separates equal freedom from both other elements of the Rousseauian model.[70]

It is natural to forsake the Rousseauian model given the tyranny and homogenization that emerged from it. We might

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logical categories, but people who share these characteristics do not constitute a relevant sociological group.

[69] Taylor, *id.*, pp. 44-51.

[70] Taylor, *id.*, p. 51.

wonder, however, if the Kantian model enables recognition of distinctness. Taylor believes that a model that simply separates equal freedom from both other elements of the "Rousseauian trinity" is bound to homogenizing as well, since it simply looks to the equality of rights accorded to citizens, detaching it from any issue of differentiation of roles and general will.[71]

Is this view of liberal equal rights the only possible interpretation? Having the Canadian case as an example, Taylor's answer is that we can identify two different forms of politics of equal rights, but with different outcomes.[72] First, Taylor associates a more individualistic view of equality with the philosophy of John Rawls, Ronald Dworkin and Bruce Ackerman, remarking that the formulation of Dworkin is perhaps the one that encapsulates most clearly this view.[73]

Dworkin makes a distinction between two kinds of moral commitments: substantive commitments concerning the ends of life (i.e., what constitutes a good life) and procedural commitments regarding the need to deal fairly and equally with each other, despite our ends. In this sense, (procedural) liberalism associates dignity with the autonomy

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[71] Cf. Taylor, *ibid*.

For me, however, it is not clear whether Kant could be read in this sense. Actually, his categorical imperative ("Act as if the maxim of your action were to become through your will a general natural law") is subjected to objections that it would result in an account of each man as an absolute end. Just the opposite of uniformization. Cf. Russell, Bertrand. History of Western Philosophy. Abingdon: Routledge, 2004. P 645.

[72] Taylor, *id*., pp. 51-52.

[73] Taylor, *id*., p. 56.

of the individual. From this perspective, societies with collective goals violate this model of a procedural liberalism, because the notion of a good life is a collective goal. Since there is a risk of oppression of those who do not share the collective goal, this kind of society would constitute, for Dworkin, an illiberal society.[74] In this sense, the liberalist morality is the observation of procedural commitments. Thus, justice would correspond to a fair distribution achieved through procedural commitments, regardless of the ways of life.

Taylor's second form of politics of equal rights is the active recognition of cultural diversity. Taylor argues that the individualistic view of liberalism represented by Dworkin is incompatible with a range of different ways of life. Liberalism should not claim a complete cultural neutrality, since it is, in reality, a Christian-based philosophy,[75] not suited to deal with the increasingly multicultural diversity and the colonial past of marginalization of members of different cultures.[76]

For Taylor, the recognition of diversity goes beyond the mere question of cultural survival, of letting cultures defend themselves: it is a recognition of the equal value of

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[74] Taylor, *ibid*.

[75] Taylor sustains (*id.*, p. 62) that liberalism is not so much an expression of the secular, post-religious outlook. Even the origin of the term secular was originally part of the Christian vocabulary, being liberalism also a "fighting creed".

[76] However, this sentiment leads sometimes to a compromise of basic political principles, in issues such as the right to life and to freedom of speech. Cf. Taylor, *id.*, p. 63.

different cultures. It is a question of whether to let them simply survive, or to also acknowledge their worth. Taylor proposes, though, that we should presume that any culture has an *ex ante* value, because we cannot really valuate a culture that we do not understand, that is unfamiliar.[77]

The issue is ultimately one of overcoming an approach to culture that looks upon it as an object of study, towards an attitude of presumed respect - "presumed" in the sense that respect and recognition are a question of will, and that we cannot make proper judgements in this field on what is right or wrong.[78] The choice of a presumed respect attitude would mean a lot to the people who might benefit from this acknowledgement, while the objectifying approach is a patronizing one. Yet, in defence of this presumed respect, I quote Taylor, *in verbis*:[79]

> "There is perhaps after all a moral issue here. We only need a sense of our own limited part in the whole human story to accept the presumption. It is only arrogance, or some analogous moral failing, that can deprive us of this. But what the presumption requires of us is not peremptory and inauthentic judgments of equal value, but a willingness to be open to comparative cultural study of the kind that must displace our horizons in

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[77] Taylor, *id.*, pp. 63-67.
[78] Taylor, *id.*, p. 69.
[79] Taylor, *id.*, p. 73.

> the resulting fusions. What is required above all is an admission that we are very far away from that ultimate horizon from which the relative worth of different cultures might be evident. This would mean breaking with an illusion that still holds many "multiculturalists" - as well as their most bitter opponents - in its grip."

These two forms of politics of equal rights exposed by Taylor can be identified by two kinds of liberalism. The first kind of liberalism, Walzer calls "Liberalism 1", referring to the conception of a neutral state, grounded in the strongest possible way on individual rights, i.e., a state without any sort of collective goals beyond the traditional liberal rights and guarantees. The second kind of liberalism ("Liberalism 2") indicates a state committed to the survival and flourishing of a particular nation, culture, or religion, or a set of nations, cultures, religions. In Taylor's words, a state committed to collective goals. But, as Walzer alerts, this is possible "so long as the basic rights of citizens who have different commitments or no such commitments at all are protected."[80] This condition is what guarantees the liberal nature of this second kind of liberalism.

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[80] Walzer, Michael. Comment on “Multiculturalism: examining the politics of recognition”. Edited by Amy Gutmann. Princeton, New Jersey: Princeton University Press, 1994, p. 99.

Walzer argues that those are optional forms of liberalism. He defends that most liberal nation-states are of the second kind, because their governments take an interest in the cultural survival of the majority nation, not claiming to be neutral with reference to language, history, literature, etc. But, they are, to some degree, tolerant of ethnic and religious differences. However, in a context of cultural diversity, he thinks the best choice is Liberalism 1 chosen from within Liberalism 2.[81]

It might be hard, however, to say what a society has chosen in this level of abstraction, as Amy Gutmann claims. She questions whether this discourse about two kinds of liberalism, of universalism, is appropriate, indicating that perhaps they are only two strands of a single conception of liberalism, which at times recommends (or requires) neutrality, and at others presents institutions that reflect the values of one or more cultural group.[82]

The equation between neutrality and recognition is not always self-evident. From a liberal point of view, the person's ethnic identity is not his or her primary identity and, from a liberal democratic point of view, his or her universal human identity and potential are the basis for equal recognition. Rockefeller claims that "the objective of

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[81] Walzer, *id.*, pp. 102-103.

[82] Gutmann, Amy. Introduction on “Multiculturalism: examining the politics of recognition”. Edited by Amy Gutmann. Princeton, New Jersey: Princeton University Press, 1994, p. 12.

a liberal democratic culture is to respect - not to repress - ethnic identities and to encourage different cultural traditions to develop fully their potential for expression of the democratic ideals of freedom and equality".[83] In other words, a liberal society must respect the different cultures, without withdrawing from its founding ideals.

As we have seen, the central idea of Taylor's theory is that minority cultures need recognition in order to flourish. This argument is challenged by those who believe that liberalism is already a sufficient response to cultural diversity and by the fact that these minorities have survived "for centuries under conditions in which they were merely tolerated by the majority, or even actively discriminated against."[84] In this regard, one of the main responses to Taylor's *The Politics of Recognition* was realized by Habermas.

2.2.1. Habermas

Jürgen Habermas claims that the modern theory of rights presupposes the notion of individual (*subjektive*) rights and

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[83] Rockefeller, Steven C. Comment on "Multiculturalism. Examining the politics of recognition". Edited by Amy Gutmann. Princeton, New Jersey, 1994, p. 89.

[84] Miller, David. On Nationality. Oxford: Clarendon Press, 1995, p. 149

the individual legal person as the bearer of rights, which raises the question of the limits of such an individualistic conception to deal with the collective demands of recognition. Habermas answers that, at first glance, these claims to recognition of collective identities are different from the traditional liberal ideal of distributive justice.[85]

Examining Taylor's approach to the demands of recognition, Habermas claims that Liberalism 2 (active recognition of cultural diversity) is an attack on the liberal principles and calls into question the individualistic core of the modern conception of freedom. Confronting with liberals like Rawls and Dworkin, who call for an ethically equal neutral legal order, Habermas sustains that Taylor misunderstood the theory of rights by affirming that Liberalism 1 is difference-blind.[86]

Taylor's conception, he continues, is paternalistic, because it ignores that individuals "can acquire autonomy only to the extent that they can understand themselves to be the authors of the laws to which they are subject as private legal persons."[87] For Habermas, there is an actualization of the basic rights through a process of socialization.

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[85] Habermas, Jürgen. Struggles for recognition in the democratic constitutional state. In: Multiculturalism: examining the politics of recognition. Edited by Amy Gutmann. Princeton, New Jersey, 1994, pp. 107-109.

[86] Habermas, *id.*, pp. 110-112.

[87] Habermas, *id.*, pp. 112-116.

Although Habermas recognizes that Taylor's analysis involves at least three discourses related to multiculturalism, namely, political correctness, philosophical discourses, and legal and political issues, he focuses on the latter dimension. In this way, he claims that the first question multiculturalism brings to light in the legal theory is the question of the "ethical neutrality of law and politics". Political questions of an ethical nature must be kept off the agenda because they are not susceptible to impartial legal regulation. This would be in conformity only with Liberalism 1. In contrast, Liberalism 2 permits that collective goals and identities take precedence over individual rights under certain circumstances.[88]

Citing Dworkin, Habermas says that collective goals can only take precedence over individual rights if these goals can be justified under other rights that take precedence. However, that does not mean that the system of rights is blind to claims to the protection of cultural forms of life and collective identities, because legal norms are set through a political process that considers the collective goals. For this reason, “every legal system is also the expression of a particular form of life and not merely a reflection of the universal content of basic rights".[89]

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[88] Habermas, *id.*, pp. 120-123.
[89] Habermas, *id.*, pp. 123-124.

This would depend on the composition of the citizenry of the state, something that is accidental: the population is a result of historical circumstances. The Constitution is an outcome of the historical process and ethical-political discourses, but is also an intergenerational dialogue. In this sense, the processes that imply changes in the social composition can alter the ethical agenda towards, for example, the representation of minorities.[90]

In other words, he affirms that the theory of rights does not forbid the citizens of a democratic constitutional state from affirming in their general legal order a conception of good, a shared conception or one agreed through political discussion. However, in no way does it allow for privilege of one form of life at the expense of the others within the nation.[91]

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[90] Habermas, *id.*, pp. 125-126, in particular: "To the extent to which the shaping of citizens' political opinion and will is oriented to the idea of actualizing rights, it cannot, as the communitarians suggest, be equated with a process by which citizens reach agreement about their ethical-political self-understanding. But the process of actualizing rights is indeed embedded in contexts that require such discourses as an important component of politics - discussions about a shared conception of the good and a desired form of life that is acknowledged to be authentic. In such discussions the participants clarify the way they want to understand themselves as citizens of a specific republic, as inhabitants of a specific region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, how they want to deal with their history, with one another, with nature, and so on. And of course the choice of an official language or a decision about the curriculum of public schools affects the nation's ethical self-understanding. Because ethical-political decisions are an unavoidable part of politics, and because their legal regulation expresses the collective identity of a nation of citizens, they can spark cultural battles in which disrespected minorities struggle against an insensitive majority culture. What sets off the battles is not the ethical neutrality of the legal order but rather the fact that every legal community and every democratic process for actualizing basic rights is permeated by ethics."

[91] Habermas, *id.*, p. 128.

In a well-functioning democracy with open communication structures, the process of actualizing equal individual rights would also guarantee different ethnic groups, and their cultural forms of life, equal rights to coexist, because this intersubjective sphere is inherent to the integrity of the individual legal person. Cultural diversity does not require collective rights to be safeguarded, which would be unnecessary and questionable. Habermas is against what he calls here "ecological perspective": the law cannot guarantee the preservation of minority cultural groups as endangered species, at the risk of violating the freedom of its members.[92]

He defends the political integration of citizens in order to ensure loyalty to the common political culture, which is rooted in an interpretation of constitutional principles according to the nation's historical experience. As he recalls, this is why no interpretation can be expected to be ethically neutral, which in turn take us back to the argument on how to deal with the risk of a forced assimilation. Habermas's answer is to draw a distinction between two levels of integration[93]: (i) one level is the ethical substance of a constitutional patriotism, which should bind all groups within the state; (ii) the second level is the sub-political level, where the neutrality of

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[92] Cf. Habermas, *id.*, pp. 128-130.
[93] Cf. Habermas, *id.*, p. 138.

law when confronted with the internal ethics of the groups must be preserved. Only the separation of the two levels can assure that the majority do not usurp state prerogatives to the detriment of other cultural forms of live.

In my opinion, these two levels of interpretation are not a realistic answer to the conflict between nationality and ethnicity or religious identity. In the section 3, I will explore the ethical nature of the nation-state and its relation to minorities' cultural traditions and practices. For now, regarding this question, I recall David Miller:

> "I believe, however, that we should be sceptical about 'constitutional patriotism' as a substitutive for nationality of the more familiar sort. (…) In particular, it does not explain why the boundaries of the political community should fall here rather than there; nor does it give you any sense of the historical identity of the community, the links that bind present-day politics to decisions made and actions performed in the past."[94]

[94] David Miller, *id.*, p. 163.

2.3. The indifference approach

In this category are the theories that take an indifferent approach to the challenges of multiculturalism, which are founded on the belief that the state should not have differentiated policies according to the culture of the citizens. For the purpose of exploring this approach, I will refer to Chandran Kukathas' theory.

Kukathas departs from the premise that the main issue addressed by contemporary political philosophy is the problem of coping with diversity in a world in which particularity, difference and separateness are being reasserted. Liberalism would be the ultimate answer to the question of how diverse human beings can live together, freely and peacefully.[95] Actually, in an earlier reflection, he claimed that multiculturalism does not pose a philosophical problem for liberalism because the liberal counsel would be to resist the demand for recognition.[96]

Liberalism would be widely grounded on the conception of a plurality of ways of life, accepting the diverse moral

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[95] Kukathas, Chandran. The Liberal Archipelago: a theory of diversity and freedom. Oxford: Oxford University Press, 2003. p. 2.

[96] Kukathas, Chandran. Liberalism and Multiculturalism: The Politics of Indifference. Political Theory, Vol. 26, No. 5 (Oct., 1998), p. 687

values and multiplicity of religious beliefs, respecting the individuals' different ends.[97] As other liberal authors discussed previously, such as Dworkin and Habermas, the good society would be one which is not governed by any particular notion of way of life, providing the "framework of rights or liberties or duties within which people may pursue their various ends, individually or cooperatively."[98]

Thus, Kukathas adopts the premise that a free society is an open society able to "admit the variability of human arrangements rather than fix or establish or uphold a determinate set of institutions within a closed order." Liberalism does not identify a set of values and moral standards by which any community must abide, but only principles by which different moral standards may be allowed to coexist. The nature of its principles then takes into account only the existence of individuals and their propensity to associate, having as the fundamental principle the freedom of association. Based on this way of thinking, he rejects the idea of recognizing group rights.[99]

He argues instead that in the liberal theory there is an important division between those who think the state should be guided by a substantive view of the good life and those who think the state should remain neutral about the

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[97] Kukathas (2003), *id.*, pp. 2-3.
[98] Kukathas (1992), *id.*, 108
[99] Kukathas (2003), *id.*, pp. 4-5 and 19.

good life[100]. However, Kukathas claims that a theory of free society is an account of the terms by which different ways of life **coexist** rather than an account of the terms by which they **cohere**. The key, therefore, is not what the state should do, but who should have the political authority. In other words, the focus is on the legitimacy, not on the justice.[101]

Against contemporary liberal theory, mainly after John Rawls, which has identified distributive justice as the answer to the question of legitimacy, Kukathas, along the line of the classical social contract theorists such as Hobbes, Locke, and Rousseau, argues that the focus must be on the political authority. That is, in an open society, where diversity is a condition, different groups would have different views or conceptions of justice, which would make it inadequate to expect a universal conception of justice. In addition, the primary question of politics is not about justice or rights, but about power.[102]

At this point, it is important to highlight the author's caveat about the nature of those authorities. They are not related to a particular kind of sovereignty. Although there is authority around every association, it is not a power in the sense of an unbreakable sovereignty. Actually, Kukathas defends that sovereignty is a matter of degree, because even

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[100] That is, the already analyzed conflict between Liberalism 1 and Liberalism 2.
[101] Kukathas (2003), *id.*, p. 5.
[102] Kukathas (2003), *id.*, pp. 6-7.

the most powerful state is compromised to a certain extent by, for example, an international treaty or protocol. He claims that international society is a kind of liberal society, since it is a society of multiple authorities exercising their powers under a regime of mutual toleration, concluding that should be the approach in every liberal society.[103]

Kukathas says that the fundamental novelty in his theory is a conception of the good society that is not grounded, unlike other theories, on the unity of the state. In contrast to the metaphors "body politic", "well-ordered society", "ship of state" that have been used to describe political society and that are hardly suitable to a notion of non-unified state, he presents the metaphor of society as an archipelago. Based on the comparison with the international society, the islands represent the different communities, or jurisdictions, operating in a sea of mutual toleration.

According to him, the image points to the fundamental value of liberalism: tolerance. In his account, tolerance does not require respect or empathy or admiration or even much concern for others. The only thing that can be asked equally of all in relation to any set of ideas or behaviours is a resigned acceptance.[104]

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[103] Kukathas (2003), *id.*, pp. 25-26.
[104] Kukathas (2003), *id.*, pp. 23-24.

From this metaphor of an archipelago, Kukathas develops a theory of liberalism that is applicable not only to societies, but also to communities, groups and associations. Two important features of liberal societies (or other forms of association) are (i) the capacity of accommodating multiple authorities and (ii) the fact that the legitimacy of authority rests on the consent of its subjects. In other words:[105]

> "a society is a liberal one if individuals are at liberty to reject the authority of one association in order to place themselves under the authority of another; and to the extent that individuals are at liberty to repudiate the authority of the wider society in placing themselves under the authority of some other association. They may even, in all this, place themselves under another authority by constituting new authority for themselves."

However, for our inquiry, the most relevant aspect of his theory is the idea of tolerance as a sufficient element to let cultural minorities flourish.

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[105] Kukathas (2003), *id.*, p. 25.

2.4. Toleration

Toleration is a central theme in multicultural theories and guides the discussions about the compatibility between liberalism and multiculturalism. Although the debate on toleration is not new to liberal theory, in the beginning, due to historic reasons, it was connected only to religious toleration: the ideal of a secular state. We can indicate Stuart Mill's *On Liberty* (1859) as the starting point of a modern conception of toleration, from which most of the common justifications for tolerance in a liberal theory society derive.[106]

Stuart Mill developed the conception of toleration from the basis of his "harm principle" premise: power could be exercised only to prevent harm done to one person by another. Hence, the state does not enforce any idea of good. Stuart Mill's conception "has substantially contributed to the definition of a liberal state as one which is open, diverse, plural, and equally hospitable to all the beliefs and activities which its members espouse."[107]

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[106] Cf. Poulter, Sebastian. Ethnicity, Law and Human Rights: The English Experience. Oxford: Oxford University Press, 1998, p. 30.

[107] Poulter (1998), *id.*, p. 31.

As we have seen, Kukathas claims that, in a multicultural society, under a regime of mutual toleration, different notions of the good life can share the same public space without blending. This is the classic liberal approach to the problem of minorities. In Rawls' account, in a modern democratic society, pluralism is characterized even by incompatible yet reasonable comprehensive doctrines.[108]

However, the approach of tolerance might be a limited response to the problem of minorities. Some theories, regarding cultural diversity, appeal to the classical heritage of liberalism, ignoring the social changes in the contemporary world. In other words, in trying to distinguish liberalism from communitarianism, they stress certain characteristics of liberalism, failing to account for social changes that have occurred since the emergence of classical liberal theory.

As already mentioned, Joseph Raz claims that the affirmation of multiculturalism is the third liberal approach to the problem of minorities, following the first attitude and policy of "toleration" and the second of non-discrimination rights. The first "consists in letting minorities conduct themselves as they wish without being criminalized, so long as they do not interfere with the culture of the majority, and with the ability of the members

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[108] Rawls, John. Political liberalism. New York: Columbia University Press, 2005, p. XVI.

of the majority to enjoy the life-styles of their culture."[109] The second is "based on the assertion of individual rights against discrimination on national, racial, ethnic, or religious grounds, or on grounds of gender or sexual preference."[110]

But what would make the affirmation of multiculturalism different from the second approach? It is the emphasis on the importance of political action based on the belief that respect for cultural group membership is a condition for freedom and prosperity, as well as on the belief of the validity of diverse ways of life.[111] In this sense, Modood claims:

> "Multiculturalism is clearly beyond toleration and state neutrality for it involves active support for cultural difference, active discouragement against hostility and disapproval and the remaking of the public sphere in order to fully include marginalized identities."[112]

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[109] Raz, *id.*, p. 172.
[110] Raz, *id.*, p. 173.
[111] Cf. Raz, *id.*, p. 174. Defending the importance of the culture to freedom, he claims (id., p. 177) "By and large, one's cultural membership determines the horizon of one's opportunities, of what one may become, or (if one is older) what one might have been. Little surprise that it is in the interest of every person to be fully integrated in a cultural group."
[112] Modood, *id.*, p. 59.

Raz insists that this is not a conservationist view of cultures. The coexistence between members of different cultures makes them aware of differences and teaches them to appreciate their strengths and respect them, calling even intolerant cultures to tolerate others, so that cultures are continuously changing. Multiculturalism's recognition of the right of each individual to abandon his or her cultural group also induces change in the group itself.[113] In this sense:

> "This tension in multiculturalism, between a policy of protecting a plurality of cultures and recognizing and sometimes encouraging change in them, may surprise some. But it should not. Liberal multiculturalism does not arise out of conservative nostalgia for some pure exotic cultures. It is not a policy of conserving, fossilizing some cultures in their pristine state. Nor is it a policy fostering variety for its own sake. (...) Liberal multiculturalism stems from a concern for the well-being of the members of society. That well-being presupposes, as we saw, respect for one's cultural group and its prosperity. But none of this is opposed to change."[114]

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[113] Raz, *id.*, p. 181.
[114] Raz, *id.*, pp. 181-182.

The conflict is endemic to multiculturalism, because of the hostility between members of different groups. At times, this would mean that incompatible options may coexist in the same society. However, this type of conflict also occurs in apparently homogenous societies. Sexual orientation, for example, illustrates this tension between acceptance and rivalry. Multicultural conflicts would be in this sense an expression of conflict between competing ways of life polarized along cultural divisions.[115]

However, whether admitting different ways of life in accordance to the principle of toleration or recognizing the need of policies to accommodate cultural diversity, we may wonder if all practices should be respected. Responding to this inquiry, Parekh, when considering toleration, concludes that we cannot establish in advance the limits of tolerance, which could be "best elicited by means of an open-minded intercommunal dialogue aimed at evolving a reasonable consensus."[116]

Though different notions may coexist, the wider society cannot be expected "to tolerate all kinds of minority practices, nor can it justifiably ban all practices that diverge from its own".[117] Indeed, in the end, unlimited tolerance can have as backlash the disappearance of

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[115] Raz, *id.*, p. 180.

[116] Parekh, Bhikhu. "Minority Practices and Principles of Toleration." International Migration Review 30.1 (1996): 251-84, Web, p. 251.

[117] Parekh (1996), *id.*, p. 251.

tolerance, according to Popper's paradox of tolerance. He claims that if we extend unlimited tolerance even to those who are intolerant, there is a risk of the tolerant being overthrown by the intolerant.[118]

Parekh[119] argues that, to decide which practices we should tolerate and which we should ban, "we need guiding principles or at least a set of general considerations". In this sense, he points out and analyses five common principles on this subject: moral universalism, core values, no-harm principles, human rights and dialogical consensus.[120] These principles will be explored in the second part of this work. For now, I would observe only his claim that "no society is static, and its very survival requires that it should constantly redefine its identity and modify its values."[121]

It is important also to be aware of two particular dimensions of the toleration issue: the theoretical and the political. The academic dialogue is not constrained by the urgency of decision, unlike the political dialogue. In politics' process, deep disagreements cannot always be completely resolved, yet we need ways of reaching a decision,

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[118] Popper, Karl. The Open Society and its Enemies. London: Routledge, 1995. P. 602. In response to this paradox, he claims that (Ibid.): "We should claim that any movement preaching intolerance places itself outside the law, and we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal."

[119] Parekh (1996), *id.*, p. 256.

[120] Parekh (1996), *id.*, p. 254.

[121] Parekh (1996), *ibid.*

even if subjected to disagreement.[122] Parekh's answer to this dilemma is as follows:

> "I suggest the best way to decide what minority practices to allow or disallow is to appeal to what I shall call the society's operative public values. Every society consists of different classes, regions, social and religious groups, and so forth, each with its own overlapping values and practices or subculture. These cannot live together and constitute a more or less cohesive society without sharing at least a minimum body of values and practices in common. The values articulate and are underpinned by the society's broadly shared conception of how its members should live together and conduct their relations. The values are rarely acceptable to all its members, some of whom avoid their constraints at every available opportunity. However most of them accept and seek to live by them, and even those who do not live by them know what they are and acknowledge their authority - at least in public."[123]

The discussion about toleration is evident also in the classic debate on assimilation vs. integration, which is in

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[122] Parekh (1996), *id.*, p. 259.
[123] Parekh (1996), *id.*, p. 259.

reality outdated and oversimplified, because it precludes, at least, the multicultural approach. Tariq Modood, for example, revising his early understanding of the three responses to difference (assimilation, integration and multiculturalism), now categorizes it in four modes: assimilation; individualistic-integration; cosmopolitanism; and multiculturalism.[124]

Assimilation is a one-way process through which it is expected that the new arrival become as similar to the majority of their new compatriots as possible. An example would be the old "melting pot" approach of the United States.[125] Another example is the French policy. Assimilation is similar to the idea of acculturation. However, while acculturation usually refers to the contact of two or more cultural groups,[126] assimilation is invoked from the individual perspective. The French model is usually pointed to as an example of the assimilationist approach: the idea of a unifying "French identity" that cannot be threatened by cultural diversity.[127]

Integration, also with an individualistic aspect, is instead a two-way process, that aims at conformity of immigrants and ethnic minorities. Unlike the assimilationist

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[124] Modood, *id.*, pp. 151 *et seq.*

[125] Modood, *id., p.* 44.

[126] Fikentscher, Wolfgang. Law and Anthropology. 2nd edition. München; Oxford; Baden-Baden: C. H. Beck; Hart; Nomos, 2016, p. 185

[127] Cf. Bruce-Jones, Eddie. Race in the Shadow of Law: State violence in contemporary Europe. Abingdon and New York: Routledge, 2017, p. 26.

process, it relies also on the participation of members of the majority in the process.[128] In the end, it would result also in an abandonment of group affiliation and culture, so that minorities would continue to be excluded unless they assimilated to the dominant norms.[129]

Beyond this individualist-integration, we have, first, cosmopolitanism and then multiculturalism. Cosmopolitanism represents an explicit recognition of the value of "difference", individuals being free to choose their identities, even mixing different identities. The boundaries are fluid. It is a conception of "multiculturalism as maximum freedom, for minority as well as majority individuals."[130] Indeed, it is considered in public discourse as well as in academia as a kind of multiculturalism.[131]

However, cosmopolitanism is also an individualistic perspective. Instead, proper multiculturalism, the second kind, accommodates groups. In this work, I am using the term 'multiculturalism' for the "sociological and political position in which groups are a critical feature,"[132] not the cosmopolitanism approach.

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[128] Cf. Modood, *id.*, pp. 44 and 152.
[129] Cf. Young, Iris Marion. Justice and Politics of Difference. Princeton: Princeton University Press, 1990, p. 168.
[130] Modood, *id.*, pp. 152-153.
[131] Cf. Modood, *ibid.*
[132] Modood, *id.*, p. 152.

2.5. The multicultural riddle

The perspectives until now explored take for granted the elements of cultural diversity. Speaking of a multicultural riddle (a paradox that can be solved by a recasting of its terms), Gerd Baumann[133] points out that only by rethinking the relations among nationality, religion and ethnicity is it possible to devise a viable multicultural philosophy.

The riddle is how to "establish a state of justice and equality between and among three parties: those who believe in a unified national culture, those who trace their culture to their ethnic identity, and those who view their religion as a culture.[134] The discussions about multiculturalism are usually centred around an essentialist approach of ethnicity. Most of the theories do not even consider religion or see religious minorities as bearers of differentiated rights. Also, the role of nationality (or nationalism) is rarely taken into account in the multicultural analyses.

The common element to these three pillars of multiculturalism is the idea of culture. But what does

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[133] Baumann, Gerd. The multicultural riddle. New York: Routledge, 1999.

[134] Baumann, *id.*, p. vii.

culture signify? This is the question that Gerd Baumann poses in order to solve the riddle. He distinguishes between two ideas of culture: essentialist and processual. The first meaning is the most widespread and represents a static view of culture. Culture as heritage, in the sense that the child would only reproduce his or her parents culture: a photocopy machine. On the processual meaning, culture "only exists in the act of being performed, and it can never stand still or repeat itself without changing its meaning".[135] In Baumann words:

> "Today's multiculturalism is no longer concerned with the 'folk cultures' white peasants flocking to cities run by other white people who despised them and often wanted them out again. The present-day challenge, both political and theoretical is about three other concerns. The points of the multicultural triangle are about nationality as culture, ethnicity as culture and religion as culture. All of these crumble as soon as one scratches the surface: Nationality as culture is neither postethnic or postreligious; ethnicity as culture is based on culturally fermented commitments, not on raw genes; and religion as culture is not a matter of sacred rule books but of contextual bearings.

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[135] Baumann, *id.*, pp. 24-26.

> Yet all three versions of culture share the same choice: whether culture is comprehended as a thing one has, or as a process one shapes."[136]

In order to circumvent the static view of cultural identity as something that one has rather than a process, Gerd Baumann suggests the replacement of the idea of "identities" with the conception of "identification" so that we no longer see any identity as fixed and immutable, because culture is not "a giant photocopy machine that turns out clones."[137] The concept of culture is going to be examined in more details in the second part of this work.

Along these lines, we may recall Bhabba's concept of cultural hybridity, which challenged the essentialist view of culture and cultural identities:

> "Terms of cultural engagement, whether antagonistic or affiliative, are produced performatively. The representation of difference must not be hastily read as the reflection of pre-given ethnic or cultural traits set in the fixed tablet of tradition. The social articulation of difference, from the minority perspective, is a complex, on-going negotiation that

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[136] Baumann, *id.*, p. 83.
[137] Baumann, *id.*, pp. 137-8.

seeks to authorize cultural hybridities that emerge in moments of historical transformation."[138]

On the following pages, I will explore briefly the three poles of multiculturalism.

3. Nationality

Isaiah Berlin defined nationalism as the

"conviction, in the first place, that men belong to a particular human group, and that the way of life of the group differs from that of others; that the characters of the individuals who compose the group are shaped by, and cannot be understood apart from, those of the group, defined in terms of common territory, customs, laws, memories, beliefs, language, artistic and religion expression, social institutions, ways of life, to which some add heredity, kinship, racial characteristics; and that it is these factors which shape human beings, their purposes and their values."[139]

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[138] Bhabha, Homi K. The Location of Culture. London and New York: Routledge, 2004, p. 3.

[139] Berlin, Isaiah. Nationalism: Past Neglect and Present Power. In: Against the Current: Essays in the History of Ideas. New York: The Viking Press, 1979, p. 341.

It is this ideological aspect of nationalism, in opposition to an objective view of nationality, that is the focus of our inquiry. As mentioned, Gerd Baumann sees nationality as one of the poles of multiculturalism, in the sense that the national culture is usually opposed to, or above, ethnic and religious identities. Indeed, since nation-states arose in the West, they had to "overcome the boundaries of ethnicity among their citizens."[140]

However, it is hard to draw clear boundaries between ethnic groups and nations, since the idea of a nation was usually constructed as a "superethnos."[141] Actually, this idea of a "superethnos" contributes to two somehow contradictory misunderstandings: first, the notion that only the state is a clear difference between nation and ethnicity[142] and second, the overlapping of the concepts of nation and state[143]. Only by refraining from this "superethnos" construction could the nation-state be "truly post ethnic, that is, truly inclusive".[144]

In fact, the opposition between nationality and ethnic minorities is performed through the construction of this "superethnos," that is the pursuit of the "one state, one nation" principle, and as a consequence the denial of ethnic

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[140] Baumann, *id.*, p. 31.
[141] Expression borrowed from Baumann, cf. *ibid.*
[142] Cf. Baumann, *id.*, pp. 31-32.
[143] Cf. David Miller, *id.*, p. 19.
[144] David Miller, *ibid.*

diversification.[145] Thus, the concept of a multicultural nation-state is, by some means, a contradiction in terms.[146] Actually, in this identification of nation with a "superethnos" lies the conflict between nationality and multiculturalism. In other words, the controversy has as origin the static and idealized view of national culture.[147]

In other words, nationalism presupposes that ethnic boundaries should not cut across political ones, guaranteeing that these differences will not take apart a given state.[148] It is a process of making all the people circumstantially living in the same territory "indistinguishable from the rest of the nation's body, to digest them completely and dissolve their idiosyncrasy in the uniform compound of national identity"."[149]

This idea of a nation can be traced back to the origins of the Western nation-state, which was founded on two antagonistic roots: rationalism and romanticism.[150] Indeed, the modern nation-state is a result of economic and geopolitical necessities, founded on the doctrine of sovereignty, associated with the romantic view of the nation (Volk).

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[145] Cf. Bauman, *id.*, p. 90.
[146] Cf. Baumann, *id.*, pp. 31-32
[147] Cf. Watson, C.W. Multiculturalism. Buckingham: Open University Press, 2000, p. 66.
[148] Cf. Gellner, Ernest. Nations and Nationalism. Second edition. New York: Cornell Paperbacks, 2008. p. 1
[149] Bauman, *id.*, p. 93.
[150] Cf. Baumann, *id.*, p. 18.

According to Scherrer, the construction of this "relationship of brotherhood (fraternity in liberty and equality)" in Europe is related to some preconditions that lead to the ethno-national unification processes, namely (i) a potentially unified ethnic base and (ii) congruence between geographical and ethnic (at least potentially) boundaries.[151] The notion of a unified ethnic origin only potentially is in consonance with the idea of construction of nation as a "superethnos".

These preconditions were a fertile terrain for the idea that a legitimate government should rule only over citizens of the same ethnos. This notion appeared in Europe at the beginning of the late Medieval period, it became "fully conscious in the late eighteenth century and flourished vigorously until about 1920".[152] The "strong" version of nationalism is rooted in "German romanticism, in its organic view of society and its cultural relativism."[153]

Undoubtedly, at that time there was a context favourable to the promotion of uniformity. On the one hand, Romantic nationalism could not deal with cultural heterogeneity, deviating to forcible assimilation, ethnic cleansing or genocide.[154] On the other hand, the Enlightenment principle

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[151] Scherrer, *id.*, pp. 9-10.
[152] McNeill, *id.*, p. 7.
[153] David Miller, *id.*, p. 8.
[154] Barry, Brian M. Culture & Equality: An Egalitarian critique of multiculturalism. Cambridge, Massachusetts: Harvard University Press, 2002, p. 280.

of universality provided a philosophical basis for this mechanism, identifying "local" and "tribal" with backwardness, ensuring that the residual traces of the past wouldn't survive for long.[155]

However, this ideal of ethnical unity has only existed as an exception[156]. Indeed, it is a rather Romantic concept. The opposition of nation to ethnicity curiously reflects the same essentialist view of "culture," often criticized when labelled by some multicultural approaches. It is the same essentialist view, only in a different guise.[157]

Besides the notion of ethnical belonging, the national identity is also sometimes misconceived to equal genetic ancestry. The mistake of attributing common cultural traces to genetic characteristics and its deviances are tragically known.[158]

These ethnical or genetic roots appeal to an idea of nationalism that does not correspond to reality, one that deems it as "something that happens to us rather than as something we participate in creating."[159] Hobsbawm says it is a paradox that modern nations claim to be the opposite of novel and constructed, rooted in some remote antique human communities "so 'natural' as to require no definition other

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[155] Bauman, *id.*, pp. 90-91.
[156] McNeill, i*d.*, p. 87.
[157] Cowan, et. al., *id.*, p. 3.
[158] Ricciardi, Mario. Identità nazionale e pluralismo. In: Pluralismo e Libertà Fondamentali. edited by Mario Ricciardi and Corrado del Bò, p. 154.
[159] David Miller, *id.*, p. 6.

than self-assertion", although the concepts of nations and nationals "must include a constructed or 'invented' component".[160] On the other hand, stressing the artificial aspect of nationhood, Gellner goes perhaps too far in denying previous characteristics[161] of these "imagined communities".[162]

In this process of building a new nation, the "repertory of cultural characteristics" played a relevant role alongside more tangible aspects, such as territory.[163] But, how does this cultural repertory come to existence? On the one hand, we have the inherited history, customs, traditions and beliefs. One the other hand, we have the imagination about these manifestations and the future shaped through common cultural expressions.[164] The pride in these symbolical elements, which distinguish the new nation from others, constitutes a large part of the co-nationals personal identity,[165] establishing national homogeneity. This coincidence between nation and state defines the boundaries

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[160] Hobsbawm and Ranger, *id.*, p. 14.

[161] Cf. Gellner, *id.*, pp. 46-47, *in verbis:* "But nationalism is not the awakening of an old latent, dormant force, though that is how it does indeed present itself. It is in reality the consequence of a new form of social organization, based on deeply internalized, education-dependent high cultures, each protected by its own state. It uses some of the pre-existent cultures, generally transforming them in the process, but it cannot possibly use them all. There are too many of them. A viable higher culture-sustaining modern state cannot fall below a certain minimal size (unless in effect parasitic on its neighbors); and there is only room for a limited number of such states on this earth."

[162] Anderson, Benedict. Imagined Communities. Revised edition. London and New York: Verso, 2006, p. 6.

[163] Cf. Watson, *id.*, p. 35.

[164] Ricciardi, *id.*, p. 150.

[165] Watson, *ibid.*

"for but one language, culture, historical memory and patriotic sentiment."[166]

However, according to Hobsbawm,[167] in the process of "building" a new state the traditions are not only reframed, but also invented, in the sense that, by reference to the past, they are formalized and ritualized, through imposing iteration. While the old traditional practices of a particular group are identifiable, the traditions of nations are not easily traceable. Contrarily to the strongly binding social nature of the traditional practices, the latter tend to be "quite unspecified and vague as to the nature of the values, rights and obligations of the group membership they inculcate: 'patriotism', 'loyalty', 'duty', 'playing the game', 'the school spirit' and the like."[168]

This process of reification of nationality boosts hostility toward cultural attachments that do not correspond to this ideal of nation. We have examined how theories about multiculturalism struggle to reconcile liberalism with respect (or at least tolerance) for cultural diversity. The theories have different conclusions on the degree of compatibility between liberalism and diversity, but all have as a common denominator the tolerant nature of liberalism. They differ basically on the notion as to whether the traditional liberal toleration approach is sufficient, or

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[166] Bauman, *id.*, p. 91.
[167] Hobsbawm and Ranger, *id.*, p. 5.
[168] Hobsbawm and Ranger, *id.*, p. 10.

not, to accommodate cultural diversity. However, the analysis of the origins of the nation-state, which has the same historical root as liberalism, does not suggest such a tolerance is required.

Nationalism and liberalism shared the same purpose. In both strategies, there was no room for an “autonomous and self-governing community.” The “one nation” ideal of nationalists and the “republic of free and unbound citizens” of liberals overcome community ties.[169] For the communities, both projects represent the same fate.[170] Nonetheless, from the fate of communities to the fate of individuals there is an enormous difference. In fact, the nationalist project, unlike the liberal ideal of individual emancipation, also limits the freedom of the individual.[171]

Yet, I would like to highlight that the rise of nations in the New World poses a different sort of questions. Since the former colonies shared cultural features with their respective imperial metropoles, we are compelled to search for additional reasons to explain these nations. Anderson presents an in-depth argumentation to explain "how administrative units could, over time, come to be conceived as fatherlands". The shared characteristic of the people of each of these New World nations was essentially the "fatality

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[169] Bauman, id., pp. 92-93

[170] Bauman, *ibid*.

[171] Baccarini, Elvio. Pluralismo e libertà fondamentali. In: Pluralismo e Libertà Fondamentali. edited by Mario Ricciardi and Corrado del Bò. Milano, Giuffrè, 2004, p. 105.

of trans-Atlantic birth". Even those who were born within one week of his or her parents' migration, were considered irremediably creole.[172]

Combined with the understanding of the political, cultural and military aspects led by the metropole[173] and with the ideological basis of liberalism and Enlightenment, which provided the ideological basis for challenging the *anciens régimes*, this "fatality" shaped the idea of a different community[174]. In fact, differently from the indigenous and the slaves, the creoles had the means to successfully assert themselves and constitute "simultaneously a colonial community and an upper class".[175] However, if even in Europe ethnic homogeneity was rarely achieved, in the New World "a homogeneous ethnic basis of the nation-state remains in most cases simply an illusion,"[176] as we will see in the chapter three.

Multiculturalism can represent the overcoming of distorted narratives of nationality, not by obliterating the sense of national belonging, but divesting it of idealized perspectives. A successful multicultural policy depends on the appropriation of a sense of belonging to one country (or federation),[177] the notion of which will become clearer in

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[172] Anderson, *id.*, pp. 47-58.
[173] Anderson, *id.*, p. 58.
[174] Anderson, *id.*, p. 65.
[175] Anderson, *id.*, p. 58.
[176] Scherrer, *id.*, p. 16.
[177] Defending the need of a sense to belonging to a country, cf. Modood, *id.*, p. 139.

the upcoming discussion on citizenship. Indeed, the aim of multiculturalism should be to confront the "very concepts of homogenous national cultures" in order to construct an internal narrative that acknowledges the diversity produced by migration and the native minorities.[178]

To conclude this chapter, I would like to quote C.W. Watson's[179] words on the complex interaction between multiculturalism and nationalism:

> "Multiculturalism and nationalism may not be intrinsically related, but it is certainly the case that in the twentieth century at least they have been awkwardly and dangerously entangled. An emphasis on the one has often meant a reduction in the importance attached to the other."

4. Ethnicity

What do we understand as ethnicity? As examined in the previous section, the idea of ethnicity, in relation to multiculturalism, is primarily used in opposition to the idea of nationality (or nationalism). In this sense,

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[178] Bhabha, *id.*, pp. 7-9.
[179] Cf. Watson, *id.*, p. 18.

ethnicity challenges the belief in a uniform concept of nationality, exposing the variety of ethnical origins in contemporary nation-states. In fact, the concept of (ethnical) pluralism is the "flip side" of assimilation.[180]

It should be recalled that polyethnicity is not an exclusive contemporary phenomenon, but a norm in history, whence "the ideal of an ethnically unitary state was exceptional in theory and rarely approached in practice".[181]

The concept of ethnicity itself is dubious and intensely problematic.[182] The definition of ethnicity has at least three different parts. The first is the perception by others of factors such as language, religion, race, ancestrality and other cultural elements, so that that a group is recognized as different. Second, the group's own identification as different regarding these factors. Third, the shared activities based on real or mythical common origin and culture.[183] But the question is how to determine these cultural traces. On this issue, Ali Rattansi's[184] speculates as follows:

> "Is any particular shared 'cultural' attribute more important than any other - for instance, language,

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[180] About this "two sides", cf. Hendricks and Nickoli, i*d*. p. 15.
[181] McNeill, *id.*, p. 4.
[182] Cf. Poulter (1998), *id.*, p. 4.
[183] Classification cited by Hendricks and Nickoli, *id.*, p. 11.
[184] Rattansi, Ali. Just framing: ethnicities and racism in a "postmodern" framework. In: Social Postmodernism: beyond identity politics. Cambridge: Cambridge University Press, 1995, pp. 252-253.

> territoriality, or religion? Do not notions of 'shared origin' smuggle in ideas of shared biology (Nash, 1989, 5)? How is 'ethnicity' to be consistently and usefully distinguished from 'race', and 'ethnocentrism' from 'racism', and both of these from 'xenophobia' and 'nationalism'? How distinctive is the current notion and practice of 'ethnic cleansing' from the Nazi project of 'racial cleansing'?"[185]

This reflection poses the question of the fluidity of the criteria to determine an ethnic group. For example, two persons can speak the same language, but do not share the same religion or social and economic attachments. The relevance of each criterion is variable and can be weighted differently according to factual situations.[186] In a process of affinity through similarities (idealized or real), a group creates bounds while stressing the differences from the others.[187]

Regarding the unclear meaning of ethnicity, Ali Rattansi[188] says that there is agreement only in relation to two points: first, that the term derives from the Greek "ethnos", meaning a collectivity sharing certain common

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[185] Rattansi, *ibid.*

[186] Cf. Spreafico, Andrea. Ripensare la comunità. In: Multiculturalismo o comunitarismo? A cura di Enrico Caniglia e Andrea Spreafico. Roma: Luiss University Press, 2003, p. 274.

[187] Cf. Spreafico, *id.*, p. 275.

[188] Rattansi, *ibid.*

attributes, and, second, that these attributes are a cultural marker.

However, even need of shared cultural characteristics is contested. In the process of building ethnical boundaries, it would not so much be the cultural elements that would define the ethnic group, but the subjective notion of the group about the boundaries.[189] Indeed, Fredrik Bark, one of the most influential contemporary anthropologists, published in 1969 an essay arguing that “members of an ethnic group could, through contact with other groups, cease to exhibit their separate cultural traits and yet still perceive themselves as distinctive and different from their neighbours."[190]

The fundamental advantage of this way of reasoning is to divert from the commonplace essentialist view of ethnic identities as “genuine’ or ‘authentic’ in contrast to other identities which are ‘manufactured’ or ‘imposed.”[191] In fact, an ethnic identity is not a static process. It is a dialogical "social imaginary" process, a narration which bounds community in “time and space, in history, memory, and

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[189] In this sense, following the lesson of Fredrik Bark, cf. Spreafico, *id.*, p. 274.

Reflecting also about the building of boundaries, I quote Eligio Resta (Il diritto fraterno. Editore Laterza. 2009. p. 23): "Il senso dell'identificazione fa presto a radicarsi in un senso dell'appartenenza e questa, si sa, è l’occasione di inclusioni ed esclusioni, di solidarietà e di ostilità, di amicizie e inimicizie."

[190] Poulter (1998), *id.*, p. 6.

We are going to see, in the third part, how this conception influenced the idea of ethnicity in the Brazilian context.

[191] David Miller, *id.*, p. 135.

territory."[192] Thus, ethnicity is a process, a product of group's actions.[193] But this procedural nature of ethnicity does not put into question its sociological truth[194] and its relevance in political theory.

Furthermore, and perhaps more relevant to our investigation of multiculturalism, Barth claims that "members of an ethnic group could disperse into very different ecological environments and significantly alter their cultural behaviour in consequence, but nevertheless maintain a common allegiance to their original ethnic group."[195] In a context of transnational connections of the ethnic and religious communities through communication tools, the fact that one member of an ethnic group is territorially detached is even less relevant for ethnical identity.[196]

From this sociological procedural view of ethnicity, it must be highlighted that, in order to achieve certain goals, or as a consequence of the attitude of the larger society and its institutions, "a group may choose to emphasize, adapt or even distort or invent specific cultural traits."[197] In other words, the differences may be determined by the social context in which the ethnic groups have to "negotiate".[198] In

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[192] Rattansi, *id.*, p. 258.
[193] Cf. Baumann, *id.*, p. 63.
[194] Cf. Modood, *id.*, p. 84.
[195] Poulter (1998), *id.*, pp. 6-7.
[196] Cf. Appadurai, Arjun. See note 7.
[197] Poulter (1998), *id.*, p. 7.
[198] Cf. Bauman, id., p. 90.

situations of threat, for example, cultural elements can become enhanced or diminished accordingly.[199]

Finally, demythologizing ethnic identity enables a proper acknowledgement of the demands of ethnical recognition and reveals the emptiness of reified views of nationality. In fact, an effective approach to ethnicity and nationality has to reflect the present and the future, not idealized narratives of the past, revisiting the country's story, symbols and images.[200] Neither national identities nor the ethnical identities are immanent and fixed in time.

5. Religion

In regard to this work, which is concerned with multiculturalism in order to examine the cultural evidence in criminal law in relation to indigenous peoples, religion is less relevant than nationality and ethnicity. Thus, I will explore only briefly this pole of the multicultural riddle.

Similarly, to the demands of ethnic minority groups, religious groups present demands of recognition, beyond the toleration and religious freedom of the classical

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[199] Scherrer, *id.*, p. 95.
[200] Cf. Modood, *id.*, p. 17.

liberalism. This has been seen as a challenge or an attack on the liberal principle of secularism.[201] Indeed, an increasing number of academics think that we are experiencing a crisis of secularism, because religious identity is being legitimated as a "basis of public engagement and political action"[202]. In this line, Habermas claims that we are in a transition from a secular to a post-secular society.[203]

The main challenge to secularism in Europe and North America is the presence of Muslims.[204] The emergence of political questions related to the presence of Muslims "has thrown multiculturalism into theoretical and practical disarray".[205] Even the traditional liberal approach of religious toleration is brought into question in this context.

Whether in the classical approach of tolerance or in a multiculturalist perspective, it is important to take into account that the question of religious identities, like nationality and ethnicity, also crosses the debate about essentialism:

> "too much emphasis is often laid on the influence of religions on people, and not enough on the influence of peoples and their history on religions. The influence

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[201] Cf. Modood, *id.*, p. 65.
[202] Modood, *id.*, p. 169.
[203] Cited by Modood, *id.*, p. 168.
[204] In this sense, Modood, *id.*, p. 170.
[205] Modood, *id.*, p. 78.

is reciprocal, I know. Society shapes religion, and religion in its turn shapes society. But I have observed that because of a certain mental habit that we have got into we tend to see only one side of the dialectic, and the omission greatly distorts our perception."[206]

6. Citizenship

As previously mentioned, multicultural theories and policies have a strong forward-looking component. How we see the future of cultural differences is the main question to be dealt with. Another key question is the future of the nation-states. Should we preserve diversity at any cost? How is national unity to be maintained in a diverse cultural context?

The answers to these questions require the overcoming of static views of nationality, ethnicity and religious identity, in order to solve the multicultural riddle. An effective multicultural policy has to go beyond an idealized view of cultural heritage towards a de-mythologizing view. Cultural practices are not always pretty things: “It involves the good and the bad, the attractive and the unattractive,

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[206] Maalouf, Amin. On Identity. London: The Harvill Press, 2000, p. 56.

reasons for pride and reasons for shame."[207] We cannot pick only the aspects that we appreciate.[208] At the same time, we have to bypass the idealized views of nation, because, at the end, nationalism is also a form of moral particularism.[209]

Furthermore, an effective multicultural theory should care about values. The right to recognition cannot represent a blank cheque to all ways of life and practices.[210] Indeed, the challenge underlying multiculturalism is how cultural diversity could contribute to a "better, richer, pluralistic society".[211] In this perspective of values, criminal law represents an "important and distinct dimension to the general multicultural debate,"[212] because of its role as mediator of different ways of life.

The accentuation of ethnic and religious identities in mere opposition to nationhood results in a dangerous space for divisiveness,[213] tending to diminish the role and autonomy of the individuals, placing them in stereotypical confines.[214] The positive self-fulfilment role of culture is turned into

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[207] Bissoondath, *id.*, p. 87.

[208] In this perspective, we would be acting in a "boutique multiculturalism", as Stanley Fish alerts us about. Cf. Fish, Stanley. "Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech." *Critical Inquiry* 23, no. 2 (1997): 378-95.

[209] Cf. Young, Iris Marion. Inclusion and Democracy. Oxford: Oxford University Press, 2000, p. 251.

[210] Perspective of Bauman, *id.*, p. 80.

[211] Lernestedt, Claes. Criminal Law and "Culture". In: Criminal Law & Cultural Diversity. Edited by Will Kymlicka, Claes Lernestedt, & Matt Matravers. Oxford: Oxford University Press. 2014, p. 45.

[212] Lernestedt, *ibid.*

[213] Cf. Bissoondath, *id.*, p. 186.

[214] Cf. Bissoondath, *id.*, p. 212.

an object for display, devaluating the inherent value of culture itself,[215] in static view of human personality.

On the other hand, from Bauman's perspective of security,[216] ethnic belonging can be seen as a shelter for those who are neither resourceful nor self-reliant, those to whom the right to a free choice of identity has been denied.[217] Seeking shelter in community comes more naturally to them.[218]

Indeed, the liberal emancipatory perspective of individuality, of a free choice of identity, is not equally available to all. It is fully accredited only to a small privileged part of the population. In this sense, Bauman distinguishes between individuality *de jure* and individuality *de facto*, the latter corresponding to an emancipative capacity that sets those favoured apart from a great number of their contemporaries.[219]

Social insecurity and exclusion usually play an undervalued role regarding the demands for recognition. In this matter, Nancy Fraser is one of the dissonant voices. She is against what she calls the "decoupling of cultural politics of difference from social policies of equality".[220]

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[215] Cf. Bissoondath, *id.*, p. 88.

[216] For Bauman (*id.*, pp. 4-5), security and freedom are two fundamental values that work in a pendulum-like dynamic. They cannot ever be in friction and they are never fully reconciled. "We cannot be human without both security and freedom; but we cannot have both at the same time and both in quantities which we find fully satisfactory."

[217] Bauman, *id.*, p. 100.

[218] Bauman, *id.*, p. 96.

[219] Bauman, *id.*, p. 58.

[220] Fraser, Nancy. Social justice in the age of identity politics: Redistribution, recognition, participation. WZB Discussion Paper, 1998, No. FS I, 98-108, p. 1

Actually, she thinks that recognition is not a matter of self-realization, but a question of justice, of institutional inclusion of minorities.[221] Justice should not be discussed only from a material distributive perspective, but include also non-distributive issues.[222]

Along the same line, arguing that the demands for cultural recognition have to be analysed through consideration about distribution, Baumann argues that:

> "The two developments - the collapse of collective retribution claims (and more generally, the replacement of the criteria of social justice by those of respect for difference reduced to cultural distinction) and the growth of inequality running wild - are intimately related. There is nothing incidental about this coincidence. Setting claims for recognition free from their redistributive content allows the growing supply of individual anxiety and fear generated by the precariousness of 'liquid modern' life to be channelled away from the political area - the sole territory where it could crystallize into redemptive action and could therefore be dealt with radically - by blocking its social sources."[223]

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[221] Cf. Fraser (1998), *id.*, p. 3.
[222] Cf. Young (1990), *id.*, p. 18.
[223] Bauman, *id.*, p. 88.

In effect, in Bauman's perspective, inequalities are recast as "cultural differences", disguising the "moral ugliness of deprivation" by reshaping it as the "aesthetic beauty of cultural variety."[224] In other words, the focus on "culture" would be an attempt to compensate the failure of the contemporary models of justice and equality.[225]

The conclusion is that the politics of recognition without policies of redistribution are pointless. The cultural recognition would be only an ineffectual consolation prize.[226] Recognition of cultural variety should be regarded as the beginning, not the end of the question. It is but a starting point for a political dialogical process, whereby the conception that "difference is worthy of perpetuation just for being a difference" is exempted.[227]

As seen above, human beings tend to find security in cultural identity; so that, in contrast to the disengagement of globalization, we encounter as a consequence an increase of localism and closing communities.[228] Thus, security is an unavoidable condition of dialogue between cultures, an instrument to engage minorities in a dialogical process.[229] In this framework, citizenship could be a secure place to the meeting of cultural diversity, a "reasonable basis of

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[224] Bauman, *id.*, p. 107.
[225] In this sense, cf. Cowan et. al, *id.*, p. 2.
[226] In this vein, Bauman, *id.*, p. 107.
[227] Bauman, *id.*, p. 136.
[228] Cf. Spreafico, i*d.*, p. 257-258.
[229] Cf. Bauman, *id.*, p. 142.

social unity"[230]. Indeed, the ascription of rights is the mechanism of social cohesion through which the differences can be respected.

The classical liberal conception of equality is rooted in the principle that there is only one status of citizenship, regardless of classes and other social factors. In this rigid scheme, granting a special place for cultural differences would cost the ruin of equality itself.[231]

In the preceding sections, however, we explored how the concept of equality has different political meanings, due to its relational nature. We analysed also how essentialist views of nationality, ethnicity and religious identity can lead to misinterpretations of the demands of recognition. In the same direction, we should ask if the apparently univocal liberal meaning of citizenship is adequate.

Seyla Benhabib associates the ideal of citizenship, as the practice and enjoyment of rights and benefits, to the liberal value of autonomy. In other words, the private autonomy of citizens "presupposes the exercise and enjoyment of liberty through a rights-framework which underwrites the equal value of their liberty".[232]

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[230] Rawls, *id.*, p. XXXVI.

[231] In this sense, cf. Ferretti, Maria Paola. Tre modi di intendere le differenze culturali. In: Pluralismo e Libertà Fondamentali. edited by Mario Ricciardi and Corrado del Bò, pp. 6-7.

[232] Benhabib, Seyla. Borders, boundaries, and Citizenship. In: Political Science Politics, 38(4), 2005, p. 673.

Belonging to a nation-state is the condition to access this framework of rights. However, since the idea of a territorially circumscribed nation-state is in crisis, the concept of citizenship is equally put at stake.[233] Ironically, "while state sovereignty in economic, military, and technological domains has been greatly eroded, it is nonetheless vigorously asserted: national borders, while more porous, still keep out aliens and intruders."[234] In this sense:

> "From a normative point of view, transnational migrations bring to the fore the constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other. I argue that practices of political membership may best be illuminated through an *internal reconstruction and critique* of these dual commitments."[235]

Using the allegory of travellers navigating an unknown terrain with old maps, she underlines the need of a reconfiguration of citizenship in order to face the decline of the unitary model of the *demos*. She thinks that only a cosmopolitan federalism with a framework of sub- and

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[233] Cf. Benhabib (2005), *ibid*.
[234] Benhabib (2005), *id.*, p. 674.
[235] Benhabib (2005), *id.*, p. 673.

transnational modes of cooperation, representation, and collaboration may reconfigure citizenship beyond nation-state boundaries.[236]

In other words, it is a reshaping of the public sphere, so that the social meanings, including citizenship, could be reconstructed through a more comprehensive and democratic public representation, aiming to circumvent the tendency of advantage of dominant groups.[237] We must overcome the closed idea of citizenship that excludes all the others. It is a question of political justice.[238] And we have already, in regional and international contexts, some experiences of forms of wider political coexistence that could guide this discussion.[239]

The challenge is to obtain cohesion, despite the cultural diversity. In this sense, the awareness of the procedural nature of nationality leads to the conclusion that the unity of the *demos* "ought to be understood not as if it were a harmonious given, but rather as a process of self-constitution through more or less conscious struggles of inclusion and exclusion."[240] From this perspective,

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[236] Cf. Benhabib (2005), *id.*, p. 675-676.

Using also the language of maps, Bauman (*id.*, p. 60) thinks that the problem has a greater intensity: "It is not as though the old maps have become outdated and no longer offer reliable orientation on this unfamiliar ground [social location] - it is rather that ordnance surveys have never been conducted, and the office that might conduct them has not been established yet, nor is likely to be in the foreseeable future."

[237] Cf. Fraser (1995), *id.*, pp. 287-291.

[238] Cf. Walzer, Michael. Spheres of Justice: a defense of pluralism and equality. New York: Basic Books, 2000, p. 60.

[239] Cf. Resta, *id.*, p. XI-XII.

[240] Benhabib (2005), *id.*, p. 675.

multiculturalism, if the procedural nature of nationality and ethnicity is adequately understood, can be, contrary to expectations, a mechanism of unification rather than division,[241] effacing the idea of a hostility of multiculturalism towards the nation-state.

Actually, citizenship is the only possible point of cohesion in a multicultural society[242]. It is not nationalism neither patriotism that would bind together the different groups in a multicultural society. The only way to reach this in a pluralistic society is through a constant negotiation in order to accommodate the naturally different interests.[243] To achieve this, we must overcome a monistic view of identity:

> "Citizens are individuals and have individual rights but they are not uniform and their citizenship contours itself around them. Citizenship is not a monistic

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[241] In this sense, Caniglia, *id.*, p. 48.

[242] In this direction, Modood, *id.*, p. 113: "The ideas of equality that are implicit in the practice of citizenship can be used to highlight how certain challenges to those ideas of equality are not being met, or need to be rethought, of how the facts and mechanism of negative difference have to be more seriously explored and highlighted and overcome by allowing the flourishing of positive difference."

[243] In the inspiring words of Bauman (Bauman, Zygmunt. Modernità liquida. Roma, Bari: Laterza, 2011, pp. 208-209): "È questo, essenzialmente, il modello repubblicano di unità, di un'unità emergente che rapresenta una conquista comune di tutti gli agenti impegnati in propositi di autoidentificazione, un'unità che è risultato, non una condizione data a priori, della vita in comune, un'unità creata attraverso il negoziato e la riconciliazione, non attraverso il rifiuto, il soffocamento o l'eliminazione delle differenze."

identity that is completely apart from or transcends other identities important to citizens".[244]

Moreover, the idea of citizenship accommodating cultural diversity is a way to preserve the values made possible with the formal and material expansion of citizenship rights that has taken place since the 17th century.

From a more substantive perspective, the rights of citizenship, or human rights, in the broader context suggested by Bottomore, "are in a continuous process of development which is profoundly affected by changing external conditions (especially in the economy), the emergence of new problems and the search for new solutions."[245] Indeed, we should depart from a universal humanistic notion of citizenship. In this regard, Zygmunt Bauman claims:

"Universality of citizenship is the preliminary condition of all meaningful 'politics of recognition'. And, let me add, universality of humanity is the horizon by which all politics of recognition to be meaningful, needs to orient itself. Universality of humanity does not stand in opposition to the pluralism of the forms

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[244] Modood, *id.*, pp. 116-117.

[245] Marshall, T., Bottomore, T., & Moore, R. Citizenship and Social Class. London: Pluto Press, 1992, p. 89

of human life; but the test of truly universal humanity is its ability to accommodate pluralism and make pluralism serve the cause of humanity - to enable and encourage 'ongoing discussion about the shared conception of the good'."[246]

[246] Bauman (2001), *id.*, p. 140.

II – Culture and Law

Although some analyses suggest that cultural conflicts within criminal law are a new phenomenon related to the multicultural contexts that emerged from the Post-World War Two migration movements, we can actually identify the first attempts to deal with this controversy as early as the 1930s.[247] Following criminological discussions about the relation between race (or ethnicity) and crime,[248] Thorsten Sellin's *Culture Conflict and Crime*, published in the United States in 1938, is the pioneer study of this question in criminal law.

However, even if the origin of the debate in criminal law can be traced back to the 1930s, it is the multicultural philosophy of recent decades and the undeniable reality of increased cultural diversity that have highlighted the presence of cultural conflicts in criminal law. Indeed, the growing cultural diversity within nation states' borders has heightened the interest in the debate about criminal cultural conflicts. In this process, multiculturalism has become a

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[247] For example, Manzini, in 1933, regarding the case of Libya, sustained that special laws integrated by the local customs were applicable to indigenous. Cf. Manzini, Vincenzo. Trattato di Diritto Penale Italiano. Torino: 1933, pp. 254-255.

[248] We are going to explore later, in a specific topic the concept of cultural conflict, especially how the first analyses were focused on race, to which ethnicity was incorporated afterwards.

theoretical reference and has exposed some contradictions of criminal law. However, this has not been a one-way process. Whilst multiculturalism challenges criminal law[249] and adds complexity to it,[250] criminal law itself represents a proof-test of multicultural policies. As we have seen in the first chapter, multiculturalism challenges the fundaments of the liberal nation-state, mainly the principles of equality and universal individualism. Since these principles are core values of modern criminal law, multiculturalism therefore tests the bases of the penal system as well. In this framework, however, criminal law also stresses the limits of multiculturalism, because of the needs of the administration of justice.

Modern criminal law has dialectical roots in the Enlightenment and Romanticism. With rationality as an aspiration, the Enlightenment brought into the penal theory the logic of universal individualism[251] but this logic refers also to the construction of the nation-state, which has, as we have seen in the first part of this work, a Romantic

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[249] In this regard, Nuotio claims that “multiculturalism challenges the liberalist presuppositions of modern law, especially liberal individualism” (Nuotio, Kimmo. Between Denial and Recognition: Criminal Law and Cultural Diversity. In: Criminal Law & Cultural Diversity. Edited by Will Kymlicka, Claes Lernestedt, & Matt Matravers. Oxford: Oxford University Press, 2014, p. 67).

[250] Posner, for instance, claims that external factors, alongside internal ones, increase the complexity of federal cases in the U.S. Among these factors, he identifies "immigration" and "foreign customs and conditions" as elements that affected the complexity of criminal law (Posner, Richard A. Reflections on Judging. Cambridge and London: Harvard University Press, 2013, p. 2-17).

[251] Cf. Norrie, Alan. Crime, Reason and History: a critical introduction to criminal law. London: Butterworths, 2001, p. 21.

origin. From this Enlightenment basis, the "homo juridicus" was deemed a rational calculating man, isolated from the social and moral circumstances in which the crime occurs, and from the local culture. However, in this process, how the background of the majority culture or, from a different angle, the national culture, is reflected in criminal law is often ignored. The awareness of these roots is fundamental for understanding the role of culture within criminal law and to locate criminal law in a cultural perspective.

This dialectical root represents a paradox between the claim of a law free of particularism (culture in the plural) and its cultural nature related to the dominant values (culture in the singular).[252] Indeed, law has developed conceptually mainly as the antithesis of culture, in the sense of tradition, myth and customs. At the same time, modern criminal law is an achievement of the Enlightenment culture and the process of civilization that lead to nation states,[253] being in this sense identified with the emerging national cultures.

This leads to the debate about the limits of legal universalism, which has gained vigour with the growth of

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[252] About this paradox, cf. Monceri, Flavia. Multiculturalismo: Disincanto o Disorientamento del Diritto? In: Religione e religioni: prospettive di tutela, tutela della libertà. Edited by Giovannangelo De Francesco, Carmela Piemontese and Emma Venafro. Torino: Giappichelli, 2007, pp. 83-84.

[253] I am indebted to Coombe for this perspective (Cf. Coombe, Rosemary J. Contingent Articulations: A Critical Cultural Studies of Law. In: Law in the Domains of Culture. Edited by: Sarat, Austin; Kearns, Thomas R. Michiga. University of Michigan Press, 2006, pp. 22-23).

migratory movements and the demands of recognition of autochthonous peoples. Although there have been harsh social (and cultural) differences since its origin,[254] modern criminal law was established taking into account an idealized homogenous society. This process of concealing differences is exposed by the multicultural demands.

However, this does not mean that this ideal (or myth) of universal individualism is fruitless and dispensable; only that we must be aware of its limits.[255] It is true that law and legal reasoning have universalistic aspirations, but this does not imply that universalism must be ethnocentric. In a multicultural society, by means of democratic procedures, different cultures could reach consensus through deliberation in order to agree universal norms for the broad community.[256]

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[254] In fact, the pursuit of a homogenous nation-state was usually accompanied by violence and oppression, including genocide. Cf. De Maglie, Cristina. I reati culturalmente motivati. Ideologia e modelli penali. Pisa: ETS, 2010, p. 3.

[255] Regarding this perspective, I quote McNeill: "Our social existence depends on shared values, symbols and meanings, proclaimed and acted upon, at least sometimes, by hundreds, thousands, and millions of persons" (McNeill, William H. Make Mine Myth. New York Times. Published: December 28, 1981. In: http://www.nytimes.com/1981/12/28/opinion/make-mine-myth.html?mcubz=1)

Highlighting the importance of the myths, Marcello Gallo claims: "Ché se è bello che si trovino tanti spiriti critici, pronti a spiare, a scoprire e a denunciare i miti, i miti duri a morire conservati o insinuati nella vita di oggi, penso per esempio al Barthes delle Mythologies, credo anche che dovremmo essere tutti così illuminati da essere capaci di credere a un mito, sapendo che è un mito." (Gallo, Marcello. Diritto Penale Italiano: appunti di parte generale. Torino: Giappichelli, 2014, pp. XXI-XXII)

[256] In this sense, the processual universalism sustained by Seyla Benhabib, cited by Mohr (Mohr, Richard. Some Conditions for Culturally Diverse Deliberation. In: 20 Can. J. L. & Soc. 87 2005, pp. 90-91).

From another perspective, the weakening of the universalistic principles in late modernity has a cost: a feebler social cohesion. Borrowing the allegory of “liquid modernity” coined by Bauman, we can say that the solid universal principles are no longer unconditional references. This configuration both enhances individual choices and weakens social bonds. What is the role of law in this process? Could criminal law become the confluence for social cohesion in a multicultural society? The answers to these questions lie in the tension between the claims of universal rights and the multiculturalist recognition of particularities, which could be balanced only through deliberative procedures that account for culture difference.

In this vein, Nuotio argues that, in addition to this testing of the assumptions of modern law, multiculturalism “pushes thinking on criminal justice issues towards political theory, because it makes it much more important than before to theorize about the premises of the authority of law."[257] This political perception of the debate reminds us that the issues raised by the cultural defence approach are only a part of a larger debate concerning multiculturalism.[258] In fact, it is meaningless to view the

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[257] Nuotio, *id.*, p. 67.

[258] Cf. Coleman, Doriane Lambelet. Individualizing justice through multiculturalism. In: Columbia Law Review 96 (1996): 1093-1157 Web, p. 1094.

cultural defence isolated from the contemporary multicultural political context.

Furthermore, one could argue that discussing multiculturalism in criminal law poses the question of how cultural aspects affect the delivery of criminal justice services. There is a certain tension between a widespread perception that defendants want the courts to excuse their behaviour based upon their culture, and, the perspective that only with a proper understanding of the offenders' culture and its impact on their behaviour can the courts accomplish their role.[259]

Although the importance of joining multiculturalism and criminal law seems evident, the vast literature on multiculturalism usually does not directly addresses the question of the cultural defence.[260] For most of this chapter, I will attempt to draw links between these areas in order to better understand the cultural defence.

Initially, in this regard, we have to keep in mind that the term "multiculturalism", as exposed in the previous chapter, covers many different forms of cultural pluralism,[261] related not only to different processes through which minorities are incorporated into political societies, but also to the different sorts of approaches of doing so.

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[259] Cf. Hendricks and Nickoli, id., p. 30.

[260] Cf. Renteln, Alison Dundes. The Cultural Defense. New York: Oxford University Press, 2004, p. 16.

[261] Cf. Kymlicka, *id.*, p. 10.

I have indicated also how essentialist views of culture and the so-called cultural relativism can lead to a "boutique multiculturalism,"[262] which picks only the easy parts of the discourse, ignoring the negative side of cultures and practices that do not contribute to a better pluralistic society. Indeed, the perspective adopted in this work is that of a "pluralism with limits", in opposition to the idea of a "cultural relativism" of giving equal weight and value to any practice.[263] This concern is, and must be, central to the debate on criminal law and culture. Otherwise, we may risk instilling a kind of boutique cultural defence as well,[264] that picks only a "favoured 'snapshot' version"[265] of the culture in question.

Multiculturalism is frequently criticized for being an essentialist philosophy. However, the defence of multiculturalism actually challenges the essentialist ideas of solid and monolithic national identities.[266] In other

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[262] Fish, *ibid*. See note n. 208.

[263] Although, contrarily to the discourse of the opponents of the idea of multiculturalism, I agree with Poulter's claim that very few actually subscribe to this kind of relativism. Cf. Poulter (1998), *id.*, p. 20.

[264] Cf. Lernestedt, *id.*, p. 45.

[265] Waldron, Jeremy, quoted in Scotti, Guilherme. A Constituição de 1988 como marco na luta por reconhecimento dos direitos fundamentais dos povos indígenas e quilombolas no Brasil – a natureza aberta dos direitos no estado democrático de Direito. In: Direitos Fundamentais e Jurisdição Constitucional. Edited by Clémerson Merlin Cleve and Alexandre Freire. São Paulo: Editora Revista dos Tribunais, 2014, p. 462.

[266] In this sense: "Negli ultimi anni il multiculturalismo è stato frequentemente criticato in quanto essenzialista. Tuttavia, mi sembra si possa affermare che l'obiezione sia mal posta o esagerata. Infatti, uno degli assi portanti di molti dei tentativi di elaborare una difesa del multiculturalismo è stato proprio quello di scardinare l'essenzialismo cui le maggioranze hanno fatto ricorso per elaborare idee di identità nazionale solide e monolitiche che finiscono per

words, multiculturalism stresses the differences under the surface of a national unified identity. As explored in the first part of this work, a viable multicultural philosophy needs to go beyond the reified views of nation, ethnicity and religious identity.

Regarding criminal law, we may not have an approach as optimistic as Bernardi's,[267] who sees criminal law as the ultimate locus in which to settle multicultural conflicts and make social harmony possible. We could, however, still agree with him in regard to the need for a greater openness to the Other in criminal law theory. This approach inevitably requires a better understanding of culture.

7. Cultural identity

Multiculturalism has been developed mainly through the idea of a personal identity forged by and dependent on the collective identity, in what constitutes practically a process of replication.[268] Culture, for Baumann, in this

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escludere le minoranze culturali e le loro specificità (Kymlicka 2015, p. 212)." (Melidoro, id., p. 17)

[267] Bernardi, Alessandro. Modelli Penali e Società Multiculturale. Torino: Giappichelli, 2006, p. 128.

[268] Caniglia associates this approach of correspondence between personal identity and collective identity to the multicultural philosophy of the North America, which would be different of the European approach, already explored on the first chapter and expanded later on this chapter. Cf. Caniglia, *id.*, p. 34.

distorted view, would correspond to a photocopy machine,[269] so that members of the same ethnical or religious group would all act in the same way, like clones.

These kinds of reified ethnic and religious identities emerge in the political sphere as demands of recognition, sometimes resulting in protecting policies of these minority groups' cultural manifestations: the so-called cultural rights. In this process of translation of these demands of identity into the language of rights, the risk is to reach an "ecological"[270] or "conservationist"[271] view of cultures.

I am not by any means opposed to demands of recognition nor to the idea of multicultural policies. My concern is only that in this process one must be aware of the risks and the incongruity of the reification of identities in politics and in law. So we must delve into the concepts of identity and culture.

In a captivating volume, Amin Maalouf[272] explores the contradictions and inconsistencies of the discourse on identity, which we will use as a point of departure. Personal identity is what prevents us from being identical to everybody else.[273] In this sense, identity is a characteristic of every human being. But in what does out identity consist? As we have already seen, Appiah distinguishes two dimensions

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[269] Cf. Baumann, id., pp. 137-138.
[270] Habermas, *id.*, pp. 128-130.
[271] Raz, *id.*, p. 181.
[272] Amin Maalouf. On Identity. London: The Harvill Press, 2000.
[273] Maalouf, *id.*, p. 10

of the individual identity: the personal and the collective dimensions,[274] being the collective dimension the intersection of its own collective identities, or in Maalouf's words, allegiances.[275] The collective identities would make up our personal identity in Maalouf's perspective.[276] The personal dimension, instead, would consist of other social or moral features that are not themselves the basis of collective identity, and would also compose the individual identity in Appiah's viewpoint.[277]

The Gordian knot of identity, regarding multiculturalism, is exactly the connections between the individual identity and those collective dimensions (or allegiances).[278] In other words, the central issue is the importance of the collective identities for the affirmation of the individual identity.[279]

The variety of possible arrangements among those allegiances is *per se* a suggestive reminder of why untying this knot is such a complex process. Indeed, according to Maalouf: "Every one of my allegiances link me to a large number of people. But the more ties I have the rarer and

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[274] Appiah, id., pp. 150-152. See note 68.
[275] Maalouf, *id*., p. 15.
[276] Maalouf, *ibid*.
[277] Cf. Appiah, *ibid*. Yet is important to reaffirm that his approach is rather sociological than logical, because he considers only the collective identities that constitute social categories, excluding other logical features. Cf. note 67.
[278] However, as already explored in the first chapter, only the collective dimensions that are embedded in a way of life are considered in the "narrow" view of multiculturalism. See p. 10.
[279] In debt with Appiah. Cf. Appiah, *ibid*.

more particular my own identity becomes."[280] However, even if it would be possible to isolate a singular allegiance - an ethnic identity, for instance - fixed characteristics would still be a fallacy.

Identity is not a static process. To use the definition of the sociologist, Manuel Castells, identity, as it refers to social actors, is the "process of construction of meaning on the basis of a cultural attribute, or a related set of cultural attributes, that is given priority over other sources of meaning."[281] It is not a mechanism that creates differences that do not exist, but a discourse that organizes and gives sense to the cultural differences.

However, this is not an endogenous process; it is rather a relational construct. The similar experiences or way of life of members of a social group are substantiated in confrontation with other groups. Indeed, "a group exists only in relation to at least one other group".[282]

As we have seen in the first part, the language of seeing culture as "a thing" is inconsistent and treacherous. Culture is a continuous process of making. The essentialist approach to culture as heritage does not subsist in the light of the evidence of this processual nature of culture. If culture itself is an ongoing process, our adherence to a

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[280] Maalouf, *id.*, p. 15.

[281] Castells, Manuel. The Power of Identity: The Information Age - Economy, Society, and Culture: 2 (Information Age Series). Wiley-Blackwell; 2nd revised edition, 2010, p. 6.

[282] Young (1990), *id.*, p. 43.

culture, and to what degree, presumably also changes over time, which means that cultural identity is not at all fixed. One way to refrain from this misconception of having culture as a "thing" is to replace the term "identity" with the notion of "identification", so that we embrace fluidity and no longer expect any identity to be fixed and immutable.[283] Indeed, identity is not immutable throughout a person's lifetime, on the contrary it is in a continuous accumulative process.[284]

On the other hand, this fluid identity or identification cannot lead to scepticism toward social groups, as if they were only fiction. The key point here is that groups are "real not as substances, but as forms of social relations."[285] Social groups do not exist isolated from individuals, neither are they a mere aggregation of indistinguishable homogenous individuals. Social groups are the result of shared constructed cultural meanings, which partially constitute each person's identity.[286]

All this complexity could explain the hesitation of Maalouf with the term "identity":

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[283] Cf. Baumann, *id.*, pp. 137-138.
I would like to note that Maalouf (*id.*, p. 20) also highlights the processual significance of identity. He claims that: "Identity isn't given once and for all: it is built up and changes throughout a person's lifetime."
[284] Maalouf, *id.*, p. 20.
[285] Young (1990), *id.*, p. 44.
[286] Young (1990), *ibid.*

> "A life spent writing has taught me to be wary of words. Those that seem clearest are often the most treacherous. "Identity" is one of those false friends. We all think we know what the word means and go on trusting it even when it's slyly starting to say the opposite."[287]

Another way to examine this inconsistency over the meanings of identity is from a historical perspective. Stuart Hall[288] distinguishes three conceptions of identity: (1) the Enlightenment subject, which is based on the individualistic conception of the human being, unified and endowed with attributes of reason, conscience and action; (2) the sociological subject, which results from the interaction between self and society, so that one's identity is formed and transformed according to the structures of the cultural system; and (3) the post-modern subject, characterized by the lack of a fixed identity, which changes according to the ways in which the subject is addressed or represented.

Although Hall argues that late modernity is characterized by a de-centering of the human identity, he claims that the notion that identities were completely unified and coherent and are now totally de-centered is an oversimplification. The fact is that the modern subject was

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[287] Maalouf, *id.*, p. 9.

[288] Cf. Hall, Stuart. A identidade cultural na pós-modernidade. 2nd edition. Rio de Janeiro: Lamparina, 2015, pp. 9-16.

born in the midst of doubt and metaphysical scepticism. The modern subject has never been unified, as it would seem from its descriptions. On the other hand, as modern societies became more complex, they acquired a more collective and social shape, which, thanks also to Darwinian biology and the social sciences, leads to the social conception of the subject. Nevertheless, the sovereign individual remained central to modern economy and law. In fact, as we will see in the following sections, this conflict between the legal instrumental concept of identity and its post-modern manifestation is the nucleus of the dilemma that I am attempting to display in this thesis.

In the first part of this work, we explored how cultural identity gained relevance and how it entered the political universe. We can speak of a shift from a politics of (class) identity to a politics of difference, resulting in the merging of identity politics with cultural politics, so that in order "to have an identity, one must have a culture."[289] In fact, the fluid aspect of identity reveals that identification can be won or lost and thus is prone to be politicized.[290]

However, the central element of the politics of recognition, i.e. culture, is inadequately considered and

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[289] Sarat, Austin; Kearns, Thomas R. The Cultural Lives of Law. In: Law in the Domains of Culture. Edited by: Sarat, Austin; Kearns, Thomas R. Michigan: University of Michigan Press, 2006, pp. 1-2.

[290] In this sense, cf. Hall, *ibid*.

accounted for. What constitutes culture? How exactly does culture affect human behaviour? What are the social and political processes regarding it? To what extent may law and institutional practices consider culture?[291] Both in the liberal and in the communitarian perspectives on multiculturalism, as explored in the first part, community and culture are taken for granted, as universalized abstractions, "empirically and logically prior to the question of rights".[292]

The lack of a proper analysis of the role and attributes of culture underestimates both culture and cultural rights, reducing the problem to a question of mere 'cultural survival', oblivious to the positive aspects of cultural change.[293] Like the continuous movement of culture,[294] the concept itself has undergone transformations over time. As a sign of its complexity, the concept of culture can be interpreted in numerous ways. Yet, for a proper scrutiny of the role of culture in criminal law, we must attempt to explore it.

De Maglie[295] affirms that there are more than one hundred definitions of culture. Fabietti,[296] citing Kluckhohn and Kroeber (1952), reports more than two hundred. In this myriad

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[291] In this regard, cf. Cowan, *et. al.*, *id.*, p. 18.
[292] Cowan, *et. al.*, *id.*, p.17-18.
[293] Cf. Cowan, *et. al.*, *id.*, p. 18.
[294] In this sense, Bissoondath, *id.*, p. 81.
[295] De Maglie, *id.*, p. 18.
[296] Fabietti, Ugo. Il destino della "cultura" nel "traffico delle culture". In: Rassegna Italiana di Sociologi / a. XLV, n. 1, gennaio-marzo 2004, p. 38.

of concepts, we need some guidelines for our inquiry, as I try to outline. The aim is not to develop a theory of culture, but to demonstrate the inconsistencies that one encounters when referring to culture in law.

First, in this regard, it should be noted that the present analysis concerns the concept of culture in the singular, i.e., the analytical category that is opposed to the notion of nature; this notion differs from the view of culture in plural that refers to particular manifestations of culture, which contrasts a concrete manifestation and another. Second, we cannot ignore the historic and scientific evolution of those meanings.

In this perspective, I quote the anthropologist Sally Engle Merry:

> "Anthropological theory now rejects the concept of culture as integrated, harmonious, consensual, and bounded in favor of an understanding of culture as historically produced, globally interconnected, internally contested, and marked with ambiguous boundaries of identity and practice."[297]

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[297] Merry, Sally Engle. Changing rights, changing culture. In: Culture and Rights: Anthropological Perspectives. Jane K. Cowan Marie-Bénédicte Dembour and Richard A. Wilson, eds. Cambridge: Cambridge University Press, 2001, p. 41.

In fact, the results of the long process of the theoretical revision of the concept of culture within the field of anthropology have not yet been incorporated into other social sciences or in law. From the seventies, the concept of culture has been subjected to criticism and extensively revised, but the social sciences and humanities still use notions that are no longer accepted by anthropologists.[298]

Giglioli and Ravaioli argue that we have two principal approaches to the concept of culture (in the singular).[299] The first one is the classical definition of Tylor (1871):[300]

> "Culture or Civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as member of a society."

This approach opposes culture to nature and covers all non-biological elements,[301] hence considering culture as a "thing", not a process.[302] The context of this definition is

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[298] In this particular, cf. Giglioli, Pier Paolo; Ravaioli, Paula. Bisogna davvero dimenticare il concetto di cultura? Replica ai colleghi antropologi. In: Rassegna Italiana di Sociologi / a. XLV, n. 2, aprile-giugno 2004.

[299] Cf. Giglioli and Ravaioli, *id.*, p. 270

[300] Tylor, Edward Burnett. Primitive culture. In: Bohannan, Paul. High points in anthropology. New York: A. A. Knopf, 1973, p. 63.

[301] Giglioli and Ravaioli, *id.*, p. 271.

[302] De Maglie, *id.*, p. 19.

still the Enlightenment philosophy, the idea of a rational man guided by reason and evidence. However, Tylor, making a distinction between “modern” and “primitive”, believed that these attributes are not equally possessed by all persons or peoples.[303]

Tylor’s definition of culture remained the dominant one in anthropology for the first half of the 20th century, and began to be challenged only in 1951, with Talcott Parsons’ definition, which was re-elaborated and refined through the years and finally perfected by Geertz (1973). In this second kind of depiction, the concept of culture is no longer contrasted to biology (this contrast is now taken for granted), but to the social organization.[304]

Before analysing Geertz’s concept of culture, I would like to make a digression into his view of the anthropological investigation of the human being. For him, anthropological writings are interpretations of second and third orders, because only a "native" can produce a first order account of its own culture. Anthropological writings are microscopic views focusing in small matters on the need to penetrate an unfamiliar universe of symbolical action.

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[303] Actually, the enlightenment figures can be divided into two camps: universalists and developmentalists. In the first group, are those who believe that the dictates of reason and evidence are equally available to all persons and peoples, au contraire of the conclusion of the second group. Cf. Shweder, Richard A. Anthropology’s romantic rebellion against the enlightenment, or there’s more to thinking than reason and evidence. In: Culture theory: Essays on Mind, Self, and Emotion. Edited by Richard A. Shweder and Robert A. LeVine. Cambridge: Cambridge University Press, 1984, in particular, p. 30.

[304] For this perspective, Giglioli and Ravaioli, *id.*, p. 272.

However, there is a certain tension between this microscopical approach and the necessity of technical advance in the theory of culture. This tension between the descriptive nature of ethnographic analyses and the demands for universal patterns is inherent to anthropology and, along with the usual lack of prediction, it may lead to some hesitation about the outcome of the anthropological investigation.[305] Taking into account this perception, it is pertinent to cite Geertz's alert:[306]

> "To look at the symbolic dimensions of social action - art, religion, ideology, science, law, morality, common sense - is not to turn away from the existential dilemmas of life for some empyrean realm of de-emotionalized forms; it is to plunge into the midst of them. The essential vocation of interpretive anthropology is not to answer our deepest questions, but to make available to us answers that others, guarding other sheep in other valleys, have given, and thus to include them in the consultable record of what man has said."

However, for the objective of this research, we have to focus on the concept of culture rather than the

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[305] Geertz, Clifford. The Interpretation of Cultures. New York: Basic Books, 1973. p. 3-30.
[306] Geertz, *id.*, p. 30.

characteristics of anthropological investigation. Geertz traces the rise of the concept of culture back to the overthrow of the view, dominant in the Enlightenment, of human nature as "regularly organized, as thoroughly invariant, and as marvellously simple as Newton's universe". The perspective of the universal origin of desires and passions in an immutable structure, where the differences among people, regarding beliefs and values, customs and institutions, over time and places, consisted only of mere accretions, or distortions of "what is truly human - the constant, the general, the universal - in man."[307] This modern ideal of humankind engendered an idea of liberation from the burden of the local attachments,[308] though a reductionist approach toward variability of human manifestations.

It was under this context, that anthropology attempted to find a path to a "more viable concept of man," one which would include culture and its variability. In fact, modern anthropology defies the enlightened view of a universal man free of particularities, sustaining the impossibility of drawing a line between what is natural, universal and constant in man and what is conventional, local and variable.[309]

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[307] Geertz, *id.*, pp. 34-35.

[308] Cf. Remote, Francesco. Prima lezione di antropologia. Roma-Bari: Laterza, 2000, p. 143: "La modernità vuole andare oltre le culture, le forme particolari di umanità."

[309] Cf. Geertz (id., pp. 37ff.) alerts, however, that, stepping away from the uniformitarian view, anthropology can fall into a trap and go over a cultural relativism that is as much an aberration as the theories and the banner of cultural evolution.

Having liberated the concept of humankind from the invariable perspective, the new goal became to locate man amid the diversity of customs. This has taken several directions, but they have proceeded through a "stratigraphic" view of the relations between biological, psychological, social and cultural factors in human life: humankind was looked at as a "composite of levels". This was (and still is) an appealing view for academic purposes and led, at the level of concrete research and specific analysis, to a hunt for universals in culture that, despite a diversity of customs, could be found everywhere in about the same form.[310]

Tylor's conception is part of this context, which is ultimately a version of the Enlightenment's notion of universal conceptions of the right, real, and just.[311] Against this universalistic approach, Geertz claims: "the notion that unless a cultural phenomenon is empirically universal it cannot reflect anything about the nature of man is about as logical as the notion that because sickle-cell anaemia is, fortunately, not universal, it cannot tell us anything about human genetic processes". Using this analogy, he

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[310] Cf. Geertz, *id.*, pp. 37-38.

[311] Cf. Geertz, *id.*, pp. 37-43. I would also like to allude to this extract (id., pp. 43-44): "The major reason why anthropologists have shied away from cultural particularities when it came to a question of defining man and have taken refuge instead in bloodless universals is that, faced as they are with the enormous variation in human behavior, they are haunted by a fear of historicism, of becoming lost in a whirl of cultural relativism so convulsive as to deprive them of any fixed bearings at all"

proposes a systematic relationship among diverse phenomena, replacing the "stratigraphic" view of the relations between the various aspects of human existence with a synthetic perspective, based on two ideas. First, that culture is best seen as a set of control mechanisms - plans, recipes, rules, instructions - for governing behaviour. And second, that man is dependent on such mechanisms. Indeed, there is no such thing as human nature independent of culture, since we are simply incomplete animals who complete ourselves through culture. Whilst the boundary between what is innately controlled and what is culturally controlled in human behaviour is loosely defined.

While the Enlightenment's image of man divested of culture renders the differences between individuals secondary, Geertz proposes a compromise between a general theoretical understanding and a circumstantial understanding, between the definition of man by innate capacities alone and his actual behaviours:

> "Becoming human is becoming individual, and we become individual under the guidance of cultural patterns, historically created systems of meaning in terms of which we give form, order, point, and direction to our lives."[312]

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[312] Geertz, *id.*, p. 52.

The processual perspective encapsulated by Geertz's goes beyond the notion that culture is an external and superior entity to the person and overcomes the anachronistic idea of culture as internally coherent and homogeneously shared by the members of a community.[313]

However, this "new" notion of culture perfected by Geertz is hardly applied to social reality, which led some anthropologists to refute the instrumentality of this concept.[314] Indeed, the complexity of the concept of culture has often resulted in controversy about the nature and relevance of culture to the contemporary world.[315]

Despite this complexity that anthropology lends to the culture concept, cultural identity is currently being used in a quasi-biological manner in the discourse about ethnicity, relying upon outdated views of culture, so that a "group of people 'has' a culture in the way that animals have fur, inherited as genes are inherited, rather than as a repertoire people create or use to adapt or changing social condition."[316] This distortion is also present in the legal discourses about culture.

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[313] Those two groups of objections are exposed by Giglioli and Ravaioli, id., p. 269.

[314] Cf. Giglioli and Ravaioli, *ibid*.

[315] In this sense, O'Hagan, Jacinta. Conflict, Convergence, or Coexistence? The Relevance of Culture in Reframing World Order. In: Reframing the International: Law, Culture, Politics (Richard Falk, Lester Edwin J. Ruiz & R.B. Walker eds., 2002)

[316] Merry, *id*. p. 42

8. Relation culture-law

Having briefly considered the concepts of culture and cultural identity, we shall proceed with an investigation into the relation between law and culture. The encounters of law and culture within legal institutions are complex and dynamic. Both culture and law are multidimensional abstract universes,[317] resulting in various manners of intersection. The concept of culture is "troublingly vague and, at the same time, hotly contested, and law's relation to culture is as complex, varied, and disputed as the concept itself."[318]

René Provost[319] claims that there are three normative sites where we can identify intersections between law and culture: (i) translation of cultures, regarding the process of representing culture as facts in order to fit them into categories known to law; (ii) acculturation of justice, whereby the legal system reacts and adapts to cultural challenges in an attempt to be culturally sensitive, e.g., alternative modes of conflict resolution; and (iii) pluralized narratives of law and cultures, which refers to

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[317] cf. Parisi, Francesco. Cultura dell'altro e Diritto Penale. Torino: Giappichelli, 2010, p. 141.

[318] Sarat, et al., id., p. 1.

[319] Provost, René. Centaur Jurisprudence: Culture before the Law. In: Culture in the Domains of Law. Edited by René Provost. Cambridge University Press, 2017, p. 3.

the cultural impact of the narratives created by legal institutions in the process of applying legal norms.

The relation between culture and law (or rights) can also be examined under another three formulations: (i) rights versus culture; (ii) a right to culture; and (iii) rights as culture (law as culture).[320] The first meaning, rights versus culture, is the already explored binary opposition between legal universalism and particular manifestations, expressed in the political-philosophical dichotomy between liberalism and Romantic political view.[321] The second approach (a right to culture) is the idea of the individual's right to "belong to" and "enjoy" a culture. Corresponding to some versions of multiculturalism, it presents, similarly to the first meaning, an essentialist view of culture.[322] The third notion, rights as culture, is related to the anthropological approach to law, not only delineating the "culture-like" characters of law, but also investigating how "the concept of culture can be applied in an analytic sense to investigate the relation between law and different domains of social life."[323] The perspectives of *rights versus culture* and *a right to culture* were explored in the first part and permeate this part as well whilst the formulation *rights as culture* (law as culture) is the object of the following chapter.

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[320] Prolific classification presented on Cowan, et al., id., pp. 4ff.

[321] Cf. Cowan, et al., id., pp. 3-4.

[322] Cf. Cowan, et al., id., pp. 8-11.

[323] Cf. Cowan, et al., id., pp. 11-14.

From the classification of Provost, I would note that the dimension *translation of cultures into law* is perhaps the key idea of this thesis, i.e., how can cultural evidence as a symbolic element be translated into a legal system that works with a structure of norms and facts. My hypothesis is that the structure of law leads to reduced views of culture, because of the need to fit cultural elements into facts. The dimension of adaptation of the law induced by multicultural contexts, in a process of *acculturation of justice,* is also a central element of this work. Finally, acknowledging the impact of pluralized narratives of cultures in the delivery of justice is a way to better understand the law itself. Indeed: "In offering a narrative about 'other' cultures, legal institutions by the same token create a narrative about their own identity."[324]

The awareness of these dimensions is essential for overcoming the simplistic notion that law should be used to enforce the norms of a society's culture, in the sense of a coherent antecedent culture.[325] Such a perspective undertheorizes both law and culture. Law does not merely enforce pre-existing cultural norms. Furthermore, a society's culture is not stable, coherent and singular. Culture, as already stated, is a dynamic process, an active process of construction of meaning.[326] As Post argues, besides

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[324] Provost, *id.*, p. 17.
[325] Devlin, cited by Post, *id.*, pp. 485-486.
[326] Cf. Post, *id.*, pp. 487-491.

the enforcement of the rules, culturally created, law has at least two other functions. First, law is a political tool to achieve instrumental ends. Second, law is sometimes used to "revise and reshape culture".[327] From this point of view, with law set deep in the cultural structure, cultural conflict in law is the ordinary state of affairs of law.[328]

For our inquiry, beyond these considerations of the dimensions of the intersections between law and culture, it is essential to understand how human behaviour is affected by culture, in order to better analyze the implications for criminal law. During my research, I acknowledged that this approach has not been properly explored yet, so that a specific inquiry about it would be required, which is, however, beyond the limits of the present work. As observed by Renteln[329], it is striking that “jurists have hardly acknowledged the manner in which cultural imperatives affect human behaviour."

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[327] Post, *ibid*.

[328] Cf. Post, *id*., p. 494-495, in particular, this excerpt: “Law is in this sense performative constituting the very culture in whose service it purports to act.”

[329] Renteln, *id*., p. 18.

8.1. Law as culture

Kluckhohn has given us the classic image that anthropology "holds up a great mirror to man and lets him look at himself in his infinite variety."[330] This mechanism of anthropology is applied to the various aspects of human experience, including the legal practices.

The central discussion of this chapter is the relationship between law and anthropology. As we saw in the previous chapter, the approach of rights as culture, or law as culture, has chiefly two functions: to depict the cultural aspects of law and to examine how the anthropological concept of culture can be analytically applied in the legal domains.[331] Before beginning this analysis, I would like to note that I will follow Clifford Geertz' perspective of equivalence between legal anthropology and anthropology of law, setting aside the varying views of these approaches.[332]

Lawrence Rosen begins his invitation to view law as culture with a very provocative citation of Thomas R. Powell:

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[330] Kluckhohn, Clyde, cited by Hoebel, E. Adamson. The Law of Primitive Man: A study in Comparative Legal Dynamics. Cambridge: Harvard University Press, 1954, p. 10.

[331] Cf. Cowan, et al., pp. 11-14.

[332] He argues that what lawyers tend to call legal anthropology and anthropologists, anthropology of law, is basically the same kind of experience. Cf. Geertz, Clifford. Local knowledge: Fact and Law in Comparative Perspective. In: Local Knowledge: further essays in interpretative Anthropology. New York: Basic Books, 2000, p. 168.

"If you think that you can think about a thing, inextricably attached to something else, without thinking of the thing it is attached to, then you have a legal mind."[333] It is indicative of his approach regarding the role of the anthropological analysis of law.

From the premise that culture corresponds to the human being's capacity to create the categories of our experience, and that the cultural concepts traverse the numerous domains of our lives, he remarks that even in the fields of intense specialization, law does not exist in isolation. He argues that for a full consideration of law one must consider it as part of culture, though it is not uncommon for law professionals to act as if law is quite separable from other cultural elements.[334]

Another seminal defence of the relevance of anthropology to the study of law is the legal anthropology of Rodolfo Sacco. He claims that the study of the law from the anthropological perspective also allowed for the norms of traditional societies to be taken into consideration, expanding the view of the law beyond the reduced perspective of state and formal rules.[335] The study of anthropology reminds jurists that there has not always been a legislator,

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[333] Rosen, Lawrence. Law as Culture: An Invitation. Princeton and Oxford: Princeton University press, 2006.

[334] Cf. Rosen, *id.*, pp. 1-13.

In this interdisciplinary perspective of the study of law, he quotes Justice Louis Brandeis (id., p. 198): "A lawyer who has not studied economics and sociology is very apt to become a public enemy."

[335] Cf. Sacco, Rodolfo. Antropologia giuridica: contributo ad una macrostoria del diritto. Bologna: Il Mulino, 2007. p. 13-21.

a jurist, and a central political power guaranteeing the observation of the rules.[336]

In the context of increasing cultural diversity and weakening of the ethical foundation of societies, Manfred O. Hinz affirms the inevitability of the legal anthropological approach. Indeed, he argues that "anthropological approaches to law are very likely to become the foundation of jurisprudence in the new century."[337]

These three briefly summarized approaches highlight the role of anthropology in disclosing the connections of law to the broad culture, making the cultural aspects of law more evident, so that the structure of law and its characteristics are better understood. The anthropology of law (or legal anthropology) uncovers the similarities and differences among systems, so that characteristics once taken for granted are exposed in their contingency, and systems that were supposed to be widely diverse reveal more similarities than expected.

In this respect, where similarities of systems seem widely diverse, Foblets argues that, from an anthropological viewpoint, every human society is faced with, and must react, to the same range of offences, divided in five theme groups:

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[336] Cf. Sacco, *id.*, p. 21-25, in particular: "L'antropologo insegna dunque al giurista come costruire un sistema ragionevole e veridico delle fonti. In modo inaspettato, gli insegna anche come costruire una dottrina del fatto sottoposto al giudizio."

[337] Hinz, Manfred O. Jurisprudence and Anthropology, 26 Anthropology Southern Africa 114-118 (2003), p. 114.

life; sex and the roles of the sexes; goods and their distribution; religion; and the exercise of power. But communities deal with these aggressions in different ways according to the value incorporated in the culture.[338]

We might take for granted, for example, that homicide must be always a question of public law. However, Foblets cites the example of the Nuer, an African group that considers homicide an offense against the family and its patrimony, and thus pertaining not to public but to private law. In addition, the intensity of punishment varies depending on factors such as the social position of the victim or the nature of the social relation between murderer and victim. These infinite varieties of systems reflect the freedom of each society to establish their norms.[339]

This way of reasoning about similarities and differences of legal systems is not only a tool for theoretical research, but also a fundamental practical instrument. It can be applied, for example, in a defence of human rights. It is undeniable that human rights, from a contemporary point of view, did not exist in traditional societies. However, this would not justify collapsing the ideal of human rights with the charge of ethnocentrism, because even in traditional societies we can observe

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[338] Cf. Foblets, Marie-Claire. Cultural Delicts: the repercussion of cultural conflicts on delinquent behaviour. Reflections on the contribution of legal anthropology to a contemporary Debate. 6 Eur. J. Crime Crim. L & Crim. Just. 187, 1998, p. 194.

[339] Foblets, *id.*, p. 195.

mechanisms to restrain power and protect individuals.[340] In addition, modern anthropology, exposing the unfixed nature of culture, allows human rights to not be seen as a struggle against traditional cultures. As long as they are not imposed from “above”, they could represent an advance in gender equality and social justice to the benefit of minority groups.[341] Indeed, as I will try to defend in the last section of this chapter, law can “provide ways of knowing, and seeing,”[342] so that the perspective of human rights, in a dialogical process, can add values to traditional cultures.

How does legal anthropology work? What are the approaches of anthropology to law? John L. Comaroff and Simon Roberts’ acclaimed theory accounts for two opposed approaches in legal anthropology: "rule-centered" and "processual paradigms". The first approach is associated with Radcliffe-Brown, Pospisil, Gluckman and Faller. They held Western legal theory as a paradigm of analyses and the premise of social life as “rule-governed”, assuming the need for centralized authorities to promote social cohesion.[343]

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[340] Cf. Dembour, Marie-Bénédicte. Human rights talk and anthropological ambivalence: the particular contexts of universal claims. In: Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity. Edited by Olivia Harris. London: Routledge, 1996, specially pp. 22-24.

[341] Cf. Kuppe, René. Human Rights from an Anthropological Perspective. In: All Human Rights for All: Vienna Manual on Human Rights. Edited by Manfred Nowak, Karolina M. Januszewski, Tina Hofstätter. Vienna; Graz: NWV, 2012, pp. 42-43.

[342] Sarat, et al., id., p. 7.

[343] Comaroff, John L.; Roberts, Simon. Rules and Process: The Cultural Logic of Dispute in an African Context. Chicago, 1981, pp. 4-10.

By contrast, the processual paradigm is an attempt to analyze the law in traditional societies without reference to Western legal theory. The origin of this approach is traceable to *Crime and Custom in Savage Society (1926)*, in which Malinowski explored the structure of order in the Trobriand Islands, "a society lacking 'courts and constables".[344] Malinowski believed that in traditional societies, "law ought to be defined by function and not by form, that is we ought to see what are the arrangements, the sociological realities, the cultural mechanisms which act for the enforcement of law."[345]

Fikentscher divides these two paths of legal anthropology into "comparative law" and "sociological" approaches.[346] In a compromise between these two main approaches, he proposes the following concept of anthropologist of law:

> "A sociologist of law who transcends from mere fact-finding to evaluation and normativity, focuses on culture rather than society, keeps an eye open for non-cultural universals, refrains from model building for individual social acts and social systems, and avoids

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[344] Comaroff and Roberts, *id.*, p. 11.
[345] Malinowski quoted by Comaroff and Roberts, *ibid.*
[346] Cf. Fikentscher, *id.*, p. 5. But he highlights that these are only general patterns: "Of course, there may be more approaches besides those two, such as from ethnology, neurology, education, or religious, political, or philosophical studies. Sociology and comparative law may provide for the most an easy access, however."

ethnocentrism, should be called an anthropologist of law."[347]

In exploring these two sides of legal anthropology, I would also quote a piece of Geertz' celebrated book *Local Knowledge,* in which he claims that among the curiosities that mark legal anthropology (or anthropology of law)*:*

"the most curious is the endless discussion as to whether law consists in institutions or in rules, in procedures or in concepts, in decisions or in codes, in processes or in forms, and whether it is therefore a category like work, which exists just about anywhere one finds human society, or one like counterpoint, which does not."[348]

In this process of showing the differences and similarities of legal institutions in different societies, legal anthropology in some way follows a similar path to that traced by anthropology in seeking a concept of culture: the attempt to find universal rules by confronting particular expressions. An example of this kind of perspective is the work of Leopold Pospisil. In his comparative study of law, he arrived at some supposed universal attributes. One of the

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[347] Fikentscher, *id.*, p. 6.
[348] Geertz (2000), id., p. 168.

most compelling and commented attributes of his theory, though also contested,[349] is the concept of “intention of universal application.”

Pospisil[350] claimed that, in all societies studied, the authorities, in making a legal decision, would “intend it to be applied to all similar or 'identical' situations in the future," even if the attitude towards this principle would assume different forms in the various cultures. This attribute is present when the decision is referred to a statute or codification or when it is referred to customs, precedents and rules, even oral ones.

This example of confronting particular experiences in search for universal patterns gives only a glimpse of the importance of an anthropological approach to law, of how this perspective can unveil the mirror through which we can see law in its various guises. It is also an inspiration to the discussion of the role of anthropological knowledge in criminal law.[351]

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[349] Contesting this attribute, Fikentscher (*id.*, p. 30) argues that: “the intent to generalize seems to be a convincing element of law. However, under a comparative approach, metatheoretically talking into consideration attitudes towards law in possibly all civilizations and think ways, the element of intent to generalize is untenable.”

[350] Pospisil, Leopold. Anthropology of Law: A Comparative Theory. New York: Harper & Row, 1971, pp. 79-80.

[351] Defending the need of this investigation, cf. Nuotio, *id.*, p. 87.

8.2. Culture as a fact

Advancing in the investigation of the intrinsic relation between law and culture, a further element for consideration is the translation of culture into the domains of law, in order to make this symbolic universe compatible with law.

The jurist is by nature of its activity a translator. He is "constantly moving between languages, mediating between them". Not only to understand different technical languages, but also to learn and translate them into legal language, in a manner that technical issues may meet legal categories.[352]

Law is "a discourse that mediates among virtually all the discourses of our world". Not only a process of mere translation, but a creation of new compositions, new texts. In this sense, "the law (like the lawyer) is both central and marginal at once: it exists at the edge of our discourses, outside all of them, structurally, supplementary".[353]

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[352] White, James Boyd. Justice as translation: an essay in cultural and legal criticism. London and Chicago: The University of Chicago Press, 1990, p. 261.

[353] White, *id.*, pp. 261-262.

In this process of mediation through translation, the courts, when selecting the facts needed to determine the outcome of a dispute involving a cultural conflict, will necessarily arbitrate cultural debates.[354] In particular, the legal discourse about culture is determined by the culture itself, albeit becoming itself a new version of the culture.

The process of translation of cultural aspects into law is not an easy one. The first issue is how to harmonize these two symbolic spheres: culture and legal institutes. Could the concept of culture be useful as an analytical tool to make sense of the claims of rights?[355]

As we have already seen, the primary risk is the essentialization of cultural evidence through "blankly claims that persons from this culture are such and such, do this and that".[356] This kind of claim is common in criminal process as a means to justify or excuse a conduct, or at least to mitigate the punishment. In this sense:

> "A central irony associated with judicial use of the culture concept is the fact that it corresponds with the emergence of a widely accepted approach to culture in anthropology that dismisses its value as a category of 'thing,' as a noun that can be identified, described, compared with others, displayed in museums, presented

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[354] Cf. Provost, *id.*, p. 15.
[355] Cowan, *et al.*, *id.*, p. 3.
[356] Lernestedt, *id.*, p. 40.

at conferences, and by extension, decided upon in courts."[357]

This tendency of essentialization of cultural facts is the result of the contingencies of legal reasoning, in which the binary frame of opposition between fact and law leads to an objectification of the culture in question. Legal reasoning is based on the valuation of facts. Thus, culture, in courts, is described as a "thing" rather than a process or a normative regime.[358]

In this process, beliefs and practices of the symbolic cultural context are translated into the description of a static context, "in a language suitable to be understood and relied upon by legal actors."[359] It is either the need to render those different languages compatible or the need for a resolution of the case. The cultural aspects of the demand are recreated for the immediate purpose of reaching a decision.[360] This means that cultural discussions are subjected to dangerous generalizations, which are a common instrument of prejudice and bias.[361]

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[357] Niezen, Ronald. Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada. In: 18 Can. J. L & Soc. 1 2003, p. 1.

[358] Cf. Provost, *id.*, pp. 5-6.

[359] Provost, *id.*, p. 6.

[360] Cf. Provost, *id.*, p. 8.

[361] In this account, cf. Twining, William. Narrative and Generalizations in Argumentation about Questions of Fact. In: 40 S. Tex. L. Rev. 351 1999, in particular, p. 358. Quoting: "Thus, generalizations are dangerous because, especially when unexpressed, they are often indeterminate with respect to frequency, level of abstraction, empirical reliability, defeasibility, identity (i.e., which generalization), and

The nature of culture also adds controversy with regard to proof. How to obtain cultural evidence is a fundamental question. The common way is the use of expert testimony. However, as we have seen in the inquiry about the concept of culture, the interpretation of a culture is always a limited view and the expert himself can induce an essentialist approach to the specific culture.[362]

These observations about cultural evidence aim to disclose the problem of either wholly excluding or uncritically accepting cultural arguments. Indeed, the essentialist view of culture has, consequently, a straightforward admission or refusal of cultural arguments,[363] so that the complexity of the question is reduced to a binary simplification.

Indeed, the main issue is that judges seem to use a "tacit conceptualization of culture"[364] that does not fit perfectly with any anthropological or historical approach, and neither represents a new theoretical paradigm. It is a

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power (i.e., whose generalization). They are powerful vehicles of prejudice and bias that may be concealed."

[362] In this sense, Kim, Nancy S., 1997. The Cultural Defense and the Problem of Cultural Preemption: a framework for analysis. In: New Mexico Law Review, 27, 1997, p. 122, in particular: "Expert testimony regarding cultural practices is problematic because of the difficulty in defining 'culture'. Culture is, by its very nature, constantly in a state of flux, constantly evolving. Therefore, culture is prone to varying interpretations regarding the existence and prevalence of any given practice. Due to the persuasive nature of expert testimony and potential misuse of this type of evidence, the judge, in exercising her discretion, must have a framework to evaluate the admissibility of cultural evidence and ensure its accuracy."

[363] Cf. Kim, id., p. 139.

[364] Niezen, *id.*, p. 3.

simplistic approach for the sake of resolving the dispute.[365] As a result, the translation of culture into law often becomes a mistranslation.

8.3. Cultural conflicts

The relation between law and culture, as we have seen, has also a dimension of "acculturation of law", of a cultural adaptation of general legal rules. In criminal law, the norms can be challenged by reference to the defendant's customs, religious duties, morals, traditions, etc., or by claims to cultural rights.

However, how do these customs, religious duties, moral and traditions become relevant to law, when they have their own platforms? Indeed, social norms are addressed to humans, who are expected to adhere to them, and hold human beings responsible under the standards of the applicable forum.[366] The different fora, i.e., legal forum, moral forum, forum of the conscience, etc., can overlap, thus generating different forms of conflict. When these fora overlap, for a cultural

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[365] Cf. Niezen, *id.*, pp. 10-11.

[366] I am using the conception of social fora exposed by Fikentscher (*id.*, pp. 100-101), who claims that cultural anthropology may also be called the theory of fora, in the sense that it serves as the meeting point of the different social fora. It is important to observe also that the term "social norm" has a wider and a narrower sense: "In a wider sense, it includes legal norms since they gear society in a way comparable to the norms of moral customs, etiquette, etc. In a narrower sense, the term excludes law but still includes other fora".

conflict to be relevant to the law it needs to “be brought into the realm of law as a conflict or tension *within* the legal culture."[367]

In this transposition of cultural conflicts into the legal universe, the distinction between “is” and “ought” is an important theoretical tool. The habits (customs and etiquette) are a matter of “is”, not of "ought", having no moral or binding legal force. In this sense:

> "Habits (customs and etiquette) may change into law whenever people become convinced that such behaviour not only ought to be observed (as in the case of morals) but also ought to be enforced by some authorized persons, institution, or entity. Then morals take the form of law, and custom, etiquette, as kinds of habit, become customary law. Customary law grows from the conviction of the people who agree to live under that law."[368]

The distinction between the “is” and “ought” spheres is relevant for the analysis of concrete cases. In fact, in many situations, some habits that are a matter of “is” *(sein)* are translated into law as a matter of “ought” *(sollen)*, having a significance beyond the perspective of its own

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[367] Nuotio, *id.*, p. 74.
[368] Fikentscher, *id.*, p. 104.

forum. In Diamond's words, "We must distinguish the rule of law from the authority of custom."[369]

Besides the inadequate incorporation of these social norms into law, their influence in human behaviour is also usually oversimplified. Foblets claims, for example, that "there is no longer any need to demonstrate the role of cultural conflicts in the etiology of criminal behaviour or other forms of deviance."[370] She claims that criminological analyses, sociological approaches, and materials developed by Freudian psychiatrists allow us to view the cultural offence as a derivative of one or more cultural encounters.[371]

I would like, however, to point out that although we do have elements to say that cultural aspects play a role in criminal behaviour, the intricacy of the concept of culture makes the investigation of cultural conflicts delicate. Only an essentialist view of culture would give certainty as to the level of influence of culture in human behaviour, so that it would be a clear manifestation of cultural conflicts.

As briefly indicated at the beginning of this chapter, the study of the relation among ethnicity, race, and crime[372]

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[369] Diamond, Stanley. The Rule of Law versus the Order of Custom. In: Social Research, Vol. 38, No. 1 (Spring 1971), p. 42.

[370] Foblets, *id.*, p. 188.

[371] Foblets, *ibid.*

[372] The relation among race, ethnicity and crime is analysed in many volumes of criminology. Following some examples. Considering the cultural conflicts emerging from migration, cf. Guerette, R., & Freilich, Joshua D. Advances in Criminology : Migration, Culture Conflict, Crime and Terrorism. Abingdon: Taylor and Francis, 2006). Exploring the structure of the criminal justice in the United States and its disparities regarding race, cf. Walker, Samuel; Spohn, Cassia; and Delone, Miriam. The Color of Justice: Race, Ethnicity and Crime in

is not new, as some recent multicultural analyses have indicated. It began in the U.S. with the social Darwinists, which advocated biological determinism to explain (i) a comparatively higher rate of arrest, conviction, and imprisonment among the black population, (ii) an apparent increase in the rate of crime among blacks after the abolition of slavery, and (iii) a likely higher rate of black crime in urban than in rural areas. In response to this view, W.E.B. Du Bois provided social explanations for the comparatively higher rate of black crime, focusing on the etiology of criminal conduct rather than on bias, thus becoming a departure point for the process of overcoming biological approaches.[373]

A fact, to some extent ignored, is that the social Darwinist critique was aimed not only at blacks, but also to various groups of white immigrants. In this line, following the trend of researches concerned with ethnic and nationality differences, Edwin Sutherland, in his 1924 textbook, *Criminology*, included sections on immigration and race as part of his discussion of causes of criminal behaviour. Contrary to Du Bois, Sutherland questioned the data of high

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America, 2016, Sixth Edition. Looking for strategies to deal with the multicultural reality, cf. Shusta, Robert M. *et al*. Multicultural Law Enforcement: Strategies for Peacekeeping in a Diverse Society. 3rd edition. Pearson Prentice Hall, 2005.

[373] Hawkins, Darnell F. Ethnicity, Race, and Crime: A Review of Selected Studies. In: Ethnicity, Race, and Crime. New York: 1995, pp. 13-15.

crime rates among foreign-born immigrants in relation to the native-born.[374]

Despite questioning the accuracy of crime statistics, Sutherland concluded in his research that there was, in fact, an apparent difference in the rate of certain crimes involving different groups according to the nationality of origin. Trying to explain these differences, he proposed,[375] in 1934, a notion of “culture conflict” as a potential explanation, saying: "the traditions of the home country are transplanted to America and determine the relative positions of the immigrant groups with reference to the types of crimes."

In the same direction, Sellin (1938) further explored this theme through his conceptualization of conflict of norms. Still focusing on immigrant populations, but acknowledging the disproportionate crime rates among recently arrived immigrants and earlier settled groups, he focused on the cultural element to explain this difference rather than on nationality.[376]

However, focusing on culture to explain the etiology of crimes committed by minorities risks deviating towards quasi biological approaches. Indeed, as we have seen in the first part of this study, the concept of ethnic and religious identity is not as reliable as some cultural conflicts

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[374] Hawkins, *id.*, p. 17.
[375] Cited by Hawkins, *id.*, p. 19.
[376] Hawkins, *id.*, p. 20.

analysis assume. In alerting us to the limits and risks of a biological/genetic research of criminal etiology, Darnell F. Hawkins[377] sustains that:

> "Race, crime, and criminality are social constructs. Social researches must not replace the quest for a measure of *real* crime with a renewed search for the *real* criminal. A more promising approach may lie in the construction and utilization of the theoretical paradigms that combine ideas from both liberal criminology and various conflict perspectives."

We can identify two broad scenarios which can lead to cultural conflicts in the application of penal law: (i) whether through annexation or colonization, the penal law of one cultural group is extended to cover the territory of another group; (ii) emigration towards another jurisdiction.[378]

From the point of view of the individual, criminal cultural conflicts can emerge in two different ways: (i) several normative groups simultaneously influence an individual, forming a conflict of norms in the personality of the offender, a common situation among young migrants of the second generation; (ii) the individual simply lacks the

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[377] Hawkins, *id.*, p. 41.
[378] Cf. Foblets, *id.*, p. 189.

norm of the group attempting to deal with his or her behaviour, which occurs with colonised populations and first generation immigrants.[379] Here it is important to clarify that this perspective is not about the conflict between state laws, but between social norms and state rules. To what extent should the judicial authorities take into account the influence of group norms of an immigrant or an indigenous person? This is the main question in criminal law.

This debate about the conflict between legal norms and other types of social norms also appears in the form of the opposition subjectivism vs. objectivism.[380] Victoria Nourse claims that this discussion, however, diverts us from the discussion of the meaning of rules, placing us in a dispute "between hyper-majoritarian views (the standard of law-abidingness) and hyper-minoritarian views (the particular standard of the defendant)."[381] In other words, we tend to become entangled in an endless argument about the possibility of having or not "exceptions" to the rules due to cultural conditions,[382] while the real discussion should be about the

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[379] Foblets, *id.*, p. 191-193.

[380] In Victoria Nourse's words, "We should at least be concerned that the opposition in the criminal law between subjectivity and objectivity is no more helpful or illuminating than it is elsewhere, in anthropology, history or social theory. As Pierre Bourdieu has bemoaned: "Of all the oppositions that artificially divide social science, the most fundamental, and the most ruinous, is the one that set up between subjectivism and objectivism." (Nourse, Victoria. After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question. New Criminal Law Review: An International and Interdisciplinary Journal, v. 11. No. 1, Winter 2008, p. 37)

[381] Nourse, *id.*, p. 48.

[382] Nourse, *id.*, p. 50.

possible meanings of the rules, and how a broad cultural perspective can add meaning to legal rules.

On the other hand, the attempt to individualize punishment lies in the structure of criminal law. Although based on general rules, criminal law is concerned with individual responsibility and blameworthiness, which would lead to a natural conclusion that the cultural attachments of the defendant should indeed be taken into account. But this logic misses the point that the focus of criminal law is individual agency, apart from its conditions of existence, so that the individualization is not based on the social context, but is sought in an abstract manner, looking at individuals as rational actors.[383] However, Norrie[384] points out a paradox in this process:

> "In order that the 'language of equality' may be heard and obeyed it must be tied to its opposite: a general and omnipotent power source which, while presenting itself as representing the general social interests in fact embodies particular social-political interests and points of view."

From this perspective, the question is no longer whether criminal law should take into account the cultural conditions

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[383] Cf. Norrie, Alan W. Law, Ideology and Punishment. Dordrecht: Kluwer, 1991, pp. 164-165.

[384] Norrie (1991), *id.*, p. 184.

of the defendant, but rather whether criminal law reflects a particular culture. The simple answer is that criminal law is conditioned by the dominant culture. However, a more accurate and sophisticated approach would be to identify criminal law with a national project, not in a reified way, but in an emancipatory attempt. That is, to identify it with the perspective of a criminal law of the citizen, of a law of equal guarantees to the citizens, regardless of status, in contrast with the view of a moralizing function of the law.[385] Without this perspective of criminal law ensuring equal guarantees to citizens, it is easy to fall into the trap of a reduced view of the criminal act.

The discussion about the cultural fundaments of criminal law also evokes the idea of cultural justice: the justice a dominant culture owes to another it subordinates. However, a legal justice that reflects the common shared values cannot be seen as one-way only. Indeed, beyond a merely tolerant attitude of the dominant culture towards the minorities, it might become a dialogical process of inhibition of intolerant cultural practices.[386]

This debate about the cultural roots of criminal law leads us to a further aspect: the relation between law and secularism. Indeed, a fundamental principle of modern law is

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[385] Cf. Cf. Canestrari, Stefano. Laicità e Diritto Penale nelle democrazie costituzionali. *In* Laicità e diritto / a cura di Stefano Canestrari. Bologna: Bononia University press, 2007, pp. 10-11.

[386] In this regard, cf. Fikentscher, *id.*, p. 104.

its separation from morality. Although there are some grey areas, these do not mean that law can be overwhelmed by morality, which is a risk in some perspectives of cultural defence. In fact, criminal law is based on the principle of certainty and only by exception can morality be an element of interpretation.[387] This segregation operates as a guarantee that law is not going to be "colonized" by morality. Indeed, a certain conduct being immoral by common standards is not a sufficient justification for this conduct to be punishable by law.[388] In this sense:

> "What ought to be the scope of the criminal law? The most familiar way to approach this question is to consider what moral constraints there might be on the decision whether to criminalize some conduct. It is not permissible to criminalize a particular type of conduct, it might be argued, unless that conduct is harmful, or it is publicly wrongful, or it is deserving of punishment, or some combination of these. Answers of this kind are likely to be highly indeterminate. The best efforts to produce principled constraints on the criminal law, even were they endorsed by policy makers,

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[387] In this sense, Perelman, Chaim. Droit e Morale. *In*: Droit, Morale et Philosophie. 2 ed. Paris, 1976, pp. 189-190. He claims, however, that, since most of the time moral and legal rules conform, the way of reasoning about the application of morals can act as guidance in law.

[388] Cf. Hart, H.L.A. Law, Liberty, and Morality. Stanford University Press. 1963. p. 4

might do little to constrain its expansive and expanding scope."[389]

Indeed, the secularism of law, and specially of criminal law, is understood as the autonomy of the law in relation to the values of the various moral conceptions of society, but also that the punitive power can seek only deterrence objectives,[390] in opposition to "transcendent ideals of absolute justice".[391] The function of the penalty is not the moral re-education of the defendant by the state.[392]

Finally, in this secular perspective, the law should not interfere in the individual religious expressions dimension where many of the demands of recognition are founded. However, the religious pretensions can sometimes conflict with inalienable rights, so that the law must constantly balance conflicting aspirations.[393]

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[389] Tadros, Victor. Criminalization and Regulation. In: The Boundaries of the Criminal Law. Edited by R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros. Oxford University. 2010. p. 163

[390] In Beccaria's words: "Il fine dunque non è altro che d'impedire il reo dal far nuovi danni ai suoi cittadini e di rimuovere gli altri dal farne uguali." Beccaria, Cesare. Dei delitti e delle pene. (Edited by Franco Venturi). Einaudi. 1994. p. 31

[391] Canestrari, *id.*, p. 9-10 (freely translated).

[392] Cf. Canestrari, *id.*, p. 29

[393] Cf. Canestrari, *id.*, pp. 16-23.

9. Culturally motivated crimes

Cultural conflicts emerge in criminal law as culturally motivated crimes (cultural offences) and cultural defences.[394] Although the first category has predominance in civil law legal systems and the second one in common law, they are manifestations of the same issue: the influence of cultural elements on human behaviour regarding a criminal offence. The terms are intrinsically related, so that, even if using more the term cultural defence in the following pages, the observations are usually applicable to the notion of cultural offence; when this is not the case, I will expressly stress. Thus, from now, I will explore how cultural elements fit in the structure of criminal law.

First at all, we have to overcome the notion of modern criminal law system as a natural law, with a metaphysical nature. Indeed, as we have already seen, it is culturally constructed, a product of its own time and society. In this sense:

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[394] Jeroen Van Broeck suggested the difference between (i) continental writers who focus on the aspect of cultural offenses and (ii) the common law countries where authors tend to focus on the problem of the cultural defence. Cf. Van Broeck, Jeroen. Cultural defence and culturally motivated crimes (cultural offences). In: European Journal of Crime, Criminal Law and Criminal Justice. Vol. 9/1, 1-32, 2001.

> "No system of law including the criminal law is mandated by human nature and in that sense culture-free or transculturally valid. We need to decide the degrees of gravity of different evils, which of them to criminalize, how to determine the agent's responsibility of his or her actions, the basic purposes of criminal law, and so on. And these decisions are invariably shaped by the beliefs in terms of which we understand and organize our lives."[395]

However, modern criminal law is not a mere cultural manifestation. It is rather a cultural achievement, resulting from a long philosophical history and an essential element of liberal democracy. This achievement is reflected by the guarantees of the citizen, from which I underscore the principles of legality and secularism. Those principles represent a guarantee that only facts are going to be punished, not categories of persons. There is no room for subjectivity in the criminalization of the action but only in the sentencing, the moment of punishment individualization.[396]

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[395] Parekh, Bhikhu. Cultural Defense and the Criminal Law. In: Criminal Law & Cultural Diversity. Edited by Will Kymlicka, Claes Lernestedt, & Matt Matravers. Oxford: Oxford University Press, 2014, p. 104.

[396] In this sense, Canestrari, *id.*, p. 25.

In this context, multiculturalism is a test for these principles.[397] Every case involving a discussion of cultural clash can be considered a hard case, given the *non liquet* principle. The judge/court must decide the case,[398] even in the face of no apparent fair solution. Trying to give an answer to this challenge, some jurists bend the traditional penal institutes in order to take into account the cultural elements, arguing that this is the best way to deal with the problem. Others claim that only a formal cultural defence or specific categories recognizing cultural motives could respond to this dilemma. There is also the group that still insists on the law's blindness to cultural factors. Ultimately, cultural conflicts are a problem of criminal policy.

Along this section we are going to explore three perspectives about cultural defence: the need for a formal defence, the adequateness of the traditional defences of criminal law to deal with cultural differences, and the unviability of discussing cultural elements in criminal law.

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[397] Suggesting flexibility on the definition of the crimes, Erik Claes claims: "L'obligation de définir des infractions de manière précise; se ramène maintenant à la responsabilité de maintenir le projet de la pluralité humaine, en constituant un espace commun des valeurs qui permet à chaque citoyen de livrer ses actes au jugement des autres dans un climat de confiance." (Claes, Erik. La légalité criminelle au regard des droits de l'homme et du respect de la dignité humaine. In: Les droits de l'homme, bouclier ou épée du droit pénal? Yves Cartuyvels et al. 2007, p. 234)

[398] However, always having in mind the role of the judge: "Il ruolo del giudice è di 'dire l'ultima parola sui conflitti e non di rappresentare chissà quale virtù classica." (Resta, *id.*, p. XVI)

First, however, we need to consider the use of cultural elements in criminal law through the perspective evolved until now of the relation between law and the concept of culture. As already explored, I do not underwrite the multiculturalism approaches that endorse reified views of culture regarding cultural defence, because a cultural norm or practice cannot be objectively identified and culture is not static.[399] In fact, there is an erroneous tendency to refer to cultural elements as determinant in human conduct and the belonging to a cultural group as a conclusive proof of this condition. Gordon R. Woodman, for example, define cultural defense as:

> "a rule of state law which constitutes a complete or partial defence to a crime or mitigation which reduces the punishment, and which takes effect where the defendant would not have committed the criminal act had **they not belonged to a particular culture.**"[400] (my highlight)

In another excerpt, he maintains that the crucial issue is "a clash between the culture followed by the defendant

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[399] Cf. Coleman, *id.*, p. 1162.

[400] Woodman, Gordon R. The Culture Defense in English Common Law: the Potential for Development. In: Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense. Edited by Marie-Claire Foblets and Alison Dundes Renteln. Hart Publishing. 2009, p. 14.

and that followed by the legal system."[401] Is the mere belonging to a particular culture a determinant cause for human action? From the elements of the concept of culture examined so far and its relation to law, I think the answer could only be no. Indeed, culture is only a reference, offering a glimmer of symbolic elements that does influence human behaviour, but not in a determinant way.

A more reasonable way to look at the problem would be to ask whether it is fair to punish a member of a minority culture under a reference that does not reflect his or her own culture. Indeed, as discussed earlier in this work, the law is a specific kind of cultural product that tends to reflect the culture of those belonging to the majority culture.[402] In this framework, cultural defence challenges criminal law to find a balance between the atomistic view of individuals and cultural determinism.[403]

In fact, as this investigation has revealed, the discussion about cultural offences and cultural defences is clearly part of the broader discussion about multiculturalism. In this way, it is a political and philosophical issue that can be better evaluated at the political level. At the judicial level, the creation of a

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[401] Woodman, *id.*, p. 12

[402] Questioning the fairness of this reality, cf. Amirthalingam, Kumaralingam. Culture, Crime, and Culpability: Perspectives on the Defense of Provocation. In: Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense. Edited by Marie-Claire Foblets and Alison Dundes Renteln. Hart Publishing. 2009, p. 35,

[403] Cf. Lernestedt, *id.*, p. 40.

cultural defence is a way to deal with cultural diversity, but it represents also a risk of fragmentation of law and unequal treatment of individuals regarding the same crime.[404]

Thus, the analysis of cultural differences in criminal law has two levels: the political level of the criminalization and the judicial level of the defence (at least partial).[405] Kimmo Nuotio[406] makes an interesting observation about the tendency to deal with cultural diversity judicially case-by-case: "We would not be willing to compromise the whole system by making cultural exceptions to the rules, but in individual instances this may be acceptable."

However, this attitude raises the issue of whether the courts are the appropriate arena for discussing the acceptance of cultural practices, even though the political arena does not always offer answers to the challenges of cultural diversity. In this regard, it is important to consider alternative forms of justice, including the recognition of indigenous systems of justice, which I am going to explore in the next chapter.

It is important to recall also that the role of cultural defence in the multiculturalism debate is not only the

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[404] For this perspective of fragmentation, cf. Amirthalingam, *id.*, p. 43

[405] Matravers, Matt. Responsibility, Morality, and Culture. In: Criminal Law & Cultural Diversity. Edited by Will Kymlicka, Claes Lernestedt, & Matt Matravers. Oxford University Press. 2014. pp. 89-103. p. 89

[406] Nuotio, *id.*, p. 84.

passive perspective of how criminal law should handle the demands of multiculturalism, but also an active perspective of how criminal law can be used to reach general ends regarding multiculturalism. However, within the multicultural debate, the question of what should be seen as distinct in criminal law is rarely posed.[407]

This relationship between cultural defence and multiculturalism reminds us of the relevance of the forward-looking and backward-looking spheres of law in the discussion about “cultural defence”. In this regard:

> "A decent system of criminal law recognizes an unavoidable and insoluble tension or conflict between (forward-looking) aims and (to a large extent backward-looking) justificatory issues. This tension or conflict, though, has not been clearly enough acknowledged in the "cultural defence" debate."[408]

However, I am aligned with the utilitarian view of the predominance of forward-looking aspects in criminal law, from which all the justifications for punishment should be forward-looking “in the sense that they explain how the justified things promises to make the world a better place, or at least to avoid its getting any worse”, as opposed to

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[407] Observations developed on Lernestedt, *id.*, pp. 18-19.
[408] Lernestedt, *id.*, p. 23.

the retributive view of "some intrinsic - not merely instrumental - value in a certain type of suffering, namely in suffering that is deserved."[409] From a utilitarian point of view, "backward-looking" aspects are only a subsidiary feature.[410]

On the other hand, if criminal law is diminished to a perspective of just deserts, the risk is deviating to a mere vendetta or a moralism. The relevance of criminal law goes much beyond this limited view. This does not mean to deprive criminal law of the values of society. In fact, criminal law by its nature preserves values and rights. Criminal law defines "outer limits,"[411] limits of rights,[412] for the common good of society. In this "ability to express the basic values of society,"[413] criminal law resembles constitutional law.

These outer limits, that should be equally valid for all,[414] are the expression of the universalistic nature of criminal law, which is in conflict with particular pretensions. Barry[415] argues that only a "misunderstanding of the nature of liberal principles" could lead to a situation of non-enforcement of legal norms that create a public good

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[409] Gardner, John. Introduction on: Hart, H.L.A. Punishment and Responsibility: essays in the philosophy of law. Second edition. Oxford University Press, 2008, p. XV.
[410] Cf. Gardner, *ibid*.
[411] Cf. Lernestedt, id., p 20.
[412] Nuotio, *id*., p. 69.
[413] Nuotio, *ibid*.
[414] Lernestedt, *id*., p. 20.
[415] Cf. Barry, *id*., p. 287.

that benefits most of the population, even when the refusal to follow the rule comes from a small group.

It is also true that, in some versions of cultural defence, there is a risk of degrading the accused and his or her culture, likening “the culture to a human weakness or deficiency, suggesting that the culture of the accused is inferior to the culture of the majority."[416] This is contrary to the principle of irrelevance of personal characteristics before the law. Indeed, the idea of taking into account the cultural attachments of the defendant, which at first glance can seem progressive, could in fact turn into a reactionary instrument.

One aspect generally overlooked and that we have to consider is whether "the culture defence is concerned only with action prescribed by a culture, rather than merely permitted, or partly or completely excused by a culture."[417] In the same direction, a more fundamental difficulty is that in certain cases the “motive” for the defendant’s action could be traced back not to cultural norms, but to mere “assumptions, conventions, beliefs' of their culture."[418] Most of the definitions and arguments in favour of “culture defence” do not take theses aspects into account. For example, in Van Broeck’s definition:[419]

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[416] Amirthalingam, *id.*, p. 44-45.
[417] Woodman, *id.*, p. 11.
[418] Woodman, *ibid.*
[419] Van Broeck, *id.*, p. 5.

> "A cultural offense is an act by a member of a minority culture, which is considered an offense by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation."

In addition to the critics already exposed while discussing the idea of social norms in regard to cultural conflicts, I would like to note that, if the references to the defendant's native legal systems are not easy to grasp, the difficulty is much more intense when the cultural conflict is not straightforwardly reflected in the native legal system, but in social norms.

Nevertheless, the main challenge that cultural defence poses is to the structure of criminal law itself, as we will explore in the following sections.

9.1. Formal vs. informal

As discussed previously, the debate about cultural conflicts is not new in criminology. It is just that previously, the focus was in the etiology of these kinds of

criminal actions. I postulate that, because of the new context of multiculturalism after the 1960s, with the tendency of a major accommodation of cultural diversity, the perspective has also evolved in criminal law, with attempts to adapt criminal law to this reality.[420]

In other words, it is true that we have had a growing number of cases where arguments related to culture have been discussed, but cultural diversity itself is not a novelty. It was only with a new philosophical approach or paradigm that the increase in diversity was able to reach the perspective of the cultural defence.

The *Harvard Law Review volume 99,* published in 1986, is pointed to as the first use of the term "cultural defence" in legal scholarship.[421] It claimed that “America’s commitment to the ideals of individualized justice and cultural pluralism justifies the recognition of the cultural defence.”[422] I would like to recall the conclusion of this review:

> “Neither the current law nor discretionary procedures within criminal justice system are adequate vehicles for dealing with cultural factors: what is needed is a

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[420] In this sense: “Questo mutamento di prospettive investe oggi in pieno il diritto penale, chiamato, come le altre scienze giuridiche, a riformulare le proprie categorie per adattarle alle nuove esigenze.” (De Maglie, *id.*, p. 5)

[421] Cf. Coleman, *id.*, p. 1100

[422] Cf. Criminal Law, 99 Harv. L. Rev. p. 1307

> formal cultural defense within the substantive law. It is often all too tempting for society to betray its underlying values when confronted with overstated fears of violence and anarchy. In the case of American society, blanket repudiation of the cultural defense sacrifices two important values -- individualized justice and cultural pluralism. (…) American society has thrived on tolerance, curiosity toward the unknown, and experimentation with new ideas. The legal system, however, recognizes that if tolerance, curiosity, and experimentation are carried too far, social disorder and disintegration of common values may result. The cultural defense would give courts the opportunity to strike the necessary balance among these competing interests."[423]

In this same vein, one of the major supporters of a formal cultural defence, the American Professor Alison Dundes Renteln, states:

> "I'm not saying that every cultural tradition ought to be tolerated. As I have emphasized throughout this book, the consideration of cultural evidence does not necessarily require that courts permit the continuation

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[423] Criminal Law, 99 Harv. L. Rev. p. 1307

> of all cultural practices. But the preponderance of the data belies the commitment of liberal democracies to the value of cultural diversity. Assuming that culture is constitutive of identity, in a pluralistic society government policies should support the flourishing of multiple identities. In order to ensure that ethnic minorities are accorded the dignity and rights which are their due, some kind of formal cultural defense is essential."[424]

Both perspectives appeal to the value of pluralism and cultural diversity as a way to support a formal cultural defence. I would argue, however, that these might be precipitated conclusions. I believe that it is necessary to further investigate whether the structure of criminal law does not give room already for this kind of adjustment. Both views are based also on the principle of "individualized justice"[425] as an argument in favour of a formal cultural defence. The same consideration applies here: we might first wonder whether criminal law does in fact already allow for individualized justice.

Indeed, the idea of an informal cultural defence is the use of established criminal institutes in order to take into account cultural elements that may have influenced the

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[424] Renteln, *id.*, pp. 186-187.
[425] Cf. Renteln, *id.*, pp. 187ff.

defendant's action. It is, in other words, an account of the defendant's culpability on charging or sentencing for a crime.[426] From a perspective of individualized justice, in observation of the principle of culpability, this could be a pertinent attitude.

From both perspectives, formal and informal, the nature of culture is usually undervalued or not even considered at all. Therefore, prior to the discussion about the formalization or not of the cultural defence, it is necessary to weigh the translation of cultural elements into law. The problem lies where this kind of approach represents a deviation from the perspective of punishment of acts rather than subjects, so that the belonging to a cultural group would eclipse the relevance of the act itself.[427]

Until now, the notion developed in this work has taken a strong stance against a static view of culture, which would naturally lead to an unfavourable view of the use of cultural evidence. In this context, following the position of Claes Lernestedt, the cultural evidence can be valued only as an indirect element, “as information in the light of which - among other things - the defendant should be judged."[428]

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[426] Defending the viability of an informal cultural defense, cf. Choi, Carolyn. Application of a Cultural Defense in Criminal Proceedings. Pacific Basin Law Journal, 8(1), 1990, pp. 90ff.

[427] In this sense, Tomao, Sharon M. The Cultural Defense: Traditional or Formal? Georgetown Immigration Law Journal 241 (1996), p. 255.

[428] Lernestedt, *id.*, p. 40.

Renteln claims[429], however, that the main reason to recognize the cultural defence is because of the notion of "enculturation", which is the process of acquiring the values of the group. This process would occur mainly on a subconscious level and influences cognition and behaviour. It is not my purpose to explore in depth cultural psychology and anthropology. However, I would like to make some considerations about the concept of enculturation. A notorious definition of enculturation is given by Ralph Linton:

> "No matter what the method by which the individual receives the elements of culture characteristic of his society, he is sure to internalize most of them. This process is called enculturation. Even the most deliberately unconventional person is unable to escape his culture to any significant degree... Cultural influences are so deep that even the behavior of the insane reflects them strongly."[430]

However, Nobuo Shimahara, through a review of researches, challenges this view of mere internalization of culture, suggesting that enculturation is a bipolar process of cultural transmission and transmutation, so that

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[429] Cf. Renteln, *id.*, p. 12.
[430] Cited by Nobuo Shimahara (Enculturation: a reconsideration. In: Current Anthropology, Vol. 11. No. 2, Apr. 1970, p. 144).

enculturation would be not only a process of cultural acquiring, but also a creative process of inquiry,[431] which fits better the processual perspective of culture defended in this work.

This dynamic view is even more relevant when we relate this concept to criminal law. Without this dynamic view of culture and enculturation, individuals' behaviour would be seen as predetermined by culture, undermining the notion of free will and guilt. Indeed, "(t)he values inculcated by a person's culture strongly influence but do not determine his or her actions."[432]

For Renteln, the important thing is not to ignore the mechanism of enculturation. She argues that culture reverberates on the psychological aspect of the individual, so that cultural evidence should be admitted into courtroom. Nevertheless, she does not consider that a person should always be excused on the basis of his or her culture.[433]

The analysis of enculturation is dependent on psychological aspects. However, the concern for culture, the attempt to discover how culture and individual behaviour relate, is rather recent in psychology. Despite its relative novelty, this approach has revealed findings noteworthy to our inquiry. For example, that mental illness is not only influenced by culture, but the respective diagnoses vary

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[431] Shimahara, *id.*, pp. 143-154.
[432] Renteln, *id.*, pp. 12-13.
[433] Renteln, *ibid.*

across cultures and subcultures. Beliefs which may be indicative of psychosis in one culture are culturally validated in another. How individuals experience and express symptoms of mental illness also varies in different cultures.[434]

The psychological approach is also relevant to the object of this research because of the common strategy of invoking mental illness in cases evolving cultural conflicts. Such strategy usually incorporates the defendant's cultural background into the criminal categories of diminished capacity and mistake of fact.[435]

In conclusion, the more relevant issue is not to determine whether the cultural element should be accounted for a formal or informal way, expressly recognized in the structure of criminal law or sheltered in its traditional institutes, but rather ensure that the proper weight of the cultural element is given.

9.2. Intention and motive

As we have seen, from a legal dogmatic perspective, cultural evidences are embodied in the category of culturally

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[434] King, Nicole A. The Role of Culture in Psychology: A Look at Mental Illness and the Cultural Defense, 7 Tulsa J. Comp. & Int'l L. 199 (1999), 199-216.

[435] King, *id.*, pp. 217-220.

motivated crimes, which highlight the cultural motives that are in the origin of the criminal conduct.[436] This notion leads to a discussion of intention and motives.

Norrie[437] says that the "abstract individualism" which is intrinsic to criminal law distorts individual justice and culpability because it excludes factors that should be relevant when determining the culpability: the motives.

Duff claims instead that the criminal system is based on the idea of "normality". According to him, the law defines the conduct that, when done by a normal agent in a normal situation, is considered a crime. The applicability of this notion of “normality” is an operative precondition of the practicality and the justice of a legal system based on the idea of deterrence. Indeed, this perspective embodies the notion of predictability for citizens, which does not amount to a disregard for differences,[438] but that only by exception

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[436] In this regard: "I reati a movente culturale o religioso, in conclusione, vengono qui intesi come quei reati il cui movente trae la sua origine e la sua spiegazione nel modello culturale o religioso cui il singolo fa riferimento, movente che non è in grado di rilevare, in quanto tale, come elemento positivo (sia pur costruito negativamente) della fattispecie incriminatrice, ma che potrebbe, almeno in via ipotetica, incidere sul giudizio di imputazione soggettiva: ciò in ragione dell'estrema difficoltà con la quale l'agente sarebbe in grado di (ri)conoscere l'illiceità o l'offensività del comportamento posto in essere." (Massaro, Antonella. Reati a movente culturale o religioso. Considerazioni in materia di ignorantia legis e coscienza dell'offesa. In: Temi Penali. Edited by Mario Trapani and Antonella Massaro. Torino: Giappichelli, 2013, p. 129)

[437] Norrie (2001), *id.*, pp. 37ff.

[438] Duff, Antony. Principle and contradictions in the Criminal Law: Motives and Criminal Liability. In: Antony Duff (ed.). Philosophy and the Criminal Law: Principle and Critique. Cambridge: Cambridge University Press, 2008, pp. 189-191.

should conducts deviating from the norm be excused or justified.

Indeed, in his idea of "normality", Duff also includes "normal" pressures (economic, for example), the results of which might tempt people to engage in criminal conduct, however resistible by “normal” citizens, distinguishing them from "abnormal" pressures that can be found in defences such as duress and necessity.[439]

In this regard, the structure of criminal law is based on a deliberate choice of the motives that are relevant, in contrast to the classical argument that motive is irrelevant for criminal liability. Even if the proof of the defendant’s intention to perform an act that the law defines as a crime leads, in general, to a conviction, exceptionally motives can be relevant. However, regarding the culpability, he affirms that the defendant’s motive “can make a significant difference to the penal fate he deserves.”[440]

Nevertheless, the conceptual (and practical) separation of motive from intention is loosely defined, mainly in the common law system. Crawford and Quinn affirm that the intention in criminal law seems to have a “magician’s quality”: "Now you see it, now you don't."[441] In fact, it is not only in law that the concept of motive and intention

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[439] Duff, *id.*, p. 191.
[440] Duff, *id.*, p. 175.
[441] Crawford, J. M. B.; and Quinn, J.F. The Christian Foundations of Criminal Responsibility: A Philosophical Study of Legal Reasoning. 1991, p. 359.

seems difficult to distinguish. For the most part, motive and intention are not treated as worlds apart in terms of their meaning.[442] However, this is equally the case in philosophy as the distinction is rarely drawn in philosophical discussions either.

The Austrian philosopher and sociologist, Alfred Schütz, divided motive in two different concepts "because-motive" (*Weil-Motive*) and "in—order-to-motive" (*Um-zu-Motive*). The first class ("because-motive") refers to the agent's past experiences (conditions of life, growing-up environment, traumas, etc.). The second one ("in-order-to-motive") refers to the end to which the action has been carried out.[443]

Borrowing Augusto Silva Dias' example[444], we can say that if a poor subject that was brought up by a dysfunctional family, in the slums of a city, murders someone to take their wallet, the end or "in-order-to-motive" is to take possession of the money, while the "because-motive" is the subject's life conditions just described.

Thus, the "in-order-to motive" refers to the end of the ongoing action and is an essentially subjective category that "is revealed to the observer only if he asks what meaning the actor bestows upon his action". The because-

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[442] Anscombe, G.E.M. Intention. 2nd edition. Harvard University Press, 2000, p. 18.

[443] Schütz, Alfred. Choosing Among Projects of Action. In Collected Papers I. The Problem of Social Reality. p. 69-70.

[444] Dias (2016), *id.*, p. 17.

motive, however, is an objective category, accessible to the observer, by glancing back to the "state of affairs brought about in the outer world by the actor's action, the attitude of the actor to his action."[445]

However, even though motives may explain the actions, "that is not to say that they 'determine', in the sense of causing, actions."[446] There is no relation of causality. This conclusion is extremely relevant to criminal law and is bound to the idea of free-will. In other words, to assume that motives are the causes of an action would undermine the idea of penal responsibility.

Kenny, also recognizing the difficult involved in distinguishing between motive and intention, claims that the fundamental distinction is between backward-looking and forward-looking reasons for the action. While the intention always refers to forward-looking reasons, motive may refer to either forward-looking or backward-looking reasons.[447]

In this vein, there are three possible explanations for an action. The action can be explained by reference to a precedent and unwanted circumstance, by reference to a wanted result, or by a combination of these two explanations.[448] Actually, referring to intention and motive to explain an action depends greatly on the description of the action

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[445] Schütz, *id.*, pp. 71-72.
[446] Anscombe, *id.*, p. 19.
[447] Kenny, Anthony. Action, Emotion and Will. Routledge, second edition, 2003, p. 64.
[448] Cf. Kenny, *id.*, p. 63.

itself,[449] which can weigh the aspects of the action in different ways. The boundaries between what is wanted or unwanted are roughly delineated.[450] Indeed, "the description of human feeling and human willing is dependent on the description of human actions." [451]

This brief philosophical inquiry about the difference between intention and motive is helpful to understand some misconceptions in law related to *mens rea (dolus)* and motive (motivation). The common legal argument is that the intention has to do with the *mens rea*, while the motive precedes and causes the wrongful intent.

However, if the *dolus* is a conscious will of carrying out the unlawful act, the affirmation that motive causes the *dolus* would amount to saying that the motive precedes and causes the conscious will, which would shatter the idea of freewill.[452]

In the civil law language, the *dolus* corresponds to the psychological attitude towards the wrongful act depicted in the norm. The motive, instead, considered as the ultimate aim of the agent or the impetus for the action (in-order-to or because-motives) is not specifically described by the

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[449] Cf. Kenny, *id.*, p. 65.

[450] In this regard (Kenny, *id.*, p. 68): "Few, if any, actions bring about only the result desired by the agent. An action which is done to bring it about that p will bring it about also that q and that r. The other results brought about may be states of affairs which the agent does not want, or which are bad for him, or which are injurious or displeasing to others."

[451] Kenny, *id.*, p. 106.

[452] Malinverni, Alessandro. Scopo e movente nel diritto penale. Torino: Utet, 1955, p. 34.

law. The *dolus*, for criminal liability, presupposes that the criminal act is intended or knowingly risked. The motive does not imply awareness.[453]

Although, in response to the challenges presented by multiculturalism, it is tempting to expand the notion of motives in criminal law in order to shelter cultural diversity, this mechanism should follow strict limits, guaranteeing that the responsibility is assigned because of the conduct, not because of the agent's origin or internal sentiments; otherwise, there is a risk of deviating to forms of objective liability.[454] It is true that the motive can be relevant in the concept of culpability, covering cultural elements, so that individualized justice is reached,[455] but the fundamental question remains how and to what extent the motives should be considered in criminal law.[456]

9.3. Justification, excuse and mitigation

With regard to the informal approach, i.e., the notion that the cultural defence should be analyzed from within the traditional institutes of criminal law, given that most literature on the theme is from countries under a common law

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[453] Malinverni, *id.*, pp. 34-35.
[454] Veneziani, Paolo. Motivi e Colpevolezza. Torino, Giappichelli, 2000, pp. 4 and 10.
[455] Cf. Veneziani, *id.*, p. 16.
[456] Duff, *id.*, p. 175.

legal system, we will explore the structure of defences departing from this perspective.

First, the defences are usually divided into justifications and excuses. Although with the same final result of non-punishment, justification and excuse have different structures and bases. In broad terms, justification relates to the wrongfulness of the act, while excuse refers to culpability.

Justifications are a product of a balancing of values and legal interests in the abstract, affecting a "matrix of legal relationships."[457] In fact, regarding the justifications, the relationship is, in general, between the action and the rule,[458] so that it ties not only the agent, but also the victim and third persons. Justifications correspond to the categories of duress, necessity, self-defence, provocation and entrapment.

Excuses, in contrast, represent a relationship between the rule and the agent,[459] and do not affect the relationship with other persons,[460] constituting "a claim to be raised only relative to the external authority that seeks to hold the actor accountable for the wrongful deed."[461] In Kimmo Nuotio' words: "Justification renders the act justified, whereas an

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[457] Fletcher, George. Rethinking Criminal Law. Boston, 1978. p. 762

[458] Dias, Augusto Silva. Crimes Culturalmente Motivados: o direito penal ante a "estranha multiplicidade" das sociedades contemporâneas. Coimbra: Almedina, 2016, p. 225.

[459] Dias (2016), *ibid*.

[460] Fletcher, *id*., p. 762.

[461] Fletcher, *ibid.*

excuse only renders it understandable."[462] The focus of the excuse is not on the act in the abstract, but in the circumstances and the defendant's psychological attachment to the act, such as age, mental disorder, automatism, mistake of fact and mistake of law, so that the wrongful act becomes comprehensible.[463]

According to the argument that has been developed in this work, culture constitutes the grammar of human behaviour, though not an irresistible impulse. Thus, since the cultural element is not determinant of the agent's behaviour, it does not generally seem to fit the framework of justifications that void the unlawfulness of the act, bonding victim and third persons. Nevertheless, it is not rare to find in the literature cases where provocation and duress have been argued. In this line, also the excuse categories of mental disorder and automatism seem inappropriate. A more suitable approach would seem to be the exploration of the categories of mistake of fact and mistake of law.

Indeed, the concept of excuse seems to fit better into the perspective of cultural influence on behaviour, since it represents the circumstances and psychological elements that, although not excluding the illicitness of the conduct, could render the action understandable and thus affect the

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[462] Nuotio, *id.*, p. 83.
[463] Fletcher, *id.*, pp. 798-799.

defendant's culpability.[464] Excuses are also understood as defences directed at the cases in which the freedom of choice is constricted.[465]

Differently from justification and excuse, mitigation presupposes conviction and liability and affects only the severity of punishment.[466] The mitigation framework applies to a situation or a mental state that provide good reason for administering a less severe penalty, such as an unusual or especially great temptation or a fact that impairs or weakens the ability of the agent to control his or her actions.[467]

In this abstract perspective, it is not easy to distinguish between reasons for mitigation and excuse. Actually, Hart[468] claims that there are many features of the conduct which could be considered under the different categories of justification, excuse, and mitigation.

We face a tension between two differing conceptions of "doing justice" in sentencing. The tendency towards individualization of justice to fit the particularities of the case regarding the individual offender, including the defendant's motive, is in apparent conflict with the abstract means of equal treatment and consistence of like cases. As

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[464] In this sense, Nuotio, *id.*, p. 83.
[465] Fletcher, *id.*, p. 802.
[466] Cf. Hart, H. L. A. Prolegomenon to the principles of punishment. In: Punishment and Responsibility: essays in the philosophy of law. Second edition. Oxford University Press Hart, 2008, *id.*, p. 14.
[467] Cf. Hart (2008), *id.*, p. 15.
[468] Cf. Hart (2008), *id.*, p. 16.

a result of the risks of allowing wider discretion to judges, including an excessive power of evaluating the defendant's character, their discretion is limited by a range of mitigating and aggravating factors determined in advance.[469]

Sentencing is ordinarily the moment for considerations of particular questions of the case, which could be used to recognize cultural elements,[470] in accordance with the fundamental role of blameworthiness in criminal law.[471] Indeed, the principle of human dignity demands this individualization of justice through inquiry of the defendant's culpability. This solution of weighing the cultural elements of the defendant's conduct in the sentencing phase give way to a "soft" multiculturalism and a progressive criminal defence philosophy.[472]

9.4. Political sphere

In addition to these perspectives related to the structure of criminal law, the penal rule can be in conflict with the regular exercise of cultural rights. In this case,

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[469] For this approach regarding the tension between these two conceptions of justice in sentencing, cf. Duff, *id.*, pp. 176-177.

The use of the term tension is not by chance, as we can observe on Duff's explanation that these two perspectives (demand for individual justice and need to constrain judicial discretion) are not necessarily contradictory, but indispensable aspirations that work in tension.

[470] In this sense, Nuotio, *id.*, p. 85.

[471] Cf. Lernestedt, *id.*, p. 20.

[472] In this way, Coleman, *id.*, p. 1095.

we could question if the act is actually wrong. That is, whether we have indeed a harmful or offensive act.

The idea of cultural rights highlights the criminal law principle that an act should be declared a crime only if it is harmful for society, i.e., if it harms a legal value. In this sense, it is logical that if a practice of a minority group is recognized under the label of cultural right, it should not be criminalized.[473] However, this correspondence between the recognition of cultural traditions and the restriction of its criminalization is not always observed or clear in the legal system.

In a criminal system anchored in the observance of the *ultima ratio* principle, in which penalties are attached to the deviation from minimum standards of behaviour,[474] this conflict between crimes and cultural rights would be residual. However, in the contemporary context of inobservance of this principle, with an excess of criminalization, this kind of conflict is inevitable. In this context, therefore, questioning the values built into the legal system is not a compromise of the criminal law structure and liberal principles, but a way to interrogate the construction of the concept of harm in a broader way, including diverse cultural values.[475]

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[473] Batista, Nilo. Introdução Crítica ao Direito Penal Brasileiro. 12nd edition. Rio de Janeiro: Renan, 2015, pp. 91-92.

[474] Hart (2008), *id.*, p. 23.

[475] Discussing the reproduction of relations of dominance, cf. Batista, *iwd.*, p. 113.

Brian M. Barry, in his persuasive essay, *Culture & Equality: An Egalitarian critique of multiculturalism,* is against these kinds of cultural exceptions. His arguments are synthesized in this excerpt:[476]

> "There is no principle of justice mandating exemptions to generally applicable laws for those who find compliance burdensome in virtue of their cultural norms or religious beliefs. No contemplation of the concept of equal treatment will tell us whether ritual slaughter should be allowed or whether it imposes an unacceptable degree of suffering on the beasts subjected to it. No more will it tell us whether the paternalistic societal interest in preventing road death and injuries should or should not outweigh the desire of some Sikhs to ride motorcycles while wearing turbans. There are considerations of some weight on both sides and the only appropriate forum for casting up the balance is a publicly accountable one: a process in which the public at large is, ideally, consulted and (in the absence of compelling reasons for believing that the majority view rests on misinformation or prejudice) heeded. I have argued in this book that, with almost no exceptions, either there is a good enough case for having a law to

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[476] Barry, *id.*, p. 321.

> foreclose exemptions or alternatively the case for having a law is not strong enough to justify its existence at all."

Barry's argument leads us to a discussion about the representation of minorities in the public sphere. This is not a new debate. Indeed, in Kymlicka's *Multicultural Citizenship* there was already a defence of special representation rights. However, provided that we do not yet have a balanced representation of minorities, is a case-by-case approach to cultural diversity in criminal law the best way to compensate for this inequality? Or is the abstract approach the only possible answer for the accommodation of differences?

Bartoli, demonstrating some scepticism in regard to the abstract way to respond to issues in a multicultural context, claims that we should cherish the moment of the application of the norm as a way to balance opposite interests, through the institutes already present in criminal law, in a perspective of the avoidability of the conduct.[477] Indeed, as Nuotio stated in a passage quoted previously, "We would not be willing to compromise the whole system by making cultural

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[477] Bartoli, Roberto. Contraddittore a Flavia Monceri's Multiculturalismo: Disincanto o Disorientamento del Diritto? In: Religione e religioni: prospettive di tutela, tutela della libertà. Edted by Giovannangelo de Francesco, Carmela Piemontese and Emma Venafro. Torino: Giappichelli, 2007, pp. 90-91.

exceptions to the rules, but in individual instances this may be acceptable."[478]

The question of cultural evidences in criminal law can also be analysed by considering the concepts of *mala prohibita* and *mala in se*. The concept of *mala in se* is related to the notion of core conducts that are expected to be seen as wrongful independently of the law, in opposition to the idea of *mala prohibita* offences, which, while also having as a fundament the common good of society, are not self-evident to a citizen. However, the notion of *mala in se* reflects an idea of a natural law that does not fit the notion of a culturally constructed law. Also, the distinction of criminal conducts in these two branches are not easily reached.

In his perspective of normality regarding the conduct expected of citizens, Duff argues that criminal law must be able to define the wrong actions, either as *mala in se* or as *mala prohibita*, from which citizens could reasonably be required to refrain from and from which they should normally expect to be safe.[479] In this sense, even *mala prohibita* offences would not be excused by reference to cultural attachments.

Once again, here, we return to the question of democratic participation of minorities in the political

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[478] Nuotio, *id.*, p. 84.
[479] Cf. Duff, *id.*, pp. 189-191.

sphere, so that the duties expected from citizens might reflect a broad cultural perspective. This is fundamental in a contemporary context of "frenetic law-creation", which falls mostly under the category of *mala prohibita*.[480]

However, in a context of poor democratic inclusion of minorities or increase of recently arrived immigrants, the perspective of "artificial" crimes is an important tool to deal with cultural offences. Such perspective serves not only to stress the evident cultural conflict regarding *mala prohibita* offences, but also to highlight the nature of some offences with "universal morals" (*mala in se*), so that, for example, "honor killings have to be understood as killings anyway".[481]

Indeed, in the line adopted in this research, the legitimacy of criminal justice needs to be built on political bases. In the first chapter, in order to deal with the problems faced by multicultural communities, I worked with the idea of citizenship as the point of meeting of nationality and cultural identities. In this perspective, the concept of citizen is a fundamental element, so that the citizenship could democratically embody a wider cultural reference.[482] In fact, the duty to respect the law rests on

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[480] Claes, Erik; Królikowski, Michal. Criminalization, Plurality, Constitutional Democracy. In: Between Complexity of Law and Lack of Order: Philosophy of law in the era of globalization. Edited by. Bartosz Wojciechowski, Marek Zirk-Sadowski and Mariusz J. Golecki. Toruń: Marszałek, 2009, p. 219.

[481] Nuotio, *id.*, p. 71.

[482] Cf. Nuotio, *id.*, p. 86.

the civic role of the member of a political community, not in his or her cultural allegiances.[483]

10. The role of fundamental rights

Recalling Montesquieu's claim that the judiciary power is "so terrible to mankind"[484], history has proven that we need guarantees to face this dreadful nature of criminal law.[485] Indeed, modern criminal law, in line with its bourgeois origin, has the double function of protecting the interests of the nation-state and the rights and liberties of the citizens, including against the state power.[486] In this logic of security, alongside substantial and formal guarantees, the principle of legality plays a fundamental role, allowing the citizens to exercise their liberty in a context of previsibility.[487] The state power is also limited by the conception of fundamental rights.

This system is the result of a process of constructing legal values: a civilizational achievement. In fact, from

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[483] Cf. Nuotio, *id.*, p. 76.
[484] Book XI, Chapter 6.
[485] Cf. Donini, Massimo. Diritto penale di lotta vs. Diritto penale del nemico. In: Delitto politico e diritto penale del nemico. (Edited by Alessandro Gamberini e Renzo Orlandi). Monduzzi Editore. 2007. 131-78. p. 140
[486] Cf. Cartuyvels, Yves. Droits de l'homme et droit pénal, un retournement? In: Les droits de l'homme, bouclier ou épée du droit pénal? Yves Cartuyvels et ali. 2007. P. 26
[487] Cf. Cartuyvels, *ibid*.

the perspective developed until this point, we are not merely conditioned by laws from the "outside". Rather we are part of the creation of meanings, and legal meanings become part of the image of ourselves, in a way that "our own purposes and understandings can no longer be extricated from those meanings".[488] This process of construction of meaning is inseparable from the cultural composition, so that the law has already in its genesis the flexibility to respond to cultural changes,[489] since law is also a cultural element.

However, this cultural feature of law and fundamental rights do not commonly appear as a solution to the issues related to culture in criminal law, but instead as obstacles to a law open to cultural diversity. Due to their roots in European liberalism, the discourse of human rights face criticisms of eurocentrism and unfeasibility of its universalistic pretension, sharing, in this sense, a connection with the demands of multiculturalism.[490]

Parekh, for example, alerts to the danger of "using the language of universality to blackmail or coerce others into accepting these values."[491] Continuing in this line, he repels the argument of the need of a minimum list of human rights,

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[488] Sarat, et al., p. 7-8.

In Ferrajoli words: "Esiste insomma un'interazione tra mutamenti istituzionali e mutamenti culturali. Le filosofie giuridiche e politiche sono sempre un riflesso e insieme un fattore costitutivo e, per così dire, performativo delle concrete esperienze giuridiche dei loro tempi". (Ferrajoli, Luigi. Iura Paria. I fondamenti della democrazia costituzionale. Napoli: Editoriale Scientifica, 2015. P. 21).

[489] Rosen, id., pp. 92-93.

[490] Cf. Maffettone, *id.*, p. 201.

[491] Cf. Parekh (1996), id., pp 255-256.

claiming that "even if we were to arrive at a genuinely universal list of human rights, it would have little value unless it enjoyed widespread support within the community so that it had the authority to bind and the power to motivate the conduct of its members".[492]

In fact, the conception of universality emulated in our legal system is a product of social transformations in Western Europe,[493] and does not necessarily fit with other views. It is true that this ambition of a universal and uniform knowledge has its origin in the eighteenth-century Enlightenment, in Europe, at least in its French variant.[494] It is also true that cultural relativism represents a challenge to this approach, which had in its origin an evolutionistic and imperious aspect.[495] However, even if with opposite origins, universalism and relativism are not irreconcilable in regard to human rights. Borrowing Dembour's perspective, we can say that they work in a pendulum motion, so that we can locate human rights in an unstable in-between position.[496]

Actually, contrary to a static and homogenous view of traditional cultures, what is observed is that minority

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[492] Cf. Parekh (1996), *id.*, p. 258.

[493] Cf. Santos, Boaventura de Sousa. Direitos humanos, democracia e desenvolvimento. São Paulo, Cortez, 2013, p. 59.

[494] Cf. Dembour, Marie-Bénédicte. Following the movement of a pendulum: between universalism and relativism. In: Culture and Rights: Anthropological Perspectives. Jane K. Cowan Marie-Bénédicte Dembour and Richard A. Wilson, eds. Cambridge: Cambridge University Press, 2001, p. 56.

[495] Cf. Merry, id, p. 33.

[496] Cf. Dembour (2001), *ibid*.

groups undertake a process of cultural appropriation of human rights. Although produced in the “central” West, human rights are now being “appropriated around the globe by other peoples and transformed in various ways in different locations”.[497]

Cultural appropriation is an uncertain process of readjustment and change that takes place over a period of time. Rights also undergo a historical process of alteration of rules and meanings, influenced by culture, also exhibiting new views that can be culturally appropriated. In this perspective, human rights offer local communities ways of revamping attitudes.[498]

In fact, the challenge is to overcome the presumptuous approach that the righteousness of human rights, which excludes the experience of the "other".[499] This does not represent the rejection of a universalistic aspiration or the embrace of a cultural relativism,[500] but recognises that a broader view of human rights should include the perspective of minorities.

The discourse of cultural relativism regarding human rights reveals two main problems. First, the assumption that culture is more determinant than it actually is, so that people are classified in boxes. Second, it represents a stark division between traditional and Western societies.[501]

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[497] Cf. Merry, *id.*, p. 47
[498] Cf. Merry, *id.*, p. 50
[499] Cf. Dembour (2001), *id.*, p. 58
[500] Cf. Dembour, ibid.
[501] Cf. Dembour, *ibid.*

Maffettone identifies this relativistic approach not only as the opposition to the enlightened view, but also as a reactionary approach.[502] He claims that, while in the twentieth century the main rival of human rights was political realism, in the twentieth-first century this opposition comes from multiculturalism.[503]

With a compromising approach, Dembour, recalling Peter Fitzpatrick, remarks that the universal can never be established by itself, but is always accessed by the specific, in the sense that it represents a particular historical experience. The Universal Declaration of Human Rights, for example, although representing a pretension of universality, was in fact "drafted by people who looked at the world from a particular window".[504]

Globalization and migration have created new challenges even for the countries that gave birth to human rights, stressing the ethical limits of these rights.[505] Moreover, human rights are also determined by economic contexts.[506]

Manfred O. Hinz sustains the viability of a "soft human rights approach". That is, a dialogical process with minority

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[502] In this regard: "Lo scetticismo filosofico sui diritti umani non è, però, solo differenzialista e identitario, romantico e anti-illuminista. È anche reazionario, come nel caso di de Maistre, rivoluzionario, come nel caso di Marx, o iper-democraticista, come nel caso di Bentham. Tranne l'ultimo caso, che è più complesso, a me sembra che romantici, rivoluzionari e reazionari convergano, nel loro essere contro i diritti umani, e che il collante sia costituito da una cultura poco sensibile al liberalismo." (Maffettone, *id.*, p. 209)

[503] Cf. Maffettone, *id.*, p. 211.

[504] Cf. Dembour (2001), *id.*, p. 75.

[505] Hinz, *id.*, p.116.

[506] In this sense, cf. Marshall and Bottomore, p. 91.

groups in order to discuss alternative ways of handling human rights issues. It is to some extent a relativistic position, not in the sense of equal moral values of cultures, but in a perspective of presumed respect for cultures.[507]

As we have seen in the debate about citizenship, the common project of building democratic constitutional states, in a multicultural context, can and should be seen not as an enterprise of people sharing an ethnic and cultural common identity, but rather an agreement among diverse and conflicting groups, in a way that the civic coexistence is guaranteed by law. In other words, this project is not the mere reproduction of the majoritarian will, but an attempt to reach harmony among citizens, regardless of their identities.[508]

With this perspective of citizenship as a meeting point of differences, Luigi Ferrajoli affirms that fundamental rights are compatible with cultural diversity, arguing that most of the criticisms against multiculturalism are based on a misinterpretation of the concept of universalism. Either an axiological or sociological meaning, which would identify universalism, respectively, with moral and ideological theories, does not correspond to the proper meaning of universalism. Indeed, in neither of these two perspectives could fundamental rights be understood as universal. The

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[507] Hinz, *id.*, p. 117.
[508] In this sense, cf. Ferrajoli (2007), *id.*, pp. 50-51.

logical meaning of universalism is that of a universal ascription of rights. That is, fundamental rights are universally and equally bestowed to citizens.[509] In fact, its premise is the equivalence between equality and the universalism of fundamental rights, so that they are ascribed *iura omnium* by abstract and general norms.[510]

For Ferrajoli, this view of the universalism of fundamental rights is not only compatible with the respect of differences demanded by multiculturalism, but it is also their main guarantee. He points to two reasons for this. First, the universal ascription of fundamental rights is a guarantee against the majority and against anybody — including, in this class of guarantees, the protection of cultural manifestations. In fact, the category of fundamental rights includes the rights of freedom, being the freedom of conscience the first fundamental liberty affirmed in Europe, which is the fundamental right *par excellence* concerning the protection of personal and cultural identity, alongside the freedom of thought and expression and religious freedom and other fundamental rights that also are tools for the protection of diversity.[511]

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[509] For this analyze, cf. Ferrajoli (2007), *id.*, pp. 57-58, from which I highlight this excerpt: "In questo *senso logico*, l'universalismo dei diritti fondamentali equivale unicamente all'*uguaglianza*, appunto, in tali diritti, dei quali forma perciò il tratto distintivo: formale e non sostanziale, descrittivo e non normativo, strutturale e non culturale, oggettivo e non soggettivo. "

[510] Cf. Ferrajoli (2007), *id.*, p. 104.

[511] Cf. Ferrajoli (2007), *id.*, pp. 58-59.

In this same line, affirming that this "framework of egalitarian liberal laws" is the mechanism that allows citizens, individually or in association, to pursue their ends, Barry insists in the role of neutrality to the equal treatment of minorities.[512] He thinks that multiculturalism is deleterious, because "it diverts political effort away from universalistic goals".[513]

The second reason for considering fundamental rights instrumental to the protection of difference in multicultural contexts is the fact that these rights substitute the "law of the jungle" with a law that protects the weakest, including his or her cultural manifestations and identities.[514]

However, the main point made by Ferrajoli regarding the compatibility of fundamental rights and multiculturalism, is the distinction he makes between the universal legal form and its original philosophical basis. He argues that, despite the concept of universalism being the product of a specific political and moral experience, it is not necessary to agree with the theories that originated this value in order to

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[512] Cf. Barry, *id.*, p. 317.

[513] Barry, *id.*, pp. 325-326, especially: "Undoubtedly, a significant source of support for the multiculturalist cause has been despair at the prospects of getting broad-based egalitarians policies adopted. But it is a fallacy to suppose that the 'politics of difference' is any kind of substitute. Imagine for a moment that the wildest dreams of every supporter of the 'politics of difference' were realize - to the extent that their maximal demands are compatible with one another. Would this transform the lives of members of cultural minorities? I think the answer is that it would make a profound difference to the lives of many, but not in ways that they would all experience as liberating."

[514] Cf. Ferrajoli (2007), *id.*, pp. 59-60.

recognize the intrinsic value of the universal ascription of fundamental rights.[515] Indeed, the notion of universal ascription of fundamental rights should be recognized as an independent value *per se*. In Barry's words: "It does not have to be valid unconditionally to be valid universally."[516]

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[515] Cf. Ferrajoli (2007), *id.*, pp. 60-61, in verbis: "Ebbene, la fallacia nella quale incorre l'ideologia del multiculturalismo consiste nella confusione tra l'universalismo dei diritti come forma logica e convenzione giuridica e il medesimo universalismo come tesi morale, cioè nella supposizione che il primo implichi di fatto e/o debba implicare l'accettazione del secondo. Certamente la convenzione giuridica della forma universale dei diritti fondamentali è prodotto storico di un'opzione politica e morale. Ma non ne implica affatto l'accettazione: non suppone di fatto, e neppure impone che si condividano valori morali ad essa sottostanti"

[516] Barry, *id.*, p. 286.

III – Indigenous Peoples and Criminal Law in Brazil

As I mentioned in the Introduction, the term "multiculturalism" is being used today in reference to the Brazilian context, due to indigenous peoples diversity and the Afro-Brazilian culture. Brazil has enormous ethnic diversity and there is currently a minimal legal recognition and specific policies regarding this cultural diversity. However, it has not always been like this; on the contrary, regarding indigenous peoples, Brazil has a history of forced assimilation. The passage from this type of policy to a more inclusive and pluralist one is the focus of the next sections. This passage was not straightforward and there are still remnants of the old approach even in the new.

Multiculturalism, as we have seen through the first chapter, represents a challenge to contemporary nation-states, revealing the inadequacy of the outdated views of universal individualism identified with ethical identities. Actually, what multiculturalism ultimately "requires" is a fusion of horizons,[517] the acknowledgement of cultural differences and the pursuit of a democratic common space for

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[517] Taylor, *id.*, p. 73.

a dialogue among different social groups in order to reach policies and rights that reflect a common constitutional identity that is distinct from national, cultural, ethnic or religious identity.[518]

In this perspective, multiculturalism highlights the Brazilian history of forced assimilation and annihilation of indigenous peoples and induces a new attitude towards these groups. The Constitution of 1988, considered a fruit of multiculturalism, ruptured this historical practice,[519] resulting in the implied abrogation of norms that were identified with this assimilationist view, as we will explore on the last section of this chapter. Indeed, the Constitution of 1988 recognized indigenous peoples' social organization, customs, languages, creeds and traditions recognized, as well as the right to the lands they traditionally occupy (article 231).

However, this rupture, although clear and undeniable before the Constitution, does not correspond, like it should do, to all political and judicial approaches. It is not rare

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[518] Cf. Rosenfeld, Michel. The identity of the constitutional subject: selfhood, citizenship, culture, and community. London: Routledge, 2010.

[519] In this sense, cf. Scotti, Guilherme. A Constituição de 1988 como marco na luta por reconhecimento dos direitos fundamentais dos povos indígenas e quilombolas no Brasil – a natureza aberta dos direitos no estado democrático de Direito. In: Direitos Fundamentais e Jurisdição Constitucional. Edited by Clémerson Merlin Cleve and Alexandre Freire coordenadores. São Paulo: Editora Revista dos Tribunais, 2014, p. 460: "A construção da Constituição no tocante ao multiculturalismo e, mais especificamente, à questão indígena, envolve um processo de negação de tradições pré-constitucionais problemáticas – em especial a concepção integracionista."

to have political and juridical discourses that still recall the previous paradigm; with the aim, usually hidden, of denying rights to indigenous peoples, conservative sectors use the argument of "acculturation" as a justification to this.[520] Much of this biased approach is also still reflected in Brazilian criminal law justice, as we will see in this chapter. However, in order to understand this mimesis, we have first to reconstruct the thinking about the formation of Brazilian national identity.

11. Miscegenation and uniformity

The hypothesis that I will try to demonstrate in this section is that Brazil adopts a paradoxical and inconsistent approach in regard to indigenous peoples. The origin of this attitude lies in the fact that, despite the diversity of ethnic indigenous groups, it is still common to view them as a "concrete entity", generically identified as "Indian", reducing the immense variety of cultures into a single category, which arouses antagonist sentiments. Sometimes seen as a "noble savage", sometimes as treacherous, lazy,

[520] In this sense, Scotti, *id.*, p. 461.

barbaric,[521] the historical contradictory attitude towards the "Indian" is also reflected in the ambiguous and unstable Brazilian indigenous policies:[522] from elimination or exploitation to paternalistic tutelary protection.[523]

In fact, the kind of "concrete" view of the "Indian" dominated not only common sense, but permeated also the "scientific" and academic analyses, the literature and the politics. The origin of this notion can be traced back to the images created during the construction of the idea of Brazil as a nation, particularly the image of a big river representing the formation of the national identity, with three affluents: Indian, white and black.[524] Undoubtedly this

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[521] For this paradoxical approach, I am in debt with Oliveira. Cf. Oliveira, Roberto Cardoso de. A sociologia do Brasil indígena. Rio de Janeiro: Tempo Brasileiro; São Paulo: Editora da USP, 1972, p. 67.

Darcy Ribeiro that pointed out that the different realities of the cities and the countryside is the reason for these antagonistic approaches: "Abria-se um abismo entre a mentalidade das cidades e a dos sertões. Enquanto, para os primeiros, o índio era o personagem idílico de romances no estilo de José de Alencar ou dos poemas ao gôsto de Gonçalves Dias, ou ainda, o ancestral generoso e longínquo, que afastava tôda suspeita de negritude: para o sertão, o índio era a fera indomada que detinha a terra virgem; era o inimigo imediato que o pioneiro precisava imaginar feroz e inumano, a fim de justificar, as seus próprios olhos, a própria ferocidade." (Ribeiro, Darcy. Os índios e a civilização: a integração das populações indígenas no Brasil moderno. Rio de Janeiro: Civilização Brasileira, 1970, pp. 128-129)

[522] But this ambiguity and instability, when we confront with the deliberated genocide committed in Argentina, for example, can be seen as an attempt to equate the indigenous question. Cf. Gomes, Mércio Pereira. Os índios e o Brasil. Petrópolis: Vozes, Petrópolis, 1988, p. 23.

[523] Cf. Rosti, Maria. L'Esperienza Normativa dei Paesi del Mercosur. In: Atti del Convegno Internazionale: Identità dei Popoli Indigeni: aspetti giuridici, antropologici e linguistici. Roma: Istituto Italo-Latino Americano, 2007, pp. 188-189.

[524] This allegory of a big river representing the formation of the Brazilian people is attributed to the German, Karl von Martius, who lived in Brazil between 1817 and 1821 (Cf. Gomes, *id.*, p. 22). It is important to note that the Independency of Brazil was declared in 1822. Thus, this image was developed on the political and philosophical context of building the new nation.

is a reductionist representation of the miscegenation process and of the elements (affluents) that formed contemporary Brazil.

Indeed, the process of miscegenation was not as homogenous and peaceful as this image suggests. Also, this reified view of indigenous peoples and blacks ignores the ethnic diversity of the peoples that inhabited Brazil when the Portuguese arrived and the fact that the slavers brought to Brazil were from different origins, representing a range of cultures that could not be simplified in a single unifying category of black.[525] Even the white element, that was in the beginning predominantly Portuguese, observed an increase of diversity from the early nineteenth century, due to migration of other European countries, not to mention the Dutch colonization in the northeast of Brazil in the seventeenth century.[526]

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[525] The black element was represented by a variety of peoples from Congo, Angola, São Tomé, Cape Verde, among others, that had broad ethnic and cultural differences, which could not be reduced into a single category. Cf. Schwartz, Stuart B. The Slave Trade to Brazil. In: Slavery. Edited by Stanly Engerman, Seymour Drescher & Robert Paquette. Oxford: Oxford University Press, 2009, pp. 207-209.

[526] Regarding the diversity of the Indian and black "affluents", cf. Prado Júnior, Caio. Formação do Brasil Contemporâneo: Colônia. São Paulo: Brasiliense; Publifolha, 2000, p. 81, *in verbis*: "Das três raças que entraram na constituição do Brasil, duas pelo menos, os indígenas e africanos, trazem à baila problemas étnicos muito complexos. Se para os brancos ainda há uma certa homogeneidade, que no terreno puramente histórico pode ser dada como completa, o mesmo não ocorre com os demais. Os povos que os colonizadores aqui encontram e mais ainda os que foram buscar na África, apresentam entre si tamanha diversidade que exigem discriminação. Debalde se quererá simplificar o problema, e como tem sido feito, no caso dos negros em particular, esquecer aquela diversidade sob pretexto de que a escravidão foi um molde comum que os identificou. A distinção apontada se impõe, e se manifesta em reações muito diferentes para cada um dos vários povos africanos ou indígenas que entraram na constituição da população brasileira; diferença de reações perante o processo histórico da colonização que não pode ser ignorada. No caso dos

Specifically regarding the "affluent" that is most related to our object of inquiry, indigenous peoples, the "concrete" approach illustrated by the river "explanation" has been used in different ways through Brazilian history. This idea has been present from anti-indigenous perspectives to romantic views of Indian, and was also determinant for those who believe in the inevitable disappearance of the indigenous peoples.[527]

Amidst the different theories about the formation of Brazil, one of the most influencing is the Gilberto Freyre's *Casa Grande & Senzala*, published in 1933, which still permeates the idea of Brazilian national identity. Although claimed to be an objective and scientific analysis, the volume is based in some anecdotal images of the Portuguese, the Indian and the Black. The Portuguese, for example, are portrayed as "less ardent in orthodoxy than the Spaniards, and stricter than the English in the prejudices of color and Christian morality."[528] On the other hand, the indigenous groups are depicted as "one of the continent's lowest populations," due to the modest social organization and the

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índios, o avanço da colonização, a ocupação do território, a maior ou menor facilidade com que prestam seu concurso ao colono branco, com ele coabitam e se amalgamam, contribuindo assim para as características étnicas do país, são outras tantas circunstâncias da maior importância sem dúvida, para a História, que derivam de particularidades étnicas próprias a cada um daqueles grupos e povos."

[527] In this sense, Gomes, *ibid*.

[528] Freyre, Gilberto. Casa-Grande & Senzala. 16.a edição brasileira. Rio de Janeiro: LJOE, 1973, p. 89 (freely translated).

lack of complex structures as palaces, monuments, bridges, irrigation and mining works.[529]

Nevertheless this economic and social configuration that put the indigenous in a weakness position, Freyre claims that the Portuguese "were forced by the geographical environment and by the demands of the colonizing policy to compete with them on an approximately equal basis."[530] The technical dominance of the Portuguese would have been undermined by the lack of women and environmental adversity, compelling them to mingle with the Indian women. In this context, Freyre claims that "(a) Christian society was organized in the superstructure, with the indigenous woman, recently baptized, by wife and mother of the family."[531] Due to environmental and political conditions, this new family incorporated many of the traditions, experiences and tools of the autochthonous peoples.[532]

Although the focus in this work is the indigenous component of the country, I would like to account that Freyre reports a similar mechanism in relation to the incorporation of the black element. The Portuguese dominance of Black

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[529] Freyre, id., p. 89 (freely translated).
[530] Freyre, *id.*, p. 91 (freely translated).
[531] Freyre, *ibid.* (freely translated)
[532] Freyre, *ibid.* More explicitly, Freyre says: "A luxúria dos indivíduos, soltos sem família, no meio da indiana nua, vinha servir a poderosas razões de Estado no sentido de rápido povoamento mestiço da nova terra. E o certo é que sobre a mulher gentia fundou-se e desenvolveu-se através dos séculos XVI e XVII o grosso da sociedade colonial, num largo e profundo mestiçamento, que a interferência dos padres da Companhia salvou de resolver-se todo em libertinagem para em grande parte regularizar-se em casamento cristão."

peoples through slavery would have been compromised by the sexual relations that led to a progressive miscegenation of the population.

Besides the anecdotal aspects of Freyre's theory, when compared to the racist and fascist theories that were *en vogue*, it represented a clear advance. He was the first to articulate the idea of "mestiço is beautiful".[533] Before him, the racist "scientific" approach was of impracticability of the country, due to the miscegenation. In this way, once seen as a deformity, the miscegenation became a virtue.[534]

Dante Moreira Leite[535] recognizes that Freyre's title was "a courageous affirmation of belief in Brazil, in the mestizo and in the black," although dated and anachronistic. He claims also that, contrary to the affirmation of Freyre, the theory has no objective proof. In his account, Freyre generalized observations of the Northeastern region, during the sugar production peak, to the rest of the country, in a poor scientific approach.[536]

In regard to our discussion, the main positive aspect of the view that emerged from Freyre's analysis is that the indigenous peoples are seen as part of the process of construction of the country and not as distant "others" but

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[533] Cf. Souza, Jessé. A Tolice da Inteligência Brasileira: ou como o país se deixa manipular pela elite. Casa da Palavra, 2015, p. 30.

[534] Cf. Souza, *ibid*.

[535] Leite, Dante Moreira. O caráter nacional brasileiro: história de uma ideologia. 3rd edition. São Paulo: Pioneira, 1976, p. 271 (freely translated)

[536] Leite, *id*., p. 275.

a part that is (or has to be) "incorporated" through the process of miscegenation, as we are going to see along this chapter. Ultimately, a paternalistic attitude towards the indigenous minorities has dominated the Brazilian history.

This view is also a mechanism to hide unattractive elements of Brazilian history in regard to indigenous peoples. In fact, contrary to this narrative of a peaceful process of miscegenation, the colonial history of Brazil is one of genocide, forced assimilation, slavery, and seizure. Freyre's idea of a "family" out of this process of miscegenation hides also the fact that the "mestizo" is frequently a child of forced sexual intercourse.

Although Freyre's theory is related to the formation of Colonial Brazil, the Independence in 1822 and the Proclamation of the Republic in 1889 did not mean a particularly better destiny for the indigenous peoples. The domination assumed only a less explicit method.[537]

Freyre's view of the formation of Brazil became somehow the founding myth of the country[538] and as a "myth" it is subjected to reinterpretations. Unfortunately, the positive

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[537] In this sense, Kayser, Hartmut-Emanuel. Os direitos dos povos indígenas do Brasil: desenvolvimento histórico e estágio atual. Translated by Maria da Glória Lacerda Rurack and Klaus-Peter Rurack (Die Rechte der indigenen Völker Brasiliens-historische Entwicklung und gegenwärtiger Stand). Porto Alegre: Sergio Antonio Fabris, 2010, p. 31.

[538] Anhezini, Karina; Ferreira, Alexandre Ferreira. Os novos intérpretes e a velha questão: o que é o Brasil? In: Identidades brasileiras: composições e recomposições. Edited by Cristina Carneiro Rodrigues, Tania Regina de Luca Valéria Guimarães [online]. São Paulo: Editora UNESP; São Paulo: Cultura Acadêmica, 2014. Desafios Contemporâneos collection. Available from SciELO Books, p. 230.

view of a new civilization formed by the confluence of three rivers became a negative characteristic. In this deviation, the person who arose from this civilization is deemed to be incompatible with the social and political challenges of the country.[539] This inversion of meaning was promoted mainly by Sergio Buarque de Holanda in his *Raízes do Brasil* (1936), which has become reference in the academic analyses of national identity, assuming an allegedly scientific aspect.[540]

When Freyre's volume was written in 1933, the idea of miscegenation, which had begun with Pombal's policy of achieving a homogenous population, was dominant. Indeed, with the Law n. 601 of 1850, there was already a clear aim to characterize the indigenous as mestizo. Before this law there was no economic and political interest in depriving indigenous peoples of their identities. However, because of this law, an appeal to the miscegenation of indigenous peoples emerged, so that they would lose the legal protection of their lands and as consequence these lands could enter the trade market.[541]

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[539] In this sense, cf. Souza, *id.*, p. 32, in particular: "Buarque toma de Gilberto Freyre a ideia de que o Brasil produziu uma 'civilização singular' e 'inverte' o diagnóstico positivo de Freyre, defendendo que essa 'civilização' e seu 'tipo humano', o 'homem cordial', são, na verdade, ao contrário de nossa maior virtude, nosso maior problema social e político."

[540] Souza, *id.*, p. 44.

[541] Cunha, Manuela Carneiro da. Critérios de indignidade ou lições de antropofagia. In: Antropologia do Brasil: mito, história e etnicidade. Brasiliense/EDUSP, 1986, p. 114.

Progressively the idea of assimilation of indigenous peoples into the national community was consolidated in the law and in the politics, having the Brazilian Constitution of 1934 conferred to the Union the competence to regulate the "incorporation of the savages (silvícolas) into the national community". The same command was in the Constitutions of 1946 and 1967.

The predominant view, reflected in these constitutional norms, was that the various ethnic groups would be inevitably incorporated into the national community, in a process that we can identify as cultural imperialism.[542] Indeed, the idea was one of having the national identity as the norm, rendering the indigenous ethnic identities as deviants or the invisible. The Other, inferior, that cannot resist the assimilation to the "universal" values of the national community.[543]

Actually, as we have seen in the first chapter, this Romantic process of construction of nationality, as a "superethnos", was usually opposed to ethnic minority groups within the borders of the nation-state, in accordance with the idea of "one state, one nation".[544] In the specific context of Latin America, there was an identification among the creoles, who shared the same as culture the metropole,

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[542] In the sense, cf. Young (1990), *id.*, p. 59, in particular: "Cultural imperialism involves the universalization of a dominant group's experience and culture, and its establishment as the norm."

[543] Cf. Young (1990), *id.*, pp. 58-59.

[544] Cf. Baumann, *id.*, pp. 31-32.

but were born on the other side of the Atlantic. This "fatality of trans-Atlantic birth"[545] shaped the idea of a different community, rendering the creoles the upper class.[546] In this sense, they became the dominant class of the new nations, which explains their cultural imperialism towards indigenous peoples.

However, this approach of incorporation of the indigenous peoples was not at all a peaceful process, as if the "national community" were a mere "spectator" of the process of assimilation. Indeed, the policy of forced assimilation and genocide of the colonial period was still "fashion" in the twentieth century. The declaration of Hermann Von Ihering, director of the *Museu Paulista*, in 1907, advocating the extermination of the Indians because they were an obstacle to progress is an example of the strength of this idea at the beginning of the last century.[547] As we will see through this chapter, this view somehow remained in the practices, even if not always explicitly, until at least the 60s. After the 70s, during the dictatorship, the indigenous peoples although having a minimum legal protection, were still victims of genocide episodes.

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[545] Cf. Anderson, *id.*, pp. 47-58.
[546] Cf. Anderson, *id.*, p. 58.
[547] "Os atuais índios do estado de S. Paulo não representam um elemento de trabalho e de progresso. Como também nos outros estados do Brasil, não se pode esperar trabalho sério e continuado dos índios civilizados e como os Kaingang selvagens são um empecilho para a colonização das regiões do sertão que habitam, parece que não há outro meio, de que se possa lançar mão, senão seu extermínio."
In: https://archive.org/stream/revistadomuseupa07muse#page/214/mode/2up Accessed in 8.9.17.

In reality, this policy of incorporation of "foresters" into the national community, followed explicitly by Brazil from the 1930s, oscillated between protection and expulsion of indigenous peoples from their lands. Even under the new progressive paradigm of the Constitution of 1988, the evidences are of a continuity of this pattern.[548]

Darcy Ribeiro, with the edition of *Os Índios e a civilização* defied the dominant view of a progressive acculturation and miscegenation of the indigenous peoples. He sustained, instead, based on an ample documental research, that most of the indigenous peoples in the twentieth century were exterminated and the remaining groups, contrarily to common expectation, were not assimilated. Even losing some customs and habits, he affirms that they had maintained a self-identification as distinct of the dominant society.[549]

Actually, when Darcy Ribeiro started his investigation about the Brazilian indigenous peoples, he had the intention to pursue a study of the process of their assimilation. However, this assumption was not confirmed during his investigation. He noticed that they retained their indigenous identities even in circumstances of complete displacement and impracticability of customs and traditions. As an explanation of this finding, he developed the idea of ethnic transfiguration.[550] Ribeiro concluded that the

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[548] Cf. Kayser, *id.*, pp. 31-32.
[549] Cf. Ribeiro, *id.*, p. 8.
[550] Ribeiro, *ibid.*

indigenous cultures are self-sufficient and are not dissolved into other cultures technically more elaborated, having their own internal and independent logic, so that the indigenous peoples are not, actually, assimilated or acculturated. In reaction to the interaction with the dominant community and the attempts of forced assimilation, they carry on the traditions and customs in new vests, what Darcy Ribeiro calls ethnic transfigurations.[551]

However, as we are going to see in this part, even though with more progressive perspectives in the literature, the assimilationist approach, though not explicitly, remained present in the legal contexts. The assimilationist attitude towards indigenous peoples was not at all exclusivity of Brazil in Latin America. Actually, during the formation of those nations, the dominant ideology, based mainly on positivism, was that the "Indians" would be inevitably eliminated, through various episodes of "ethnic cleansing", like what happened in Chile, Uruguay, Argentina and some parts of Brazil. The United States was the "successful" example of indigenous policy to be followed.[552]

Regarding the indigenous peoples' cultures, the attitude in Latin America was either of indifference or

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[551] Cf. Gomes, *id*. pp. 30-31.

[552] In debt with Stavenhagen, Rodolfo. Derecho Indígena y Derechos Humanos en América Latina. Pedregal de Santa Teresa: El Colegio de México, 1988, p. 29.

superiority.[553] This attitude was reflected in the new states' Constitutions of the beginning of the nineteenth century, which in "copying" the European Constitutions, omitted the indigenous peoples.[554] According to Souza Filho,[555] there were only two hypotheses beyond this invisibility: being declared enemy or becoming a worker and, as consequence, being no longer "Indian".[556]

This attitude was in line with the ideals of nationalism and liberalism that dominated this period. Both notions shared the same purpose, as we have seen in the first chapter. In both there was no room for an "autonomous and self-governing community" like indigenous communities in Brazil. In fact, the community ties were overcome by the "one nation" ideal of nationalists and the "republic of free and unbound citizens" of liberals.[557]

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[553] Stavenhagen, *id.*, p. 31, in particular: "En la América latina moderna, el concepto de cultura nacional se ha sustentado en la idea de que las culturas indias no existen; o bien, que se existen tienen nada o muy poco que ver con la cultural nacional, y que, en todo caso, tienen muy poco que aportar a la cultural nacional (su grandeza, si acaso, pertenece sólo al pasado histórico); en fin, que tales culturas, si aún existen, no son más que vestigios de esplendores pasados y tienden naturalmente a desaparecer, razón por la cual lo mejor que pude hacer un gobierno progresista y modernizante es apresurar su fin. De este modo, no sólo se beneficiaría la fortaleza de la unidad y cultura nacionales, sino que los propios pueblos indígenas se verían beneficiados en términos de su desarrollo material y espiritual, así como su modernización y progreso."

[554] Cf. Souza Filho, Carlos Frederico Marés de. O Direito de Ser Povo. In: Igualdade, Diferença e Direitos Humanos. Edited by Daniel Sarmento, Daniela Ikawa e Flávia Piovesan. Rio de Janeiro: Lumen Juris, 2008, p. 479.

[555] Cf. Souza Filho, *id.*, p. 481.

[556] Cf. Souza Filho, *ibid.*

[557] Bauman, id., pp. 92-93.

Indeed, the idea of "incorporation" of indigenous peoples through acculturation had this aim of using them as workforce. The founders of the Indian Protection Service (SPI), for example, believed that, with "adequate" opportunities of development, i.e., the dominant cultural environment, the indigenous would be able to reach more advanced stages of development.[558] This sense of superiority over indigenous peoples was also reflected in the criminal law.

12. The invisibility of indigenous peoples in criminal law

Until 1830, the year of the publication of the first Brazilian Penal Code, the criminal law in Brazil was regulated by the Reign Ordinances. Although being the formal rules, these ordinances were not effective, due to the particular contingencies of the colony, which led to several law and decrees to regulate them. Furthermore, the powers conferred on those who were granted a plot of land (*sesmarias*) to begin the colonization and exploration on behalf of the crown, often overlapped with the norms of the Ordinances.[559]

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[558] Ribeiro, *id.*, pp. 191-192.

[559] Cf. Bitencourt, Cezar Roberto. Tratado de Direito Penal. Volume 1. Parte Geral. 22nd ed. São Paulo: editora Saraiva, 2016, p. 89.

The fist Penal Code of Brazil (1830) was inspired by the ideas of Bentham and Beccaria, and based on the French Code of 1810, the Bavarian Code of 1813 and the Neapolitan Code of 1819, being also original, however, on some points.[560] It influenced the Spanish Penal Code of 1848, and, through the Spanish Penal Code, also inspired many Penal Codes in Latin America.[561] Even the Portuguese Penal Code of 1852 was influenced by it.[562] This Code was considered very well elaborated, precise, concise and technically accurate, having as one of the originalities the individualization of penalties.[563]

One the other hand, the 1890s Code, enacted just after the Republic Proclamation, is considered one of the worst known Codes ever.[564] The imperfections and inaccuracy imposed the integration of the Code with an enormous quantity of laws, leading to an unsystematic structure, which was concentrated in a unified text by Vicente Piragibe, in 1932.[565] However, what is more important for our inquiry is that, though the Code of 1830 had the approach of the Classic School, the 1890s Code was influenced by the Positivistic School, the predominant at that moment.[566]

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[560] Cf. Bitencourt, *id.*, p. 90.

[561] Cf. Pierangelli, José Henrique. Códigos Penais do Brasil: evolução histórica. Bauru (SP): Jalovi, 1980, p. 8.

[562] Cf. Bitencourt, *ibid.*

[563] Cf. Bitencourt, *ibid.*

[564] Pierangelli, id., p. 10.

[565] Cf. Bitencourt, *id.* p. 91.

[566] Varejão, Marcela. Il Positivismo dall"italia al Brasile: Sociologia del Diritto, Giuristi e Legislazione (1822-1935). Milano: Giuffrè, 2005, p. 432.

The 1940s Code, instead, is considered eclectic, representing a compromise between Classic and Positivistic Schools.[567] Although suffering various modifications and having the General Part completely altered in 1984, it is still in vigour and, thus, relevant for the understanding of the contemporary criminal approach towards indigenous peoples, as we are going to explore in more detail later.

The fact that none of the Brazilian Penal Codes had ever mentioned the indigenous peoples is remarkable and is in line with the notion of an expected miscegenation and the attitude of superiority towards indigenous peoples. A counter-argument against this hypothesis would be that the lack of reference to indigenous in the Penal Codes is actually an emancipatory perspective. It is true that, from the eighteenth century, the idea of citizenship was of an equal universalization of rights, following the premise of non-discrimination of race, ethnicity. However, the moment of construction of the Argentinian, Chilean, Peruvian, Brazilian, Mexican nationalities and so on, was also the affirmation of the idea of "one state, one nation", as we have seen in the first chapter and in the previous section. This affirmation was made without practically any reference to the indigenous peoples that lived within the borders of the new states. Au contraire, the indigenous peoples were in

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[567] Cf. Pierangelli, id., p. 12. Because of this eclecticism, he claims: "Daí afirmarem que o legislador acendeu uma vela a Carrara e outra a Ferri."

many cases object of forced assimilation and extermination in order to reach the ideal of homogeneous nation.[568]

In this context, Karl Friedich von Martius, German naturalist, who, from 1817-1820, participated in a commission of travellers who explored Brazil, made the first known report of the perspective of law among Brazilian indigenous peoples.[569] In his descriptions, we clearly perceive an evolutionistic and imperious approach.

He was astonished in regard to the "degree" of development of the indigenous peoples in Brazil, affirming that they were at an inferior level of humanity; morally, in infancy; but, in regard to the ambition of progress, they were like an "old stationary". This nature was not only an obstacle to their development, but also to "conciliate" them with the "winners" and make them pleased and happy citizens.[570] Concluding his analyses, he claimed that, in Brazil, until that moment, there was not any vestige of civilization, which, in the case it had previously existed, it must have been in a remote past.[571]

About a century and half later, this kind of reconstruction of the indigenous peoples' organization, was still the rule. João Bernardino Gonzaga, later designated

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[568] Cf. Rosti, *id.*, pp. 188-189.

[569] Von Martius, Carlos Frederico. O Direito Entre os Indígenas do Brasil. Translatad by Amaral Gurgel. Edições e Publicações Brasil, 1938.

[570] Von Martius, *id.*, p. 17.

[571] Von Martius, *id.*, p. 135.

Professor of Criminal Law at USP – University of São Paulo, in 1971, published his *O Direito Penal Indígena: à época do Descobrimento do Brasil*. In a biased description, he claimed that they were in a "state of deep backwardness."[572] He claimed also that the Brazilian Indians had not any public institutions[573] and that the cases of organization were only exceptions.[574]

Both descriptions about indigenous peoples in Brazil reduced the diversity of these peoples to a single category, reflecting an evolutionistic approach towards indigenous peoples. At the time of Von Martius' report, we did not even have the Victorian anthropology and Comte's positivism had not yet been developed, but the narration seems already to reflect these perspectives. Regarding Gonzaga's analysis, although superficial in my opinion, it was in line with the ethnography of the time, which still looked to the universalization of patterns among different cultures, as we have seen in the previous part regarding the concept of culture.

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[572] Gonzaga, João Bernardino. O Direito Penal Indígena: à época do Descobrimento do Brasil. Max Limonand, 1971, p. 18-19, *in verbis*: "Viviam em plena idade da pedra lascada. Sua economia era de mera subsistência, para consumo imediato: a caça, a pesca, a coleta de plantas, limitadíssima agricultura, tudo com métodos rudimentares. Nem foram capazes de domesticar animais, para dêstes obter trabalho ou alimentos. Não possuíam roupas, praticamente nada que lhes protegesse o corpo." (p. 19)

[573] Gonzaga, *id.*, p. 26.

[574] Gonzaga, *id.*, p. 34.

However, this kind of approach has been, since the 1980s, challenged by archeological reconstructions of Brazil before the arrival of the Portuguese. For example, in 1987, Aurélio M. G. Abreu, in his volume *Culturas Indígenas do Brasil*,[575] had already worked with hypotheses of a more complex civilization in Brazil than those known through the narrations following the colonial period. More recently, Reinaldo José Lopes released an important volume, in which he exposes how the archeology is advancing in revealing the social complexity of indigenous communities in Brazil before 1499.[576]

This kind of cultural imperial approach that dominated Brazilian history dates back to the beginning of the colonial period with dominance being its main function. An example, we could point out is the discourse, in 1539, of Francisco de Vitoria, a philosopher and theologian, who claimed in his *De Indis et de Ivre Belli Relectiones*, at the University of Salamanca, that:

> "Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard

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[575] Abreu, Aurélio M.G. de. Culturas Indígenas do Brasil. Liberdade (SP): Traço, 1987.

[576] Lopes, Reinaldo José. 1499: O Brasil antes de Cabral. Rio de Janeiro: Harper Collins, 2017.

required by human and civil claims. Accordingly, they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries, of human life. It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay, our sovereigns would be bound to take it, just as if the natives were infants. The same principle seems to apply here to them as to people of defective intelligence; and indeed they are no whit or little better than such so far as self-government is concerned, or even than the wild beasts, for their food is not more pleasant and hardly better than that of beats.

Therefore their governance should be entrusted to people of intelligence."[577]

This kind of process of essentializing arbitrary attributes, which results in prejudice, stereotyping, discrimination and exclusion, exists because some people mistakenly believe that group identification determines capacities, temperament, or virtues of group members,[578] a static view of culture, as we have seen in the previous chapter. In this perspective, which dominated the Brazilian assimilationist approach, not in a Republican perspective of equality, but in a poor conception of civilization superiority, the ideas of the Positivistic School found a fertile soil.

The history of the formation of Brazil was an attempt to reproduce the liberal democratic European model without a proper adaptation to the particularities of the country and without the presence of the social conditions that made the creation of the European states possible, resulting in a deformed copy of the European example, favouring only the aristocracy.

The same mechanism of model mistranslation can be observed in criminal law. Brazil always imported theories

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[577] Vitoria, Francisco de (Franciscus de Victoria). De Indis et de Ivre Belli Relectiones. Translation by John Pawley Bate. In: The Classics of International Law. Edited by James Brown Scott, pp. 160-161.

[578] Cf. Young (1990), *id.*, p. 46.

that did not fit its reality, without acknowledging the political dimension of criminal law.[579] Actually, it deformed them in such a way that they make even less sense in the current context than the original versions would have made. Maybe because of our peripheral position, our tendency is to seek the "modernity" from the outside,[580] blinding our potentialities and specificities.

The "modernity" of the Positivist School fit like a glove in the context of prejudice and bias of the Brazilian approach towards indigenous peoples. The theories of the New School "justified scientifically" the already adopted attitude of superiority towards the autochthons. Emblematic is the fact the first measurements of Lombroso were of soldiers of the South of Italy,[581] revealing that even there the theory arose as an attempt to justify a biased perspective.

Rosa del Olmo[582] says that the words of Lombroso, Ferri or Garofalo were sacred for the Latin-Americans, being assimilated without taking into account the differences of the local context, in contrast to the distinct Italian conditions. Actually, she assumes that was a refusal of

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[579] Cf. Freitas, Ricardo de Brito A. P. As Razões do Positivismo Penal no Brasil. Rio de Janeiro: Lumen Juris, 2002, p. XXV.

[580] Rosa del Olmo saw in this attitude the refusal of our own history. Cf. Del Olmo, Rosa. A América Latina e sua Criminologia. Rio de Janeiro: Revan, 2004. p. 161, in particular: "Mas precisamente, era porque persistia a recusa em aceitar nossa história que se voltava o olhar para o europeu. Por sua vez, o caráter dependente dessas sociedades contribuía para a recusa de nossa própria história."

[581] Cf. Del Olmo, *id.*, p. 51.

[582] Del Olmo, *id.*, p. 161.

accepting Brazil's history associated with its dependency which led it to pursue the European models.[583]

The classification of delinquents proposed by the Positivistic School, especially Ferri's typology of habitual and innate delinquency, was greeted in Brazil and gained the adhesion of jurists. However, in the unequal context of Brazil, a criminal policy focused on the types of delinquents rather than their acts had as a consequence the correlation between delinquents and poor people.[584]

The Positivistic School was not acclaimed as "modern" by chance. It emerged in the context of the birth of criminal anthropology, which was influenced by the French and Italian positivism, the evolutionistic theories and the materialism, *en vogue* at the time. Indeed, the object of study of the new criminal anthropology science, the delinquent, was in line with the perspective, at that time, of the other sciences that were focused on the study of the human being.[585] In this context, I will briefly explore the main influences of the theories developed by the scholars of criminal anthropology and the Positivistic School: Hebert Spencer, Hippolyte Taine, Gustave Le Bon and Karl Krause.

The evolutionistic perspective of the spencerianism and the comparative data provided by this doctrine led in Latin America to a search of the peculiarities of these countries

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[583] Del Olmo, *ibid*.
[584] Cf. Freitas, *id*., pp. 359-360.
[585] Del Olmo, *id*., p. 38.

that could fit this perspective.[586] In this sense, the approach brought about the question of race as an element to explain these particularities.[587]

In a deterministic perspective, Taine, who was the preeminent theoretical influence of French naturalism and a leading proponent of sociological positivism, best known for the idea that the scientific analysis of literature should be based on the categories of *race, milieu* and *moment*, gave room to the notion that the scientist should look for the moral and psychological elements of the specific people being analysed.[588]

At the beginning of the twentieth century, attention moved to the theory of Gustave Le Bon, which was based on the idea that the crowds are not the sum of their individual's parts, but rather autonomous entities, determined also by racial factors.[589] Again, this is the idea that human behaviour is conditioned by collective attachments.

Krause, from an organicist view of humanity, through which humanity would reach the state of full development through the full identification with God, believed that morality, law and religion are necessarily connected, in a

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[586] Varejão, *id.*, p. 19.
[587] Varejão, *id.*, p. 20.
[588] Varejão, *id.*, p. 21.
[589] Varejão, *ibid.*

way that morality and law would not exist without religion, leading to a subjective notion of law.[590]

In the context of these theoretical deterministic influences, the criminal anthropology and the Criminal Positivistic Italian School represented a reaction to the individualism of the eighteenth-century philosophy and the illuminist idea of free-will, which are the fundaments of the of the Classic School of criminal law.

This determinism of the criminal anthropology and of the Positivistic School was well received and seen as a plausible answer to the Latin American challenges. There was the "problem" of the Indian and his assimilation, the "problem" of black emancipation after slavery, the immigration of Chinese in some countries and also the European immigrants, many of whom fled to Latin America because of criminal issues.[591] However, as I already mentioned, despite Brazil's dependency, due to the needs of its elites and the specific characteristic of its societies, the experience in Latin America resulted in a deformation of the ideas carried out by these movements, so that only those elements deemed useful to the historic Latin context were kept.[592] In this process of adaptation and deformation, the

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[590] Varejão, *id.*, pp. 24-25.
[591] Del Olmo, *id.*, pp. 181-182.
[592] Del Olmo, id., p. 194.

focus on race was slowly substituted for a less evident deterministic view identified with psychological factors.[593]

For our inquiry, it is important to explore in further detail the context of the criminal anthropology and the criminal positivism in Brazil. Three names are essential in this analysis: Tobias Barreto, Viveiros de Castro e Nina Rodrigues.

Tobias Barreto was the main defender of the Lombrosian criminal anthropology in Brazil. Member of the Law School of Recife, philosopher and Germanist,[594] best known for his "Menores e Loucos" (1884), a volume in which he analyzed the criminal capacity of minors and mentally ill persons, he considered will as the result of human and social evolution.[595]

However, even before him the view of the phrenology was already circulating in the Brazilian academy. In 1876, for instance, the results of a series of studies carried out by João Baptista de Lacerda Filho, based on measurements of indigenous skulls, and concluding that traces of animality could be perceived, which lead to the conclusion of an ethnic

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[593] For this perspective, I am in debt with Rosa del Olmo. Cf. Del Olmo, pp. 181-182. Specifically, she identifies a process of progressive identification of delinquency with psychopathy. In this sense: "Um indivíduo seria delinqüente por falhas em sua personalidade e outro especialmente porque era um "psicopata". Delinqüente e psicopata se tornaram sinônimos na América Latina, como veremos posteriormente, com muita mais força que na Europa." (*id.*, p. 182)

[594] Varejão, *id.*, p. 106.

[595] Cf. Freitas, *id.*, p. 269.

inferiority, was published in the Magazine of the National Museum of Rio de Janeiro.[596]

It was Viveiros de Castro, however, with his volume "A Nova Escola Penal" (1894), who spread the ideas of the Positivistic School in Brazil. Contrary to the theory of free will of the Classic School adopted in the Penal Code in vigour at the time, he reproduced the criminal positivism's notion of delinquents' classification, affirming that this classification should be based not only on biological factors, but also on social and juridical aspects. Not surprisingly he defended the superiority of men over women and whites over blacks and mestizos.[597]

Viveiros de Castro's perspective was clearly evolutionist. Believing in a historical evolution of the idea of justice, he considered that indigenous peoples did not have any notion of justice because of their approach to the three manifestations of justice: respect of life, respect of property and family sentiment.[598]

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[596] Lacerda Filho; Rodrigues Peixoto. Contribuições para o estudo antropológico das raças indígenas do Brasil. 1876, p. 82.

[597] Cf. Freitas, *id.*, p. 302.

[598] Viveiros de Castro. A Nova Escola Penal. In: bdjur.stj.gov.br. https://bdjur.stj.jus.br/jspui/bitstream/2011/21309/A_nova_escola_penal.pdf, pp. 27-28, in verbis: "Basta lançar um rápido olhar retrospectivo sobre o desenvolvimento histórico da humanidade para comprehender-se que a idéa da justiça somente se apura e se aperfeiçoa á proporção que a evolução mental do homem progride corrigindo e educando o sentimento. Os povos selvagens não possuem absolutamente a noção da justiça. E isto demonstra-se pelo seu modo de proceder sobre as três manifestações principaes da noção da justiça, o respeito á vida, o respeito á propriedade e o sentimento da família." (sic)

Regarding specifically the question of criminal responsibility, from the viewpoint of the Lambrosian criminal anthropology and the Positivistic School, Raymundo Nina Rodrigues was the major prophet. He sustained that the observation demonstrated that the savages, because of their primitive recalcitrance, had a diminished conscience of rights and duties. In this sense, based in Lombroso and Ferri, he claimed that is impossible to account them in a perspective of equal criminal responsibility.[599]

Based on the phrenology, Nina Rodrigues's volume "As raças humanas e a responsabilidade penal no Brasil" (1894) represented an attempt to adapt the Italian Positivism to Brazilian Criminal Law. In a spencerian perspective,[600] Nina Rodrigues proposed a theory for the criminal responsibility of what he accounted as "non-developed races," i.e., blacks, Indians and mestizos. In this evolutionistic perspective, he did not believe in the incorporation of the indigenous to the national community, claiming that only the miscegenation could improve the imperfect nature of this "race".[601]

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[599] Varejão, *id.*, pp. 295-297, in particular (p. 295): "l'osservazione dimostrava che, nelle razze selvagge, la coscienza del diritto e del dovere diminuita, prevalendo l'impulsività primitiva, restringendosi dunque il concetto di delitto, come avevano osservato d'altra parte anche Lombroso e Ferri."

[600] Rodrigues, Raymundo Nina. As raças humanas e a responsabilidade penal no Brasil, 1894, p. 31: "O aperfeiçoamento lento e gradual da actividade psychica, intelligencia e moral não reconhece, de facto, outra condição além do aperfeiçoamento evolutivo da serie animal."

[601] This idea seems to be clearly influenced by José Verissímo, who is many times quoted in the book, in particular in this excerpt: "E o que ha a fazer para arrancar as raças cruzadas do Pará ao abatimento em que jazem? inqueria o auctor referido. Pensamos que nada. Esmagal-as sobre a pressão enorme de uma grande immigração, de uma

In Nina Rodrigues's volume, the opposition to the notion of free will and equality addressed by the Classic School is evident. The idea of moral and juridical responsibility is substituted by a social responsibility. In fact, in his account, since the "races" are in different stages of evolution, which has direct relation to the actions of the individuals, the natural consequence is different levels of criminal responsibility, so that the savages, according to their "inferiority", are not subjected to criminal responsibility.[602] In reality, Nina Rodrigues advocated a kind of biological determinism, which, from the classic criminal perspective, is even more problematic as concerns psychological and social forms of determinism.

This idea of criminal responsibility determined by biological "racial" origins remained in the academic debate long after Nina Rodrigues. For example, in 1913, Laurindo

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raça vigorosa que nessa lucta pela existencia de que falia Darwin as anniquile assimilan-do-as parece-nos a unica cousa capaz de ser util a esta província. E ai delia se assim não fôr!" (Rodrigues, *id.*, pp. 150-151)

[602] In this sense: "Ora, desde que a consciencia do direito e do dever, correlativos de cada civilisação, não é o fructo do esforço individual e independente de cada representante seu; desde que elles não são livres de tela ou não tela assim, pois que essa consciencia é, de facto, o producto de uma organização psychica que se formou lentamente sob a influencia dos esforços accumulados e da cultura de muitas gerações; tão absurdo e iniquo, do ponto de vista da vontade livre, é tornar os barbaros e selvagens responsaveis por não possuir ainda essa consciencia, como seria iniquo e pueril punir os menores antes da maturidade mental por já não serem adultos, ou os loucos por não serem sãos de espirito." (Rodrigues, sic, id., p. 85)

Regarding the ideas of Nina Rodrigues, cf. Coracini, Celso Eduardo Faria. A Antropologia Criminal no Brasil nas Obras de Candido Nogueira da Motta e Raimundo Nina Rodrigues. In: Revista Brasileira de Ciências Criminais, vol. 41/2003, pp. 179-205.

Leão, Professor of the Recife Faculty of Law, affirmed that some individuals are free and others are not. Not surprisingly, in his view, the indigenous had not the free will typical of an adult man, being quasi animals, moved by their instincts, without intelligence and will.[603]

As we have already seen, the Positivistic School influenced the Brazilian Codes of 1890 and 1940. The 1940s Code, although with major changes relating the General Part, is still in force. And the remaining traces of the criminal positivism in our legislation have a strong presence in the doctrine and in the case-law (jurisprudence), as we are going to explore later in this chapter.

One explicit example of late use of the ideas of the Positivistic School, is the already mentioned volume of Gonzaga, in which he, for instance, expressly quoted Lombroso's *L'Uomo Delinquente*, concluding that the indigenous peoples' "indifference" to the suffering and misfortune endorses Lombroso's theory about certain types of criminals and primitives.[604]

This erroneous importation of the ideas of the Positivistic School and criminal anthropology, disguised as being scientific, caused and still causes, as we will see, deformations in the Brazilian criminal system that are not

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[603] Leão, Laurindo. A questão da responsabilidade. In: Revista Academica da Faculdade de Direito do Recife. Ano XXI. Pernambuco: Imprensa Industrial, 1913, p. 3-66. P. 53

[604] Gonzaga, id., p. 83.

compatible with a modern theory of criminal law based on the guarantees of the citizen. This attitude of superiority towards indigenous peoples was (and still is) so entrenched that even the attempts to recognize their rights to carry on their cultural identities have traces of this way of thinking.

13. Recognition and essentialism

The law was an instrument of domination over the indigenous peoples. With few exceptions, the rules regarding indigenous people endowed repressive, dominant and paternalistic aspects. Their differences used to be seen as inferior characteristics, so that they did not have the same capacities of a white person. This essentialist perspective was reflected in civil and criminal law in an intertwined way. Even in the Indian Statute of 1973, which was supposed to be an instrument of recognition of indigenous cultural diversity, this perception of inferiority was still present.

In this section, we will explore the civil capacity of indigenous peoples, a necessary step in order to understand the criminal responsibility of indigenous peoples in Brazil. Indeed, the view of culture as determinant cause of human action is present in the civil law as well as in the criminal area. The Civil Code of Brazil of 1916, in vigour until 2003,

relative to the indigenous persons civil capacity, established:

> "Art. 6. Those incapable, relatively to certain acts (Art. 147, no. 1), or to the manner of exercising them, are:
>
> (…)
>
> IV. savages (*silvícolas*)
>
> Single Paragraph. The savages shall remain subject to the tutelary regimen established by special laws and regulations which shall cease as they become adapted to the civilization of the country."[605]

At the time of the edition of the Civil Code, the special law regulating the tutelary regimen of the single paragraph was the Law of 27th October 1831, which in its article 3 subjected the indigenous to a orphanological protection. In fact, the Indians were considered orphans and seconded to the respective judges.[606]

This remained the regulation of the single paragraph of article 6 of the Civil Code of 1916 until the edition of the

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[605] The civil code of Brazil, being law no. 3,071 of January 1, 1916: with the corrections ordered by law no. 3,725 of January 15, 1919, promulgated July 13, 1919 : Diario official, vol. LXVII, no. 159 / tr. from the official Portuguese text by Joseph Wheless. St. Louis: Thomas Law Book Co., 1920.

[606] "Art. 3º Os índios todos até aqui em servidão serão della desonerados.

Art. 4º Serão considerados como orphãos, e entregues aos respectivos Juizes, para lhes applicarem as providencias da Ordenação Livro primeiro, Titulo oitenta e oito."

Decree 5,484 of 1928, which emancipated the indigenous from the orphanological protection (article 1),[607] with some limits concerning the exercise of rights until the "incorporation" into the "civilized" society (article 5) still remaining.[608] This Decree stayed in force until the publication of the Indian Statute, being law 6,001 of 1973, which established a different tutelary regimen. The Brazilian Civil Code of 2002 remits the question of civil capacity of indigenous entirely to the special laws, so that the question remained regulated by the system of the Indian Statute.

The major part of the doctrine considered the tutelary regimen a protection rather than a downgrade. The idea was that the indigenous peoples were protected by the presumed tutelary regimen against exploitation.[609] However, according to Clóvis Bevilaqua, this orphanological protection was a very fragile solution, because the guardianship institute, from Roman Law, is an instrument of individual protection that does not fit the protection of ethnic-cultural collectivities.[610]

Under the Indian Statute, the tutelary regimen was in line with the idea of progressively "integration"

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[607] "Art. 1º Ficam emancipados da tutela orphanologica vigente todos os indios nascidos no territorio nacional, qualquer que seja o grão de civilisação em que se encontrem." (sic)

[608] "Art. 5º A capacidade, de facto, dos indios soffrerá as restricções prescriptas nesta lei, emquanto não se incorporarem elles á sociedade civilizada." (sic)

[609] Miranda, Alcir Gursen de. O Direito e o Índio. Belém: CEJUP, 1994, p. 32.

[610] Cf. Souza Filho, *id.*, p. 302.

(acculturation), being restricted to the Indians or indigenous communities not yet “incorporated” into the national community (Article 7). Actually, the classification of the degrees of integration foreseen in the Indian Statute, is fundamental to understand the criminal responsibility of indigenous peoples. As we have seen in the last section, the evolutionistic and deterministic ideas of the Positivistic School were dominant in the first half of the last century, having remaining traces in the Brazilian criminal system until now. These ideas were reaffirmed by the notion of superiority towards indigenous peoples embodied in the Indian Statute, especially in its article 4:

> Art 4 The Indians are considered:
> I - Isolated - when living in unknown groups or of which few and vague knowledge through occasional contacts with elements of national community;
> II — Undergoing the process of integration - When, in intermittent or permanent contact with alien groups, they conserve less or most of their native conditions of life, but accept some practices and modes of existence common to other parts of national community, from which they need more and more for their own sustenance;
> III - Integrated - When incorporated into national community and recognized in with the full exercise of

civil rights, even if they retain customs, customs and traditions characteristic of their culture.

Even if the Indian Statute was supposed to be a progressive statute, it endows an assimilationist approach, an ethnocentric view that the Indians would transit through gradual stages into the full integration into the national community. The enactment of the Statute meant that the indigenous peoples gained a recognition from the dominant society. It represented also the abandonment of the policy of forced assimilation. Extraordinarily, despite the attempts of forced assimilation and episodes of genocide, Brazil arrived in the second half of the twentieth century with a significant number of indigenous. One hypothesis for this resilience is that, contrary to the highly centralized indigenous states (Aztecs, Incas) which were broken in an astonishing short time, the decentralised societies, like most of the indigenous peoples in Brazil, had a more successful resistance, persisting after the formation of the new nation-states.[611]

The Indian Statute represented the consolidation of a switch from a policy of forced assimilation to a policy of progressive assimilation. Along with the respect for their cultural diversity, it was the idea that the future of

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[611] Cf. Scherrer, *id.*, p. 8.

indigenous peoples would be of an inevitable physical and cultural incorporation into the more developed national community.[612] The proof of this contradictory approach lies in the first article of the Indian Statute,[613] which expresses the aspiration of their protection and integration into the national community, concepts difficult to harmonize.[614]

The philosophical context that lead to this limited recognition was the strong influence of the anthropology of Franz Boas, which, from a relativistic perspective, gave room to a new attitude towards indigenous peoples.[615] From a political perspective, the work of the so-called Villas Boas brothers and international pressure led to the abandonment of the forced integrationist policy and resulted also in the beginning of the recognition of Indigenous Lands. Orlando and Claudio Villas Boas were the most famous *sertanistas* or Indianists. They, with their other two other brothers, participated in the Roncador-Xingu expedition that had the aimed to open up land in the, at the time, inhabited centre of Brazil. Luckily, because of their fascination with the "Indians", they pushed the expedition to take a non-aggression attitude; otherwise the indigenous peoples of

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[612] Kayser, id., p. 161.

[613] "Art. 1º — Esta Lei regula a situação jurídica dos índios ou silvícolas e das comunidades indígenas, com o propósito de preservar a sua cultura e integrá-los, progressiva e harmoniosamente, à comunhão nacional."

[614] Silva, Orlando Sampaio. O Índio perante o Direito. In: O Índio perante o Direito (ensaios). Sílvio Coelho dos Santos Organizador. 1982, p. 40.

[615] Kayser, id., p. 210.

this region would most likely have had the same destiny as other groups: extermination.[616] Indeed, in 1961, as a result of their sensibility towards the indigenous peoples' condition, instead of the genocide that would have been taken for granted at that moment, the brothers convinced the government to establish Brazil's first Indian reserve, the *Parque Nacional do Xingu*, with 11 different indigenous peoples, covering 26,000 square miles of rainforest.

One of the participants of this expedition was the anthropologist Darcy Ribeiro, already mentioned as an opponent of the idea of assimilation of the indigenous peoples,[617] through his theory of ethnic transfiguration.[618] His conclusions had a major influence on the new indigenous policy adopted from the 70s. However, as we are going to see through this chapter, the boundaries between the old and the new approach are not strictly defined.

Darcy Ribeiro's classification of the degrees of integration is pointed to as one of the theoretical basis for the Indian Statute.[619] Indeed, in his book, published in

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[616] The configuration of the expedition itself was indicative of what would be the likely destiny of these indigenous peoples in the areas object of the exploration. Orlando Villas Boas himself said: "On our expedition, the peao (labourer) with the least number of crimes had eight murders under his belt. I lived for 40 years among the Indians and never saw one of them slap another in the face. But we were the ones who were going to civilise [them]."
https://www.theguardian.com/news/2002/dec/14/guardianobituaries.brazil

[617] Cf. Ribeiro, *id.*, p. 8.

[618] Cf. Ribeiro, *ibid.*

[619] In this regard, cf. Menezes, Gustavo Hamilton de Souza. O conceito de aculturação indígena na Antropologia e na esfera jurídica. In: Ensaios sobre justiça, reconhecimento e criminalidade (recurso

the 70s, but based in researches lead from the 50s, he claimed that indigenous populations of the modern Brazil could be classified into four categories regarding the degrees of contact with the dominant society: isolated, intermittent contact, permanent contact and integrated. For him, these would be successive and necessary stages to the integration of the indigenous into the national community, even if different groups would follow different paces regarding these stages, according to specific conditions of contact and the particularities of each people.[620]

Although apparently similar to evolutionistic and assimilationist approaches, we cannot lose sight of his perspective of ethnic transfiguration. In fact, the stage of integration, in his account, does not correspond to the fusion of indigenous groups into the national community. This conclusion came from the fact that this kind of group assimilation was not observed in the cases examined by him. The state of integration, designed also as a condition of Indian-generic (*índio-genérico*), actually represented a form of accommodation of the indigenous peoples in the context of an increasing participation in the dominant society, without losing the ethnic identification.[621] Due to environmental,

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online). Organized by Juliana Melo, Daniel Simião and Stephen Baines. Natal, RN: EDUFRN, 2016.

[620] Ribeiro, *id.*, p. 432.

[621] Ribeiro, id., p. 434, in particular, I quote this excerpt: "Igualmente mestiços, vestindo a mesma roupa, comendo os mesmos alimentos, poderiam ser confundidos com seus vizinhos neobrasileiros, se elês próprios não estivessem certos de que constituem um povo à parte, não guardassem uma espécie de lealdade a essa identidade étnica e se não

socio-economic and also ideological factors, the Indians would change from the condition of being tribal Indians to Indians-generics (índios-genéricos).[622] In this process of transfiguration, he claimed that neither the indigenous cultures would remain the same. Ribeiro believed that only in areas unexplored or of recent contact or in artificial conditions of protectionist intervention could indigenous cultures survive autonomously.[623]

Underlying the perpetuation of these evolutionistic misconceptions lies the notion of culture. In this context of considering the degree of integration of the indigenous peoples into the national community, in a process of progressive acculturation, culture is taken as a "thing" rather than a process, as we discussed on the second chapter. If we consider that ethnicity was and sometimes still is accounted in biological premises, the shift towards the notion of culture is positive.[624] However, the biological determinism cannot be substituted by a cultural fatalism. Contradictorily, only an essentialist approach towards culture gives room to the idea of acculturation. That is, only if culture is considered as a "thing" we can talk of losing it. In fact, in the perspective adopted in this work,

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fôssem definidos, vistos e discriminados como "índios" pela população circundante."

[622] Ribeiro, *id.*, p. 441.

[623] Ribeiro, id. p. 445.

[624] Cf. Cunha, Manuela Carneiro da. Etnicidade: da cultura residual mas irredutível. In: Antropologia do Brasil: mito, história e etnicidade. Brasiliense/EDUSP, 1986, p. 98.

culture is always as process. Like any community, the indigenous peoples are not immutable. There are always changes, at different paces according to the specific experiences of every group. However, this process of constant recreation does not wipe out the cultural identities.[625]

As observes Niezen,[626] culture is an extremely broad "catch-all" concept. Depending on the approach, it can cover the "entire range of human institutions, values, customs, and practices". This amplitude is a fertile soil for all sort of ideological deviances. Thus, in order to "prove" the superiority of the European society on the scale of development, the cultural European aspects, were positively valued in detriment to the indigenous cultures.[627]

It was not only the technological sophistication, but also values and institutions like monogamous marriage, legal codes, monotheist religion, private property and commerce that were placed as signs of development. According to these parameters, it is clear that the indigenous societies could only be placed at the bottom of the scale. This evolutionist thinking was not at all reached by change, it was, as is now widely recognized, "a central ideological component of policies of assimilation".[628]

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[625] Silva, José Afonso da. Curso de Direito Constitucional Positivo. 27a ed. Malheiros. 2006. p. 854-855

[626] Niezen, *id.*, p. 5.

[627] Niezen, *ibid.*

[628] Niezen, *id.*, p. 6.

However, the most intriguing aspect is that in this scale of development the indigenous peoples had practically only two destinies: either remain on the same technological position or lose the condition of indigenous. Indeed, the limits, accepted by the dominant societies, up until which indigenous peoples could alter their technologies, techniques, attitudes and beliefs without losing their identities or cultural rights protection tended to be lowered.[629]

The cultural process of an ethnic group, on the diasporas or in situations of intense contact, endures a strong process of contrast in response to these situations, which does not mean that the group will lost their culture or that they are going to be incorporated into the dominant group, but only that the culture will face some adaptations, tending to make more noticeable some diacritic traits, becoming more simple and inflexible.[630]

Furthermore, we must keep in mind that ethnic identity is always contextual, relational and fluid. There are not any substantial, genetic, social or transcendental criteria to determine the "indianity" of a person.[631] The

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[629] Niezen, *id.*, p. 8.

[630] Cunha (1986[2]), id., p. 99.

[631] Castro, Eduardo B. Viveiros de. Índios, Leis e Políticas. In: O Índio perante o Direito (ensaios). Sílvio Coelho dos Santos Organizador. 1982, p. 34, in particular: "Do ponto de vista antropológico, é preciso ser enfático; não existem critérios de 'indianidade' em si. A identidade étnica de um grupo não é uma substância, genética, social (não há substâncias social) ou transcendental. Toda identidade é sempre situacional, contextual, contrastiva. É-se 'índio' em certos contextos; em outros se é 'Xavante',

indigenousness is not an "on-off" quality, as if some persons would be indigenes in some periods and not in others, or even as if they could simply lost this quality. This logic would serve only to assimilationist views lead by dominant societies, guided by the belief or the false idea of a temporary indigenousness, that is always about to be rendered obsolete by the amalgamation and assimilation of the population.[632]

Due to this contextual character, it is a challenge to reflect the concept of ethnic identity in a legal text. As we have already seen in the last chapter, the law works basically with the categories of norm and fact, so that to translate the concept of ethnic identity into law represents a natural tendency to oversimplify. In this line, the concept of self-identification appears to be the only possible one to be translated into law.[633] Indeed, as we have seen in the first chapter, since Fredrik Bark, in order to define ethnicity, the subjective notion is more important than the distinct cultural traits.[634]

'Kamayurá' ou 'Tupiniquim'; em outros, se é um ser humano sujeito dos famosos direitos humanos, em outros ainda, se é 'brasileiro' sem por isso deixar de ser 'índio', 'Xavante' ou ser humano."

[632] Miller, Bruce Granville. Invisible Indigenes: The Politics of Nonrecognition. University of Nebraska Press, 2003, p. 57

[633] Recognizing the limits of the translation of the concept of culture into law and at the same time claiming adequacy of the incorporation made by the Indian Statute, cf. Castro, Eduardo B. Viveiros de. Índios, Leis e Políticas. In: O Índio perante o Direito (ensaios). Sílvio Coelho dos Santos Organizador, 1982, p. 34.

[634] See notes n. 189 and 190.

In this regard, article 3 of the Indian Statute establishes the definitions of “Indian” or savage (*silvícola*) and indigenous community or tribal group for the purposes of that law.[635] Indian or savage would be any individual of pre-Columbian origin and ancestry who identifies himself and is identified as belonging to an ethnic group whose cultural characteristics distinguish him from the national society. Furthermore, an indigenous community or tribal group would be a group of Indian families or communities, either living in complete isolation from the national community or in intermittent or permanent contacts, not integrated into the national community.

Manuela Carneiro da Cunha criticizes the definition of “Indians” foreseen in the article 3 of the Indian Statute. She argues that they do not have proper logical and anthropological fundaments, affirming that the pre-Columbian ascendency is not a "rational" criterion, since the biological existence of races is no longer accepted. Also, she continues, it cannot be referred to a genealogical

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[635] “Art. 3º Para os efeitos de lei, ficam estabelecidas as definições a seguir discriminadas:
I - Índio ou Silvícola - É todo indivíduo de origem e ascendência pré-colombiana que se identifica e é identificado como pertencente a um grupo étnico cujas características culturais o distinguem da sociedade nacional;
II - Comunidade Indígena ou Grupo Tribal - É um conjunto de famílias ou comunidades índias, quer vivendo em estado de completo isolamento em relação aos outros setores da comunhão nacional, quer em contatos intermitentes ou permanentes, sem contudo estarem neles integrados.”

aspect, because this cannot be proved for a human group beyond some generations.[636]

Regarding the cultural aspect, she claims that the existence of culture is not a primary characteristic and this shared culture is not necessarily the ancestral culture.[637] This is in accordance with the concepts of culture and ethnicity developed in this dissertation, in particular the just recalled Fredrik Bark's view.

Thus, in this vein, only the self-identification as a member of a group and the identification by the other members would be strictly correct from an anthropological point of view. Cunha claims that this criterion would include the other two criteria (pre-Columbian ascendency and distinguished cultural characteristics), because the latter would be consequence and instruments of the former.[638] This conception gives to the community the power to decide who is and who is not its member, which is also a perspective of group autonomy.

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[636] Cunha, Manuela Carneiro da. Os índios no Direito Brasileiro Hoje. In: Os Direito dos Índio: ensaios e documentos. Editora Brasiliense, 1987, pp. 23-24.

[637] Cunha (1987), *id.*, p. 24-25.

[638] Cunha (1987), *id.*, p. 25.

In a similar way, although recognizing a pre-Columbian continuity, cf. Afonso da Silva, *id.*, p. 854, in particular: "o sentimento de pertinência a uma comunidade indígena é que identifica o índio. A dizer, é índio quem se sente índio."

14. Criminal responsibility of indigenous peoples

Due the absence of specific criminal law norms related to indigenous criminal capacity, and because of a misinterpretation of the Indian Statute, the civil regime is poorly translated into the criminal sphere. At times, the supposed protection conferred by the tutelary regimen is interpreted as a lack of sufficient discretion and intelligence of the indigenous peoples, equating them to persons with incomplete or retarded mental development;[639] in other contexts, only to the indigenous communities that are not yet "incorporated" into the national community is any cultural consideration regarding criminal responsibility recognized. Actually, this approach reveals that the ideas of the Positivistic School are still present in the current Brazilian criminal practices. It is an essentialist and evolutionistic view of culture that, in addition a straightforward admission or refusal of cultural

[639] In this regard, cf. Miranda, id., p. 38: "Analisando-se a imputabilidade, quando o sujeito é capaz de compreender a ilicitude de sua conduta e de agir de acordo com esse entendimento, doutrina-se que o índio pode ter a culpabilidade diminuída por desenvolvimento mental incompleto, porém, desde que fique demonstrada sua inaptidão à vida no meio civilizado, haja vista sua condição normal de relativamente capaz, nos termos do Código Civil (CCB: art. 6.o, III)"

arguments,[640] reproduces a logic of indigenousness as an "on-off" quality,[641] as we have seen previously.

Even the few advances that the Indian Statute could have represented are not incorporated into legal practice, which is still focused on the previous paradigm. This could be partially explained by the unsystematic set of norms regarding indigenous peoples that results in a confusing and tortuous application of the law. Because of this chaotic legal structure, some digressions will be necessary in order to understand the context of regulating indigenous liability.

Article 26 of the Brazilian Penal Code, with the changes carried out in 1984, determines that an agent who, due to mental illness or incomplete or retarded mental development, is, at the time of the action or omission, entirely incapable of understanding the unlawful nature of the act or to determine himself or herself accordingly to this understanding is exempt of penalty. If the agent's incapacity is only partial, the penalty may be reduced from one to two thirds, as foreseen in the single paragraph.[642] Almost the

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[640] Cf. Kim, *id.*, p. 139.

[641] Cf. Granville Miller, *id.*, p. 57.

[642] **Inimputáveis**

Art. 26 - É isento de pena o agente que, por doença mental ou desenvolvimento mental incompleto ou retardado, era, ao tempo da ação ou da omissão, inteiramente incapaz de entender o caráter ilícito do fato ou de determinar-se de acordo com esse entendimento.

Redução de pena

Parágrafo único - A pena pode ser reduzida de um a dois terços, se o agente, em virtude de perturbação de saúde mental ou por desenvolvimento mental incompleto ou retardado não era inteiramente

same rules were present on the original text of the Civil Code of 1940, at the time on article 22.[643]

Since, in the Penal Code there is no norm regarding indigenous criminal responsibility, and because of the indigenous civil incapacity appointed by the Civil Code of 1916, the jurisprudence (case-law) included the indigenous peoples in the category of the persons with incomplete or retarded mental development of the original article 22[644] and then, with the changes of 1984, article 26 of the Penal Code.[645] Even after the Decree 5.484 of 1928, the Indian Statute and the actual Civil Code, none of which repeat the notion of relative incompetency of indigenous persons, this

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capaz de entender o caráter ilícito do fato ou de determinar-se de acordo com esse entendimento.

[643] **Irresponsáveis**

Art. 22. É isento de pena o agente que, por doença mental ou desenvolvimento mental incompleto ou retardado, era, ao tempo da ação ou da omissão, inteiramente incapaz de entender o carater criminoso do fato ou de determinar-se de acordo com esse entendimento.

Redução facultativa da pena

Parágrafo único. A pena pode ser reduzida de um a dois terços, se o agente, em virtude de perturbação de saúde mental ou por desenvolvimento mental incompleto ou retardado, não possuía, ao tempo da ação ou omissão, a plena capacidade de entender o carater criminoso do fato ou de determinar-se de acordo com esse entendimento.

[644] Before the Constitution of 1988, the Supreme Court (STF) had the competence to interpret the federal law. In observance of this competence, the STF decided that the article 22 of the Penal Code was applicable to the "savages" (sívicolas): "Na cláusula de desenvolvimento mental incompleto ou retardado, prevista no art. 22 do Cód. Penal, pode situar-se o silvícola. *In casu*, não há comprovação de tratar-se de réu silvícola. Ademais, ainda que silvícola, não ficou demonstrada a sua inadaptação à vida do meio civilizado." (HC 45.349/SP, Official Gazette, 11.10.1968).

[645] After the changes of the 1984 of the Penal Code and after the Constitution of 1988, the STF decided that the indigenous peoples are subjected to the article 26 and single paragraph: "Sujeição do índio às normas do art. 26 e parágrafo único, do CP, que regulam a responsabilidade penal, em geral, inexistindo razão para exames psicológico ou antropológico, se presentes, nos autos, elementos suficientes para afastar qualquer dúvida sobre sua imputabilidade, a qual, de resto, nem chegou a ser alegada pela defesa no curso do processo." (HC 79.530-7/PA, Official Gazette, 25.02.2000)

category remained invoked in the analyses of criminal responsibility. In this process, the tutelary regimen that could be seen as a protective mechanism is turned, in an evolutionistic attitude, into a biased perspective of the indigenous inferiority.

The use of article 26 is clearly inadequate, because the attachment to a different culture, in an illuminist perspective, could not be considered a signal of "incomplete or retarded mental development". This is a biased, dated and poor solution, which does not find confirmation neither in the contemporary anthropology nor in modern criminal law. In the Brazilian Penal Code context, the best solution would be to apply article 21 of the Penal Code,[646] which foresees the mistake of fact.[647] This solution is in line with the arguments exposed in the last chapter regarding the analysis of culturally motivated crimes.

Moreover, in my opinion, the solution of using article 21 of the Penal Code is more adequate, from a dogmatic point of view, when, although recognizing that the culture of the defendant could have influenced his or her behaviour, the

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[646] **"Erro sobre a ilicitude do fato**

Art. 21 - O desconhecimento da lei é inescusável. O erro sobre a ilicitude do fato, se inevitável, isenta de pena; se evitável, poderá diminuí-la de um sexto a um terço.

Parágrafo único - Considera-se evitável o erro se o agente atua ou se omite sem a consciência da ilicitude do fato, quando lhe era possível, nas circunstâncias, ter ou atingir essa consciência."

[647] In this sense, cf. Dotti, René Ariel. A situação jurídico-penal do indígena - Hipóteses de responsabilidade e de exclusão. In: Direito Penal e Povos Indígenas. Coordenador: Luiz Fernando Villares. Curitiba: Juruá, 2014, p. 76.

legal value protected by the specific violated criminal provision could not give room to a cultural protection.

On the other hand, article 56 of the Indian Statute settles that "In the case of conviction of an Indian for a criminal offense, the penalty shall be mitigated and in its application the judge shall also consider the degree of integration of the savage (sívicola)."[648]

In the strict terms of Article 56, this hypothesis of mitigation should be applied to every indigenous person convicted, according to the degree of integration. However, this article does not give any parameter and, since there is not any reference to this circumstance in the Penal Code, the judges, using the classification of degrees of integration, claim that the mitigation applies only to the indigenous persons not yet acculturated.[649] The solution is biased, because it is based on an evolutionistic perspective that no longer has room in modern criminal law. A better

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[648] Art. 56. No caso de condenação de índio por infração penal, a pena deverá ser atenuada e na sua aplicação o Juiz atenderá também ao grau de integração do silvícola.

Parágrafo único. As penas de reclusão e de detenção serão cumpridas, se possível, em regime especial de semiliberdade, no local de funcionamento do órgão federal de assistência aos índios mais próximos da habitação do condenado.

[649] The majority of the High Upper Level Courts' precedents is in the opposite sense. Concluding that article 56 of the Indian Statute is applicable only to the Indians acculturated or in process of acculturation, see the following precedents of the Superior Court of Justice (STJ): HC 11.862/PA, Official Gazette, 09.10.2000; HC 30.113/MA, Official Gazette, 16.11.2004; RE 1.129.637/SC, Official Gazette, 10.03.2014; RHC 79.210/SC, Official Gazette 20.04.2017. Accessed in www.stj.jus.br.

perspective is to analyse case-by-case the influence of culture in the indigenous individual behaviour.

Article 56 of the Indian Statute, in its single paragraph, in substitution of the regular penalties of imprisonment, foreseen a special "semi-liberty" system, when possible in the concrete cases. In this system, the condemned serves his or her sentence at the place of operation of the federal assistance agency for the indigenous affairs closest to his or her dwelling. The single paragraph of article 56 is particularly tricky, because it indicates that is should only be applied "when possible". What determines whether an indigenous person should serve his or her sentence in confined imprisonment or in the regime of semi-liberty? In response to this openness, the decisions about the question tend, in line with the precedents concerning the hypothesis of the mitigation of the caput of article 56, to recognize the application only to indigenes not yet "integrated".[650]

In this context, the question of indigenous peoples' identity is extremely relevant to the analysis of criminal

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[650] In this sense, see the following precedents of the Superior Court of Justice (STJ): HC 11.862/PA, Official Gazette, 09.10.2000; HC 30.113/MA, Official Gazette, 16.11.2004; HC 88.853/MS, Official Gazette, 11.02.2008; HC 243.794/MS, Official Gazette, 24.03.2014. Accessed in www.stj.jus.br. Analyzing the case of the HC 11.862, the STJ decided that it is not possible to apply this norm when the defendant had committed one of the so-called heinous crimes (*crimes hediondos*).

In consonance with the arguments defended on this work, an exception to this way of thinking is a precedent of the Supreme Court (STF), in which it is recognized that article 56 of the Indian Statue is applicable for the mere condition of being an indigenous person: "Regime de semiliberdade previsto no parágrafo único do art. 56 da Lei n. 6.001/73. Direito conferido pela simples condição de se tratar de indígena" (HC 85.198-3/MA, Official Gazette, 09.12.2005; acessed on www.stf.jus.br).

law responsibility in Brazil. Actually, it has become the first step in the analysis of criminal responsibility, because, as we have seen, only for the indigenous that are not yet "integrated", basically meaning acculturated, is a differentiated treatment recognized.[651] In this process, there is a tension between the self and hetero-identification, which is even more relevant when the indigenous person is judged by the dominant society's justice system. This is the general rule in Brazil. Although having a norm that authorizes the recognition of indigenous justice systems,[652] this rule is barely used, remaining the question of indigenous identity as the main discussion.[653]

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[651] Alerting to the risk of ethnocentrism in this perspective of "integration", Zaffaroni claims: "Muito embora exista delito que o silvícola pode entender perfeitamente, existem outros cuja ilicitude ele não pode entender, e, em tal caso, não existe outra solução que não a de respeitar a sua cultura no seu meio, e não interferir mediante pretensões de tipo etnocentrismo, que escondem, ou exibem, a pretendida superioridade de nossa civilização industrial, para destruir todas as relações culturais a ela alheias. As disposições da Lei 6.0001, de 19.12.1973 (Estatuto do Índio), que mostra uma aparente atitude de benevolência para com o indígena, fazem uma constate referência a sua 'integração', esquecendo-se que o silvícola está integrado, só que está integrado na sua cultura, acerca da qual nós estamos tão desintegrados como ele da nossa." (Zaffaroni, Eugenio Raúl. Manual de direito penal brasileiro. Volume I, parte geral. 10. ed. Rev., atual. São Paulo: Editora Revista dos Tribunais, 2013.p. 578)

[652] Indeed, article 57 of the Indian Statute establishes that the application of criminal or disciplinary sanctions by the tribal groups against their members will be tolerated according to their own institutions, provided that these penalties are not cruel or infamous, being prohibited in any case the death penalty: "Art. 57. Será tolerada a aplicação, pelos grupos tribais, de acordo com as instituições próprias, de sanções penais ou disciplinares contra os seus membros, desde que não revistam caráter cruel ou infamante, proibida em qualquer caso a pena de morte."

[653] The vagueness of article 57 of the Indian Statute is *per se* an obstacle to its proper application (cf. Souza Filho, id., p. 485). But at the same time it is a recognition of the limitation of the official penal system to deal with the cultural diversity of indigenous peoples in Brazil, being in line with article 231 of the Brazilian Constitution, as we will see in the next section. In this sense, cf. Villares, Luiz Fernando. Direito Penal na Ordem Jurídica Pluriétnica. In: Direito Penal

In this process of "judging" the "Indianity" of the defendants, the judges are influenced by "popular will-ideas, including stereotypes and prejudices, that reflect widely held convictions, or "common sense" ideas that often (mis)inform judicial decisions and motivate political action".[654] In this context, it is necessary to pay special attention to poor arguments that jump to conclusions regarding indigenous identity, such as external elements like civil identification or exercise of civil rights, ability to speak Portuguese, clothing, regular job,[655] ignoring internal elements that could influence the conscious of the wrongfulness.[656]

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e Povos Indígenas. Coordenador: Luiz Fernando Villares. Curitiba: Juruá, 2014, p. 17. The STJ recognized that the article 57 of the Indian Statute is legally valid, within the limits imposed by the norm. Cf. HC 208.634/RS, Official Gazette, 23.06.2016.

[654] Niezen, id., p. 18.

[655] The use of these elements as proof of acculturation is widely spread in the Brazilian criminal justice system. Even in the Upper Level Courts, which have the role to render the precedents uniform, misconceptions and poor analyses are common, in this regard. Using the status of voter or the exercise of civil rights as an evidence of acculturation: from the STJ, HC 9.403/PA (18.10.1999), HC 88.853/MS (11.02.2008), REsp 1.361.948/P (16.09.2013), REsp 1.129.637/SC (10.03.2014) and HC 243.794/MS (24.03.2014); from STF, HC 79.530-7/PA (25.02.2000), RHC 64.476/MG (31.10.1986). Pointing out the ability to drive as this kind of evidence: HC 9.403/PA and HC 30.113/MA (16.11.2004), STJ. The knowledge of Portuguese: from STJ, HC 30.113/MA, REsp 1.361.948/PE, REsp 1.129.637/SC and HC 243.794/MS; from STF, HC 85.198-3/MA (09.12.2005) and HC 79.530-7/PA. The criminal practice itself as a clue of acculturation: HC 30.113/MA, STJ and HC 85.198-3/MA, STF. Finally, having a regular job: precedent STF on RHC 64.476/MG (31.10.1986).

[656] Pontes, Bruno Cézar Luz. O índio e a Justiça Criminal brasileira. In: Direito Penal e Povos Indígenas. Coordenador: Luiz Fernando Villares. Curitiba: Juruá, 2014, p. 175.

Saying that this qualification of integration works also for economic reasons, cf. Eduardo B. Viveiros de Castro. Índios, Leis e Políticas. In: O Índio perante o Direito (ensaios). Sílvio Coelho dos Santos Organizador. 1982, p. 33.

This perspective of inferiority of indigenous peoples in the law it is not exclusive to Brazil. This ethnocentrism was and still is present in the other Latin America legal systems, which commonly equate the indigenous status to the psychological illnesses,[657] like the Brazilian approach, classifying them, in general, in two broad groups: (i) savages and (ii) incorporated to the "civilization".[658]

In a perspective of cultural imperialism, the Penal Codes in Latin America did not usually reflect the diversity within their borders.[659] Until recently, in regard to the treatment of indigenous peoples, the Penal Codes in Latin America could be divided into three categories:[660] (i) those characterized by the lack of any mention of them (Mexican Code of 1931 and Porto Rico' Code of 1974); (ii) Codes with prohibitions regarding minorities' religious practices; for example, the Haiti Code of 1935 prohibited the practice of voodoo and the one of Costa Rica whereby the practice of sorcery or any cult contrary to the "civilization" or the common decency was outlawed; (iii) those with express

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[657] Cf. Sanchez, Raúl Cervini. Los procesos de descriminalización. 2. ed. Montevideo: Ed. Universidad, 1993, p. 119.

[658] In this sense: "En general, y en la mayoría de los países que tienen núcleos importantes de población indígena, se pueden hacer dos grandes divisiones: a) indios selváticos y en estado de salvajismo; y b) indios incorporados o adheridos a la civilización." Calvimontes, Raul; Prado, Núñez del. El Indio ante el Derecho Penal y La Ciencia Penitenciaria. In: Estudio Juridico Penal y Penitenciario del Indio: Trabajos preparatórios, Ponencias, Debates y Acuerdos del II Congresso Penal y Penitenciario Hispanico-Luso-Americano y Filipino (São Paulo, Brasil, 19-25 de Enero de 1955). 2. Ed. Madrid: Ediciones Cultura Hispanica, 1956, p. 57

[659] Sanchez, *id.*, p. 121.

[660] Sanchez, *id.*, pp. 125-126.

reference to indigenous, even if referring to them in a evolutionistic perspective; in this category, the Penal Code of Peru of 1924, which in its articles 44 and 45 divided the Peruvians in "hombres civilizados" and "indígenas semicivilizados"; the Penal Code of Bolivia of 1973, which in its articles 17 and 18,[661] talked of "indio selvático" and "inadaptado cultural", respectively, exempted of penalty and subjected to a reduced liability; and the Penal Code of Colombia of 1980, which in its article 96[662] referred to the indigenous as "inimputable por inmadurez psicológica".[663]

Regarding exclusively liability and responsibility we can identify three criteria: (i) positivistic criterion, from which the indigenous peoples are considered subject to irresistible forces to commit the crimes, so that they are

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[661] "IMPUTABILIDAD
ARTICULO 17.- (Inimputabilidad). Son inimputables:
(...)
5) (Indio selvático). El indio selvático que no hubiere tenido ningún contacto con la civilización.
ARTICULO 18.- (Semi-imputabilidad). Cuando los casos a que se refiere el artículo anterior no excluyan totalmente la capacidad de comprender o de querer del agente, si no que la disminuyan notablemente, el juez atenuará la pena conforme al artículo 39º o decretará la medida d seguridad más conveniente.
El juez procederá en igual forma, cuando el agente sea un indígena cuya incapacidad derive de su inadaptación al medio cultural boliviano y de su falta de instrucción."

[662] "ARTICULO 96. Otras medidas aplicables a los inimputables. A los inimputables que no padezcan enfermedad mental, se les pondrá medida de internación en establecimiento público o particular aprobado oficialmente, que pueda suministrar educación o adiestramiento industrial, artesanal o agrícola.
Esta medida (tendrá un mínimo de un (1) año de duración y un máximo indeterminado). Se suspenderá condicionalmente cuando se establezca que la persona ha adquirido suficiente adaptabilidad al medio social en que se desenvolverá su vida.
Cuando se tratare de indígena inimputable por inmadurez sicológica, la medida consistirá en la reintegración a su medio ambiente natural."

[663] Cf. Sanchez, *ibid*.

neither liable nor responsible; (ii) the criterion of equality before law, without any special treatment; (iii) the notion that the situation of the indigenous peoples have particular characteristics that have to be accounted for by law, in order to respect the substantial principle of equality.[664]

In a multicultural perspective, where there is not any room for evolutionistic and imperious cultural perspectives, the weight of indigenous' responsibility does not fit in a presumed psychological inferiority or illness. Also, as we explored in the second chapter, the cultural allegiances should not be seen as irresistible forces that determine human behaviour, mainly in a criminal law perspective based on free will and punishment of facts and not of subjects. The perspective of influence of cultural factors on the culpability seems more adequate and in consonance with a pluralistic approach, as we will see in the next section.

15. Pluralism and criminal law in Brazil

The Brazilian Constitution of 1988 is a milestone in the recognition of indigenous peoples' rights in Brazil and,

[664] Yrureta, Gladys. El indígena ante la ley penal. Caracas: Univ. Central de Venezuela, 1981, pp. 48-54.

along with the Constitutions of Guatemala (1985) and Nicaragua (1987) constitute the first cycle of the so-called "multicultural constitutionalism" in Latin America.[665] For the first time in Brazilian history, the Constitution expressly recognized the cultural pluralism of the country, especially in its article 231:

> "Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the union to demarcate them, protect and ensure respect for all of their property."

In this line, the Constitution also recognized their legal capacity, as individuals and as cultural communities.[666] In addition, the notion of indigenous population is not anymore linked to the idea of racial origin or attached to an idea of biological characteristics, but to ethnic cultural allegiances.[667]

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[665] In this sense, using the classification of Raquel Farjado, cf. Damasceno, Luiz Rogério da Silva. Novo Constitucionalismo Latino-americano: participação popular e autonomia indígena como expressão do pluralismo jurídico na Colômbia. In: Revista da AGU, Brasília-DF, v.15, n.01, p.291-308,jan./mar.2016.

[666] "Article 232.
The Indians, their communities and organizations have standing under the law to sue so as to defend their rights and interests, with the public prosecution intervening in all the procedural acts."

[667] Afonso da Silva, *id.*, pp. 852-853.

This constitutional context represents an attempt to overcome the historical debt of Brazil regarding indigenous peoples and the policies of forced integration, erecting pluralism as a value. Important to observe, however, that there was a refusal of the National Constituent Assembly to use the terms nation or peoples regarding indigenous peoples.[668]

Indeed, the Constitution is an undeniable step towards a respectful and egalitarian society. However, there is some criticism that Brazil should go further forward in the recognition of indigenous peoples' cultural diversity, with, for example, institutional state support for indigenous justice systems, and providing material support for their accomplishment.[669] In fact, the second and the third cycles of multicultural constitutionalism went further on the recognition of indigenous peoples' traditions, customs and organization in Latin America.[670]

However, in line with the position defended in the second chapter, the more important is the political integration of these communities in the decisional spheres

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[668] Afonso da Silva, *id.*, p. 853.

[669] Villares, *id.*, p. 26.

[670] On the second cycle, following the context of the ILO Indigenous and Tribal Peoples Convention n° 169 of 1989, different sources of law and indigenous legal systems are recognized. In this category, we can identify the Constitutions of Colombia (1991), Mexico and Paraguay (1992), Peru (1993), Ecuador (1998) and Venezuela (1999). On the third cycle, instead, there is a complete rupture with the notion of one state, one nation, being pursued plurinational states. The examples are the Constitution of Ecuador of 2008 and the Bolivian Constitution of 2009. Cf. Damasceno, *ibid*.

of the national society. Indeed, in a universalistic view of universalism completely blind to difference, there is always a risk of perpetuation of the marginalization of the weakest, as the Latin America experience of the indigenous reveals.[671]

This idea of increasing their lack of representation is confirmed also with a historical justice view. In fact, these populations were not minorities when the Portuguese and Spaniards fist arrived in Brazil. They became minorities through violence and diseases that resulted in the genocide of most of these groups and the overall reduction of their populations.[672]

The Brazilian effort of recognition is not isolated from the broad international context. For decades, the world community, especially the United Nations, based on liberal democratic ideals, implemented systems and rules in order to recognize and preserve the rights of indigenous peoples to culture, language, self-determination, and economic survival.[673] The indigenous demands for recognition have slowly been translated into the human rights system.[674]

We should recall that neither the United Nations Charter nor the 1943 Declaration of Human Rights mentioned a right to self-determination.[675] For more than twenty years, the United Nations commissions discussed the claims and status

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[671] Caniglia, *id.*, p. 46.
[672] Santos, *id.*, p. 124.
[673] Granville Miller, *id.*, pp. 33-34.
[674] Granville Miller, *id.*, p. 35.
[675] Young (2008), *id.*, p. 40.

of indigenous peoples,[676] and only in 2008 was the Declaration on the Rights of Indigenous Peoples adopted,[677] which expressly recognized their right to self-determination, so that they have the right to freely determine their political statues and freely pursue their economic, social and cultural development.

Before this Declaration, regarding the protection of indigenous cultural diversity, we can point out: (i) article 27 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the UN General Assembly in 1966,[678] entered into force in 1976, ratified by Brazil in 1992:[679] (ii) article 30 of the Convention on the Rights of the Child,[680] which was

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[676] Young (2008), *id.*, p. 42.

[677] In particular, articles 3, 4 and 5.

"Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."

[678] "***Article 27***

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[679] Decree n° 592, 6th July 1992.

[680] "***Article 30***

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture,

adopted by the UN General Assembly in 1989, entered into forced in 1990 and was ratified by Brazil the same year;[681] (iii) article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[682] adopted by UN General Assembly in 1992; (iv) Article 5 of UNESCO Universal Declaration on Cultural Diversity;[683] and (v) Article 2 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005.[684]

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to profess and practise his or her own religion, or to use his or her own language."

[681] Decree no 99.710, 21st November 1990

[682] "**Article 1**

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

2. States shall adopt appropriate legislative and other measures to achieve those ends."

[683] "Article 5 – Cultural rights as an enabling environment for cultural diversity

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms."

[684] "Article 2 – Guiding principles

1. Principle of respect for human rights and fundamental freedoms
Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

(…)

3. Principle of equal dignity of and respect for all cultures
The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all

In fact, the notion of cultural rights is intrinsically related to the concept of self-determination, which is "a right to their own governance institutions through which they decide on their goals and interpret their way of life."[685] It is a relational concept and can be only full implemented in a cooperative relation. It does not imply sovereignty, but it limits the sphere of control of the nation-states regarding their minorities.[686]

However, the turning point in regard to the international recognition of self-determination was the Indigenous and Tribal Peoples Convention n° 169 of 1989, especially its article 1, item 2, which determines: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply." The Convention entered into force in 1991 and was ratified by Brazil in 2004.[687]

This Convention overcame the widely criticized Convention n. 107 of 1957, which had an assimilationist approach to indigenes.[688] In fact, the old Convention expressed the notion that indigenous peoples should renounce their inferior cultural identities in favour of the more

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cultures, including the cultures of persons belonging to minorities and indigenous peoples."

[685] Young (2008), *id.*, pp. 50-51.

[686] Young (2008), *id.*, pp. 50-52

[687] Decree n° 5.051, 19th April 2004.

[688] Granville Miller, *id.*, p. 36.

developed national identities.[689] As we saw in the last chapter, this assimilationist view is anthropologically dated.

In this pluralistic context, we could wonder, as we saw in the second chapter, whether there is a conflict between the right to carry cultural practices and the criminal justice system approach, so that we would be presented with a justification for the agent's conduct. However, in Brazil, where the majority of the cases involving indigenous practices is decided by the national criminal justice system, because of the lack of established indigenous judicial systems of justice, the answer to this question has to be sought in the classic structure of criminal law in detriment of alternative justice experiences.

In this perspective, considering the observations pointed out in the chapter two, we could, analysing the specific case, first, consider whether it is an artificial provision or if there is a fundamental value protected by the provision. In the case of a "mala in se" norm, we would analyse case-by-case the configuration of a mistake of fact. In the case of *mala prohibita*, instead, we should evaluate if the act could be understood in the light of the notion of cultural rights. In this situation, the legal system could not expect a different conduct, so that a "supra-legal"

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[689] Kayser, id., p. 333.

exemption for the exercise of a cultural rights should be admitted.[690]

In both solutions, the indigenous criminal capacity is no longer in discussion, which would not be compatible with the Brazilian Constitution and theoretical basis of a multicultural society. Indeed, when not possible to trace back the indigenous act to the exercise of legitimate cultural practice, the discussion should be focused on the influence of the culture on the understanding of the facts that constitute the crime. In this sense, the cultural attachment could be seen as an explanation of a mistake that affects the agent's conscience regarding the wrongfulness of the act, so that a hypothesis of reduced responsibility and blameworthiness would be configured.[691] This is also in consonance with the Brazilian doctrine concerning culpability, which adopts predominantly nowadays the German finalistic theory, using Welzel's perspective,[692] from which the degree of cultural conformity should be taken into account in the case.[693]

Although, as we have seen, the Brazilian Penal Code does not have any norm concerning indigenous peoples and article 56 of the Indian Statute is too imprecise, the

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[690] Recognizing the possibility of a supra-legal exemption, although without making any distinction regarding the nature of the crime in se (mala in se/mala prohibita), cf. Dotti, *id.*, p. 76.

[691] Cf. Machado, Fábio Guedes de Paula. Culpabilidade no Direito Penal. Quartier Latin. São Paulo, 2010, pp. 232-233

[692] Machado, Fábio Guedes de Paula. Culpabilidade no Direito Penal. Quartier Latin. São Paulo, 2010, p. 211.

[693] Dotti, *id.*, p. 75.

solution of applying the mistake of fact (article 21 of the Penal Code) to the analyses of the cases involving indigenous peoples' cultural conflicts, when it is not possible to recognize the exercise of cultural rights, it is in consonance with the Constitution of 1988 (article 231) and international regulations. Also, from a comparative perspective, we could point out that this is the solution adopted by Peru[694] and Colombia.[695] Finally, I would like to note also that this approach is in discussion on the Law Project of the new Brazilian Penal Code.[696]

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[694] Article 15 of the Peruvian Penal Code:

"Artículo 15.- Error de comprensión culturalmente condicionado El que por su cultura o costumbres comete un hecho punible sin poder comprender el carácter delictuoso de su acto o determinarse de acuerdo a esa comprensión, será eximido de responsabilidad. Cuando por igual razón, esa posibilidad se halla disminuida, se atenuará la pena."

[695] In Colombia, although the article 33 of the Penal Code refers to "inimputabilidad", the Constitutional Court, through the "Sentencia C-370/2002", decided: "Declarar EXEQUIBLE la expresión "*diversidad sociocultural*" del artículo 33 de la Ley 599 de 2000 o Código Penal, bajo los siguientes dos entendidos: i) que, la inimputabilidad no se deriva de una incapacidad sino de una cosmovisión diferente, y ii) que en casos de error invencible de prohibición proveniente de esa diversidad cultural, la persona debe ser absuelta y no declarada inimputable, conforme a lo señalado en esta sentencia."

[696] Article 36 of the PLS 236/2012 (www25.senado.leg.br), *in verbis*:

"Art. 36. Aplicam-se as regras do erro sobre a ilicitude do fato ao índio, quando este o pratica agindo de acordo com os costumes, crenças e tradições de seu povo, conforme laudo de exame antropológico.

§ 1º A pena será reduzida de um sexto a um terço se, em razão dos referidos costumes, crenças e tradições, o indígena tiver dificuldade de compreender ou internalizar o valor do bem jurídico protegido pela norma ou o desvalor de sua conduta.

§ 2º A pena de prisão será cumprida em regime especial de semiliberdade, ou mais favorável, no local de funcionamento do órgão federal de assistência ao índio mais próximo de sua habitação."

Conclusion

With the aim of analysing the question of criminal responsibility in relation to the indigenous peoples in Brazil, the focus of this doctoral thesis has been the debate around the cultural diversity within the structure of criminal law. In other words, the thesis has addressed the question of whether it is possible to acknowledge cultural diversity within the traditional structure of criminal law, or if alternative justice approaches are necessary. However, prior to analysing this matter in the criminal law, I felt it necessary to investigate the broader context of contemporary cultural diversity, starting with the issue of multiculturalism.

It was pertinent to explore the debate on multiculturalism because of the various analyses of cultural diversity in law, and criminal law in particular, that take multiculturalism and cultural diversity for granted, oblivious to a proper consideration of the theoretical basis of this discussion. Indeed, cultural diversity in itself is not reason enough to conclude that criminal law must adapt to every kind of cultural practice. Beyond commonsensical arguments, the multicultural theory brings to light underlying issues in criminal law, and helps clarify the

possibilities and limits of a juridical consideration of cultural diversity.

However, having in mind that our inquiry is aimed towards Brazilian indigenous peoples, the first question that may arise is whether the approaches of Western democracies to cultural diversity are applicable to the Brazilian social context, which is characterized by an ethnic mix of various indigenous groups, Afro-Brazilians and European descendants since the colonial period. In fact, multiculturalism has evolved from the 1960s, first in the United States, Canada and Australia, and later, due mainly to different migration dynamics, in other Western democracies. The awareness of an increasing cultural diversity, and the challenges deriving from it, brought to light differences that were already present before in these countries, helping to bring the issue of indigenous peoples to the fore.

In the first chapter, I explored how multiculturalism represents a challenge to the “one state, one nation” principle, the dominant approach that underlies the formation of the modern nation states. This notion of ethnical uniformity did in fact remain throughout history despite the fact that the ethnic homogeneity of nation states was only ever an ideal, rarely reached in reality. Multiculturalism, as a reality and a philosophy, tests this belief. By stressing the limits of this conception of

ethnical unity, in the contemporary context of increased cultural diversity within nation states' borders, multiculturalism leads us to seek answers to social cohesion beyond ethnic attachments and the notion of universalism associated with the idea of ethnical uniformity.

From a political perspective, I defend, in accordance with the analysis of different multicultural perspectives, that a possible response to the challenges related to the increase of cultural diversity and the tensions between universalism and particularism lies in the enlargement of the concept of citizenship, so that cultural differences could take shelter under a common civic sphere. In the Brazilian social context, this is the main contribution made by multiculturalism: the idea of overcoming cultural conflicts through a dialogical political process, guided by an inclusive and expanded view of citizenship.

However, in order to reach this goal and to understand better multiculturalism, we have first to solve the so-called multicultural riddle, as we saw in the first chapter. That is, in order to overcome reified notions that undervalue cultural diversity, we have to understand how cultural identity bears on the three poles of multiculturalism: ethnicity, religion and nationality. Indeed, much that is accounted for under multiculturalism, or rather blamed on it, including deviations such as an excessive relativism, are derived from erroneous and reified notions of these three

elements. Due to static views of culture as a “thing” rather than a dialogical process of construction of meaning, ethnic, religious and national identities are misrepresented into essentialist notions, as if culture would be a giant photocopy machine that reproduces identical elements, in a quasi-biological manner.

It is typical of this perspective that multiculturalism may represent a persuasive instrument for the analysis of cultural diversity in criminal law. In fact, the unveiling of the reified notions of ethnic and religious identities, as well as of a Romantic view of the idea of nation, disclose the fragility of claims of cultural recognition based on deterministic ideas of culture, as if all members of a cultural group would be clones of the same matrix. In this vein, multiculturalism points to an amplification of the idea of culture.

In the legal sphere, the cultural conflicts and the tension between universalism and particularism are primarily represented by the pendular tension between the principles of equality and liberty. As explored in the first chapter, these are not indisputable concepts. They are relational concepts and thus dependant on political consensus. In this regard, we cannot lose sight of the guarantee to citizens represented by the universal ascription of rights, so that the claims of consideration of particularism have to be taken with a grain of salt.

The common element between issues of cultural diversity in the political and legal spheres is the concept of cultural identity. Therefore, with the aim of discussing criminal responsibility in light of cultural identity, I examined in the second chapter the relation between law and culture from different aspects. Indeed, law and culture are intertwined in various ways that are not always self-evident. In this regard, the thesis presented the three main aspects of this relationship between law and culture as: (i) the right to undertake a cultural identity; (ii) the law as a cultural phenomenon; and (iii) the translation of culture into law as a fact.

The first aspect reflects the primary discussion of multiculturalism: the demands of recognition, which can enter the legal sphere as cultural rights. The second one involves uncovering the cultural features of law through an anthropological lens; that is, taking the work of anthropology as a mirror that displays the cultural nature of law, as opposed to the idea that law would be a phenomenon completely apart from other cultural expressions. This anthropological view is the basis for the argument that law is ethnocentric and that we need to enlarge the legal spectrum so that different particular cultural expressions could be sheltered in law. Finally, in addition to these two aspects that led to the discussion of culture within law, there is the need to translate the cultural elements of a

specific case into the legal language, so that culture may enter into the domains of law. In this manner, to fit the legal binary mechanism of facts and rules, culture is translated – or rather misconstrued – into law as a fact. In this process, there is a risk of deviation to an essentialist view of culture. Such risk reinforces the relevance of an inquiry about the concept of culture in anthropology and multiculturalism.

In this doctoral thesis, more specifically, we analyzed how the idea of cultural conflict fits into the structure of criminal law. We started with a discussion of the category of culturally motivated crimes, or cultural offences, which is the reverse side of the notion of cultural defences. From this point of departure, we proceeded to explore the question of whether a formal category for the consideration of cultural diversity within criminal law was necessary, or if the traditional categories were already sufficient to this purpose. In this investigation of the question of cultural diversity in criminal law, the first step is a reflection on the idea of motives and how criminal law limits their recognition, as we considered in the second chapter through the notions of justification, excuse and mitigation.

However, the inquiry demonstrated that the most central element in the relationship between law and culture, similarly to the diagnostic of the question of multiculturalism, is an examination of the concept of

culture, so that a static notion of cultural attachments may be overcome. Indeed, only essentialist views of culture justify some deterministic approaches to multiculturalism and the cultural defence. In this sense, I concluded that in order to deal with cultural conflicts within criminal law, the most suitable approach would be the use of the categories of mistake of fact and mistake of law and the notion of mitigation according to the defendant's culpability.

The hypothesis that I tried to demonstrate through the first and second chapters is that only a processual or dialogical view of culture has a place in contemporary anthropology. Moreover, we must acknowledge modern criminal law as a political construct, in opposition to notions of a natural law and universal morality. However, the political dimension of criminal law and the function of universal ascription of rules are usually undervalued in some approaches to cultural defence. Indeed, we cannot forget the importance of a criminal law of equal guarantees to all citizens, regardless of status, focused on acts rather than on subjects, in contrast with the view of a moralizing function of the law, applicable only to certain categories of people.

The political dimension of law also reminds us that it is possible for a national community, even if it recognizes the liberty of the individual to maintain his or her allegiances to minorities groups and to carry out traditions

and cultural practices, to ultimately maintain, in a multicultural context, the perspective of outer limits, of a minimum standard to be followed by every citizen regardless of his or her allegiances. In fact, this is the idea behind the universal ascription of rules in a liberal democratic state. The fact that an action can be traced back to the defendant's cultural allegiances does not mean that his or her conduct can be justified, especially when the recognition of cultural evidences challenges the fundamental or minority rights of others.

However, in imperfect or dysfunctional political and criminal systems, as in the Brazilian case, where we have an excess of criminalization beyond the minimum standards of behaviour that should be the aim of criminal law, the conflict between cultural rights pretensions and criminal law provisions emerges in the practice of criminal law justice, so that concepts such as the harm principle and *mala in se* are usually invoked to accommodate this kind of conflict.

This broad scenario is essential to understand what is at stake in relation to indigenous peoples' criminal responsibility in Brazil. Indeed, as we explored in the third chapter, Brazil, in line with the European idea of "one state, one nation" has developed throughout its history a notion of uniform nationality through miscegenation. However, the current multicultural context, where the ideal

of ethnical uniformity is challenged even in the central democracies, exposes the artificiality of the theories that are at the basis of this miscegenation ideal, and their distance from the social reality.

Dissecting the notion of uniformity underlying the national ideal of miscegenation is essential to understand the historic invisibility of indigenous peoples in Brazilian criminal law and the process of essentialization of their cultural identities. In fact, the reconstruction of the history of indigenous peoples' criminal responsibility in Brazil reveals an attachment to evolutionistic notions of cultural allegiances, so that the individual's belonging to an ethnic group would be determinant of his behaviour. This approach is associated with the Positivistic school of criminal law. In the Brazilian case, the indigenous peoples have been (and still are) considered mentally inferior or impaired. This distortion is an implied risk in some perspectives of multiculturalism and cultural defence. In this sense, the case of the indigenous peoples in Brazil may be seen as a cautionary example of the risks of applying a static and essentialist view of culture to law.

Such an essentialist view of indigenous peoples was however not exclusive to Brazil. On the contrary, this was the dominant view in Latin America for most of its history. Only in the 1980s the Constitutions of Latin American countries began to recognize the cultural diversity within

their borders. The Brazilian Constitution of 1988 was one of the first to adopt the so-called multicultural constitutionalism, which has since been surpassed by more progressive approaches.

Nevertheless, the study of law and criminology in Brazil is isolated from its neighbours, ignoring parallels and similarities. The identification of Brazilian intellectuals with European thought, and more recently with the U.S experience, contributes to an almost complete absence of comparative studies regarding the criminal indigenous situation in the continent, both in criminology and criminal law.[697]

The continued fascination with foreign theories, "imported" without a critical consideration of the local social reality and historical particularities,[698] results in the perpetuation of "scientific" myths and blocks the development of theories that could fit our particularities.[699] In this sense, concerning the case of indigenous peoples, Brazil, for the most part, still adopts a rather outdated perspective that associates ethnicity to mental capacities, and which does not find any support in contemporary perspectives on culture.

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[697] Cf. Batista, Vera Malaguti. Introduction of Del Olmo, Rosa. A América Latina e sua Criminologia. Rio de Janeiro: Revan, 2004. p. 11, in particular: "Poucos intelectuais brasileiros saboreiam hoje esse inesquecível sentimento de ser latino-americano."

[698] Varejão, *id.*, p. 13.

[699] Del Olmo, *id.*, p. 19.

In this process of trying to respond better to the particular challenges that indigenous peoples pose to the Brazilian criminal law justice system, I hope to have contributed to the deconstruction of deterministic and reified views of cultural identity in regard to criminal law.

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