

Criminal Law and Cultural Sensitivity

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Criminal Law and Cultural Diversity

Should theorizing about modern criminal law pay more attention to the fact of cultural diversity? The claim here is that it should. Criminal law with its emphasis on formal values such as legality and legal certainty faces problems when encountering social issues and social questions that relate to cultural conflicts and different perceptions of substantial principles of justice and morality. In terms of political thinking, these issues have been discussed as the tensions between liberalist and communitarian view points.

The current article looks at the discussions on multiculturalism and tries to see, how the theory and practice of criminal law should take notice of such developments.

Keywords: Cultural Diversity, Culture, Criminal Law, Criminalization, Identity, Multiculturalism, Rechtsstaat, Recognition

1 The Challenge of Multiculturalism

The fact of multiculturalism challenges the liberalist presuppositions of modern law, especially liberal individualism, forcing us to recognize the importance of cultures and communities for our ethical and moral thinking in a sense which is relevant for the law as well. Issues of criminal law provide a very helpful forum for reflections about cultural issues. In the Nordic countries, these issues have not been discussed much.¹ I would also claim that 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.

In this paper I will try to show both that the issue of multiculturalism is relevant for today's theorizing about criminal law and penal liability as well as that such theorizing on criminal law issues is also helpful in understanding more generally the challenges that multiculturalism poses to thinking about modern law.

1 See, however, Lernestedt, Claes, »Universalism Abroad and at Home. Something on Cultural Defenses and Cultural Evidence in Criminal Law«, in Nuotio, Kimmo (Ed.), *Festschrift in Honour of Raimo Labi*. Helsinki 2007, pp. 235-263.

As a very fine-tuned and in many respects strongly value-based and value-oriented field of law, criminal law provides a good context for such reflections. Due to the flexibility of criminal law, cultural issues may be taken into account in various ways, should this turn out to be necessary. Criminal law is also a cultural phenomenon itself, representing the values of the community. Western criminal justice is surely individualistic in many ways, as it aims at allocating blame and responsibility to individuals for their wrongful actions. At the same time, it is the part of law through which the political community largely defines itself by deciding about issues of right and wrong. Criminal law is marked by an ethical we-perspective. In a broader view, this means that the community forming the polity defines itself by adopting a certain culture of control, that of criminal justice. Such a culture consists broadly of legal and ideological principles on crime and punishment. This culture also consists of principles of legislative ethics (last resort), views on how the threat of punishment is meant to work, defence rights, etc. Criminal justice is not just a matter of legal norms; instead, it is the sum of norms, institutions and practices.²

2 Taylor vs. Habermas

The analysis by Charles Taylor presents a good starting-point for our study.³ He sees belonging to a community as relevant for all human individuals. We are all cultural persons, and the whole idea of being a free and independent person is a result of the development of moral ideas in moral communities through historical periods of time in a search for the common good. This he has already considered in his famous »Sources of the Self« from 1989.

According to Taylor, traditional communities are important sources of identity, a fact which straight-forward liberalism fails to see. Cultures, communities and identities are intertwined. Since liberalism, left alone, is not able to deal with issues related to the definition of common goals of community life, a politics of difference that takes such facts into account is needed as a supplement to the basic liberalist principles. Such principles do not automatically lead to the recognition of the various interests and identities of cultural groups and communities. A politics of recognition is needed because liberalism has treated members of many oppressed groups badly. It has not been able to correct past injustices; it merely promises more of the same. A modern communitarian approach along Taylor's lines sees the interconnection of the identity of individual persons with the identity of their respective communities.

2 Cf. my article »The Ethics of Criminal Justice«, to be published in *Festschrift X* in March 2008.

3 Taylor, Charles, The Politics of Recognition, A. Gutmann (Ed.), *Multiculturalism. Examining the Politics of Recognition*. Princeton, Princeton University Press, 1994, 25-73.

The significance of this tie requires adaptation and scrutiny, and a change in the framework of morals and politics. A politics of recognition requires a substantial conception of equality and the introduction of positively discriminatory practices.

Taylor himself favours a modified liberalism in which cultural values are recognized and uniform rights sometimes leave room for cultural considerations.⁴ The matters of diversity are, accordingly, not something that we can exhaustively phrase in terms of rights. Multiculturalism requires sensitivity to cultural differences far beyond that.

However, Taylor also seems to sympathize with a type of liberalism, because cultural considerations should not lead to the abandonment of the essence of liberalism.⁵ Issues of the good life have to be raised in the debates on political life, but public-policy considerations of good life should not override the fundamental rights of individuals. Seen in this light, cultural defences, for instance, could be allowed in criminal law if this can be done without compromising the core values of liberalism. Taylor's text also opens up to a more radical reading, according to which multiculturalism requires a special sensitiveness and openness in cultural issues, something which is foreign to liberalist views in general, and which perhaps cannot be reconciled with them.

Jürgen Habermas, for his part, brings to the table his comprehensive reconstruction of a modern constitutional rule of *Rechtsstaat* in order to show that such a state is able to deal politically with ethical issues of collective goals and ways of life («good life») legitimately.⁶ This is explained by resorting to a political legitimation of law that must be procedural in character. In a constitutional democracy, the law belongs to the people. The political and the legal communities express their values and ethical views in political and legal debates. The legal system is thus not blind to such issues. This »becoming ethical« does not mean imposing something external on the community as long as the democratic principles are part of the constitution. Habermas means that the exercise of public autonomy by the citizens needs to be taken into account. Different world views will inevitably clash with each other in the various procedures of democratic rule in a *Rechtsstaat*. Accordingly, cultural conflicts will be part of political conflicts that have to be addressed as such.

Habermas regards the system of rights as a product of such political struggles and conflicts, and not something pre-existing. The difference between Taylor and Habermas is that Taylor sees cultural conflicts as sometimes unresolved under the

4 *Ibid.*, at p. 59-61.

5 In fact, it is essential for Bhikhu Parekh, for instance, to stress the fact that liberal values can be embedded in various kinds of cultural settings. See Parekh, *Rethinking Multiculturalism. Cultural Diversity and Political Theory*. Second edition. Palgrave 2006, p. 369.

6 Habermas, »Struggles for Recognition«, in A. Gutmann (Ed.), *Multiculturalism. Examining the Politics of Recognition*. Princeton, Princeton University Press, 1994, 107-148.

liberalist scheme, whereas Habermas relies more on the ability of the legal and political system to deal with all types of value-based conflict. As Taylor says, »Liberalism is not a possible meeting ground for all cultures...«⁷ Habermas, in turn, believes that every group in a state needs to be assimilated in the sense that loyalty to specific forms of exercise of public reason must be required. Constitutional principles need to be shared, but nothing more. People need not share actual life-worlds. Commitment to the law follows from the people's civic role.

Habermas would probably criticize radical cultural critiques of modern law as seeking to dissolve the structures of law.⁸ The modern positive law has been turned into a medium, a sort of collectively agreed programme that develops according to the political decisions taken. In a modern context, cultural diversity causes extra pressure on political and legal systems, but it does actually render modern law even more important than before, as the substantial disagreements cannot be handled otherwise. Dissolution is not an available option. We could, if we follow Habermas, say that what we need are open communicative political processes in order to decide bindingly how much culture matters in law.

The debate between Taylor and Habermas is important for us, because it might indeed be the case that multiculturalism even challenges our conception of the modern political and legal community and its underlying principles. The point made by Habermas that liberalism allows for cultural considerations to be included into political and legal processes is also important. Group rights are one way to develop this line of thinking as in a sense they denote disconnecting rights from individuals. The particular system of rights develops as the liberal rule of law state develops towards a welfare state, and even further.⁹ It is hard to imagine a step backwards however.

We certainly need to make sense of what multiculturalism means when seen specifically from a legal perspective. There is no conceptual necessity for a multicultural society to have a multicultural law. In Rawlsian thinking, for instance, even groups with radically different cultures could and should reach a reasonable overlapping consensus on living together under shared political institutions.¹⁰ These institutions are then used as procedures to decide the extent to which culture matters. Although cultural differences do not automatically trigger conflicts that challenge formalistic legal principles and the virtues of formalism, in practice they naturally do so. If we look at the present political debates, this certainly is the case. At a deeper level, the difference lies in the conception of individual and group identity:

7 *Ibid.*, at p. 62.

8 Habermas, *Struggles*, at p. 124.

9 Habermas has of course developed his ideas in his *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Suhrkamp, Frankfurt a. M. 1992.

10 Rawls, John, *Political Liberalism*, New York, Columbia University Press 1993.

Taylor's view accentuates the significance of cultural features for individuals, as well as raises the question of justice at the level of group phenomena.

The pressure, that the political institutions of a society have to face, increases as the societies become more and more multicultural. A lot of conceptual and theoretical work becomes necessary as well. We should work out the different meanings of community; the traditional, the legal, the political, etc.¹¹ Which communities are the relevant ones that should have a role to play? Theorizing about group-level phenomena would quite obviously also need to be related to the design of institutions, which is especially important in criminal procedural arrangements. As an example we could mention representational problems of lay participation in criminal courts.

We should also work more with the issue of how criminal justice should handle topics in which the presupposed failure of the legal system and the community to recognize the rights and interests of particular groups has cast doubts on the legitimacy of the law itself. Criminal justice should always preserve its legitimacy, even when reacting to past injustices. In periods of transition, criminal justice has often had a role to play that also stresses the political context of criminal justice.¹² The discussion of criminal justice reactions to such macro-criminality has some obvious similarities with that of the multiculturalism issue.

Taylor's view propagates fuller recognition of various identities as they are, and thus the politics of recognition. In order to defend such a view, one would have to know how this recognition should occur. One needs to know how to measure recognition. It might also be the case that a politics of recognition needs to be balanced against something else. Paul Ricoeur points out the significance of various experiences that we have of a peaceful mutual recognition of each other in practices such as trade and giving gifts. It is probably relevant that social life entails many such practices that will have the advantage of smoothing out the negative effects of practices that count as discriminatory and dismissive.¹³ Mutual recognition is then a sort of reciprocity which is much more than just exchange: it means recognizing each other as people.¹⁴

11 See, e.g., Duff, R.A., *Punishment, Communication, and Community*. Oxford University Press, Oxford 2001, p. 42ff.

12 Cf. Günther, Klaus, »The Criminal Law of »Guilt« as a Subject of a Politics of Remembrance in Democracies«, in E. Christodoulidis, S. Veitch (eds.), *Lethe's Law. Justice, Law and Ethics in Reconciliation*. Hart Publishing, Oxford 2001, 3 – 15.

13 See Ricoeur, Paul, *The Course of Recognition*. Harvard University Press, Cambridge 2005, p. 219ff.

14 The legal principle of mutual recognition of decisions and judgments in the EU law is of course not reciprocal, but mutual, referring back to the community of the law reaching beyond the limits of Member States' legal systems.

I would also stress the fact that the recognition aspects are especially important if we wish to reconstruct the legitimate law normatively. Legitimate criminal justice as law requires the backup of a recognition structure, which needs to begin from recognition of each other as individuals, as citizens, and as having some rights. All this needs to be institutionalized into the legal structures of the democratic constitutional state. I would say that the law as an effective means of coordination depends on the existence of such a primordial recognition structure, and it is this which creates the context in which the criminal justice of the polity in question needs to be designed. I would not be willing to reduce the law's authority to the function of coordination only.¹⁵

So far I have not positioned myself in this debate. It seems clear to me that a Taylorian approach is too romantic and cannot be fully followed under conditions of modern law. However, it raises important issues that need to be addressed. The problem with the Habermasian approach, in turn, is that it is very formalistic in its proceduralism. What we would need is a thicker conception, a somehow substantial conception on public reason in a similar vein that we need in criminal law thinking more than just formal principles.¹⁶ This point I cannot, however, develop further here, because it would need a much more detailed scrutiny and argument. I refer to the briefer task that I have set for myself in this paper.

3 Criminal Law, Criminal Justice

I think it is correct to say that cultural issues have not traditionally been regarded as relevant to criminal law and criminal justice. One of the reasons is, surely, that the traditional philosophical presuppositions concerning the structures and elements of penal liability are »modern« products that build on rationalistic criteria. The concept of personhood, for instance, is not much connected with things such as what people in general are like in legal analysis, what their beliefs are, etc. The law has rather operated with formal ideas. This is especially true with categories of penal liability. If you are below an age limit, you are not held criminally responsible; if you are a juvenile, you'll get a reduced sentence; and if you're adult, you'll get the normal sentence. The legal system orders people in formal categories, and treats

15 See the discussion from a coordination perspective in Besson, Samantha, *The Morality of Conflict. Reasonable Disagreement and the Law*. Hart Publishing, Oxford 2005, Part Two.

16 See, e.g., Kandil, Ferial, »Economic Efficiency and Social Justice: A Prudential Approach for Public Actions«, in Joerges, Chr. et al (Eds.), *The Economy as a Polity. The Political Constitution of Contemporary Capitalism*. UCL Press 2005, p. 207ff.

them accordingly.¹⁷ Such abstract systems are fair as such, but might be unfair in individual cases. Certain adults might be less capable of rational behaviour than some juveniles.

One way to approach the issue of cultural sensitivity of criminal justice would be to ask whether in fact modern law fails to recognize something very important; namely, that culture determines or influences people's actions which could render such laws both inefficient and unjust. Ethnic and religious minorities, for instance, may sometimes be regarded as local communities that are closer to pre-modern law and pre-modern communities than a state-law paradigm dares to see. A better option could then be to leave the law to such communities themselves, letting them handle the conflicts internally. From a radical cultural and communitarian perspective, modern law might be simply wrong.

This observation could have significance if we think about practices such as victim-offender mediation, or other practices that are not directly instances of legal application. Once again we face the challenge of legal pluralism. The problem is, of course, that modern law finds it hard to establish closed regimes that would not need to share the normal commitments to *ordre public*.

Since states have gained the monopoly of violence, criminal law is, however, mainly state law. As such, criminal law is not a very effective and dynamic instrument for the transformation of society. Instead, it has a defensive nature, intended to preserve values and rights. Criminal law is in any case able to express values and interests, which makes it interesting from a cultural point of view. Criminal law resembles constitutional law in this ability to express the basic values of the society. In contrast to constitutional law, criminal law is more clearly a particular order as it defines the limits of rights. Criminal law is a product of constitutional processes, but it is not itself situated at this level.

Criminal law is value-laden, but in a liberal western society it does not seriously impose »internal values« to the communities that are bound by it. It requires conformity, but nothing more. Some practices may be challenged and prohibited, but it does not generally demand that we internalize certain motives and reasons for action. The legal community is much weaker than cultural communities typically are. The question of criminal laws' relationship with social values has of course close connections with issues of criminal law moralism, such as whether criminal justice can be seen as a means of enforcing morality. The cultural view could easily mean falling back to moralist positions.

17 Cf. my »On Becoming a Responsible Person'. *Ohio State Journal of Criminal Law*. Vol 2, Nr 2, 2005, 513 – 520.

4 Criminalisation

Too little work has been done on the principles of criminalisation generally, and specifically on the principles of criminalisation in a multicultural setting. This is an interesting level on which multiculturalism brings in new types of issues. We could, perhaps, basically agree on some general principles, such as the harm principle, but in culturally sensitive issues the harm to be prevented is often immaterial rather than material in nature and the potential harm as well as the potential burdens of criminalization are perhaps not evenly distributed in the community.¹⁸

We have usually considered that the issue of humiliation and the degrading aspects of penal justice deal with matters of penal sanctions only. We are not used to the idea that some *criminalisations* could have effects that are in a negative sense relevant for those, whose interests are involved. The ordinary way of looking at this is that committing a crime means showing disrespect for other people's interests, and what is and what should be defined as a crime is not a topic worth being discussed.

What I have in mind is again the possibility that already a criminalization may have problematic effects, something similar to the humiliating effects of certain penal sanctions, on the lives of people. We are speaking of a phenomenon which resembles the problem of enforcing morality through criminal justice, but which is actually a mirror image of it; a censure of traditional morality by means of an interventionist criminalization. The question that one should address is, whether a criminalisation may be unfair and problematic, because this censure of traditional morality entails aspects that criminal justice should not touch upon. Borrowing the term used by Andrew von Hirsch and Uma Narayan, we could talk about an *acceptable penal content*.¹⁹ Is there anything in penal norms that is not acceptable to some, for cultural reasons? Are there restrictions to the way that criminal justice should infringe on sensitive cultural issues? Should repressive law leave such areas for other, perhaps smoother and more flexible kinds of law? It may indeed be the case that this option should be considered when there is fundamental insecurity about the underlying evaluations.²⁰

Criminalisations may differ in various respects. One traditional conceptual distinction has been drawn between offences *mala in se* and offences *mala prohibita*.

18 Jonathan Schonscheck has discussed the hidden »racism« of a drugs crime regulation. Schonscheck, Johathan, *On Criminalization: An Essay in the Philosophy of the Criminal Law*. Kluwer, Dordrecht 1994, 294ff.

19 von Hirsch, Andrew, *Censure and Sanctions*. Clarendon Press, Oxford 1993, at p. 84.

20 Cf. the useful analysis in Ivison, Duncan, »Justifying Punishment in Intercultural Contexts«, in M. Matravers (ed.), *Punishment and Political Theory*. Hart Publishing, Oxford 1999, 88–107.

Offences that are wrong in themselves are usually violations of both someone else's rights and a shared moral conviction. *Mala prohibita*, in turn, entails regulatory offences that are wrong simply because they have been included in the law-books. It is clear that these two groups of criminalisations (I am not claiming that such a clear-cut categorization is always possible) present different problems for multicultural societies. As far as the first group is concerned, the problem is that we might have several views on what the fundamental moral rules are, and these might clash even with the rights-based view that individual rights enjoy a special position as protected legal interests. The whole basis of the justification of criminal law which in some sense enforces a common morality needs to be rethought. When no consensus concerning substantial values can be reached, criminal law becomes more political. As an institution it needs to stand alone, without a strong consensus backing it up. This might entail that issues of criminal law become more political than before, because they might seem more open to different legislative option.

We should not, however, accept such a relativist argument unquestioningly. It might turn out that the core area of criminal law, that of core criminalisations, represents some deeper values that could not and should not be relativized so easily. This could be part of the constitutionality of the *Rechtsstaat*, which always recognizes a set of fundamental rights as limiting the use of legislative authority.

The other part, criminalisations *mala prohibita*, is problematic because it is so openly interventionist. The interventionist welfare state with its safety regulations and programs readily clashes with culture-based norms and require adaptation on the part of cultural groups. The obligation to wear a safety helmet instead of a turban is an example of this. Such an obligation is based on the idea that a safety helmet provides safety in the case of a crash and as this sort of paternalistic safety measure has been generally accepted, the legislature has produced a rule making this a general obligation. The issue of a cultural objection to such a general rule had probably not been raised at all when the justification for introducing such a rule was discussed.

Many of these issues could be discussed from the point of view of fundamental rights. If doubts arise, such discussions could basically be raised during the legislative procedure. After the legislative measures have been taken, the constitutional provisions on fundamental rights could play a role in fixing the general norms in the courts as well. There might be legal grounds for cultural exemptions from general rules.

Turning back to Taylor and Habermas on multiculturalism and law, we have to admit that multiculturalism poses serious challenges for a liberal criminal law. The problem is that although cultural issues such as particular minority rights could emerge during the legislative process, it is not quite obvious how much they could and should be taken into account at that stage. It is far from clear how far excep-

tions from the general legal obligations could be included in the texts of laws, without sacrificing the basic virtues of legislation.

The laws are expected to be general, and exceptions to legal obligations should be made on principled grounds and be based on fair criteria. They should be granted to other similar groups as well. If the sacramental use of the peyote drug is allowed for Native Americans, other groups might wish to enjoy a similar advantage. It might turn out that the real reason behind granting this exemption is not the preservation of and respect for Indian culture and tradition, but something more familiar: the religious rights of each people.

It might also be difficult to address the question of exceptions to general rules at the level of legislation. For obvious reasons, we do not prefer to write down exemption clauses in the legal provisions themselves. We might use the technique of dealing with the issue as a matter of the will of the legislator, and include guidelines and examples for the judiciary in the *travaux préparatoires*, but then we face the problem of democratic legitimacy since such documents do not share the same status as the legislation itself. The possibility of making use of this passage is of course dependent on the particular design of the legal system. I would, however, claim that there are serious defects in this type of effort. The voices of the cultural minorities are surely often too weak to allow for a full account of this aspect during the legislative stage. In this sense, it would be a weakness if cultural considerations had to fight their way through the ordinary political processes without any support in the pre-existing legal system.

The second way of handling the problem could be to try to anchor the cultural adaptations of law in the human rights and fundamental rights law. Cultural considerations that can be backed up with genuine legal arguments probably have a much better prospect of having an impact on the politics of the general rules to be adopted. Referring back to the peyote example: in order to make up the design of the law on drugs, relevant knowledge of the culturally conditioned ways of using drugs is important.

The second instance in which the question of cultural adaptations of general legal rules could arise is the ordinary context of legal proceedings. The defendants of a criminal case might challenge the charges by referring to generally accepted long-term custom, cultural rights, or something similar, and oppose the application of a penal norm to the action in question. Non-applicability would normally mean creating an exemption from the general rule. The application of a rule would thus be contested on the grounds that the consequences of blindly following the rule in question would be detrimental to valuable interests that either can or cannot be backed up by ordinary legal arguments.

The main issue is, in my understanding, the nature of the general legal rules and the exceptions to them. The courts certainly do not often have to take a stand on the constitutionality of a specific law, and can restrict themselves to a particular

application. This gives room for the emergence of a broad set of techniques of legal argument. Even after non-application in a given case, the law maintains its validity. Legal decision-making knows of many lines of argument about how this can be done, but for systematic reasons, the exceptions to the rules need to be systematic and based on reasons. Like cases have to be treated alike.

Challenges on cultural grounds in criminal cases could have a multifaceted nature. They could be supported by internally legal grounds, such as minority rights and human and fundamental rights. At the same time, they could be of a political and moral nature, exposing the political and moral conflict below the calm surface of the law.

One might even come to think that there is a link between generally discriminatory practices and the effort to introduce cultural defences, which could do practically the same job as civil rights, correcting past injustices and addressing equality concerns. This sense of inequality, of discrimination, could explain the legal fight because if the ordinary liberalist and retributive penal practices result in such a state of affairs, is it not a general problem of how the criminal justice system encounters ethnic and cultural minorities that are often also marginalized otherwise? On this reading, the matter is actually highly political, the cultural defence being needed in order to respond to certain oppressive features of the modern formalist culture of criminal justice. Without such a general context of social justice, the argument for the cultural defence seems much weaker to me. The introduction of cultural defences could reflect the acknowledgement that criminal justice has treated minority groups badly and still does, and these injustices need to be corrected by introducing a balancing principle along the lines of a sort of reverse discrimination, now in this case internal to the criminal justice system. This line of thinking would certainly call for criticism because of the problems with formal equality before the law.

The topic of cultural adaptation of criminal justice through the courts is a difficult one. The Taylor/Habermas debate does not really deal with this in depth. What is obvious is that the generality of laws necessitates that the courts have to actively continue the work of reconstructing the legal system as a system of rights. This task, which we might speak about as upholding the »integrity of law«, presupposes many techniques judges use to try to resolve hard legal cases. Judicial review of the cases necessarily lets the judges decide. As judges are not political but (at least ideally) legal actors, they might not recognize all the political and moral conflicts which form part of the setting. The courts could be turned into policy-makers on issues in which they are not fully prepared to take such a role.

Bringing in cultural sensitivity could challenge the legal way of thinking very profoundly. It might challenge the rationality of law in general. It might also challenge the nature of rights, because the fundamental rights or human rights could prove underdeveloped as they apply to cultural issues. We might observe lacunae in

human rights in issues that are constitutive for traditional communities such as customs.

We might also note that the tension between culture and tradition and the normative requirements of the law is somehow reproduced in the field of human rights. Human rights are, just as criminal laws are, normatively critical, being means of censorship in relation to tradition and existing culture. I believe that no positive law can permanently resolve the underlying problems, because the cultural criticism, the cultural challenge to criminal justice presents a proposal for a reversed censorship, which is based on the view that criminal laws should not inflict on cultural issues. This is a battle between two perspectives, two sources of criticism.

We started our observations by noting that the cultural issues could be important because the community might be defined by its culture, and the identity of the members of the community could thus be culturally conditioned in the sense that requires the accommodation of criminal justice. In some sense we could say that what really clashes is the actual culture and the normative legal culture. If the normative legal culture is based on the assumption that law represents, as the Kantians would say, a sphere distinguished from tradition, a realm that assures freedom for the individuals, it may face a difficulty in accommodating itself to the cultural challenge. For culture to become relevant for law would require that the cultural conflict be brought into the realm of law, as a conflict or tension within the legal culture.

One problem that we also must consider is that, even taking cultural context into account in criminal law might itself become a denunciatory practice, a denial of recognition. This view indicates that culture is like nature in that it influences and even determines the actions of the individual, thus limiting individual responsibility on factual grounds. Culture would then be regarded as a kind of force that actually diminishes responsibility for one's actions in declaring it traditional and customary instead of highlighting its individuality. It is therefore crucially important to think carefully about how and why culture matters. It might be that both culture and law have the potential to work towards non-recognition or misrecognition. Culture itself is not innocent in this respect.

The criminal liability of individuals requires freedom, not having been forced by external factors to act in a certain way. The mentally ill, for instance, lack freedom, because they cannot set their own preferences or express themselves fully in their actions because of their illness. If we constructed culture as a kind of external determinant of action, we would lessen the responsibility of individuals for their actions. If culture is like tradition, recognizing the importance of culture could mean abandoning many of the underlying presuppositions of legal and moral personhood. The public autonomy of the individuals that Habermas speaks about requires a mutual recognition structure which is based on abstract normative principles. In this sense tradition cannot be a source, or at least the sole source, of the concept of a

citizen or of a legal person. In modern law and its post-conventional morality, this structure is formalistic since everyone is recognized as having rights that are freed from any particular social status structure. Every person is regarded as free to set his or her political preferences, and needs to be taken as such a person.

Laws of traditional communities build on much weaker presuppositions of legal personhood. I feel that this is one field of research that should now be taken up very seriously: the problems of law in a multicultural society that includes many types of groups, including such that base their view of legal subjectivity on non-universalistic viewpoints. The work of Axel Honneth especially could be valuable here.²¹ This is of course an extensive research task, but it would be important for criminal justice matters as well.

The idea is that in a way, modern positive law has transformed its underlying moral principles. At the same time as the positive law has become positive and statutory, it has developed to grant people new types of rights: the political rights to participate and the social welfare rights in addition to the freedom rights. These are all constitutional rights now limiting the possibility of a return to the pre-modern conception. It is difficult to imagine how we could step backwards in our legal development. Following this line of thinking we should say that a return will only be possible by deliberately taking political decisions and abolishing the definitional structures of modern law. The legitimacy of a legal system is dependent on us first recognizing each other as right-holders at a pre-legal stage.

The strange thing that could happen and that in fact seems to happen is that people who have been »educated« to become modern persons – productive, politically active, conscious of their rights – might still, as fully deliberative persons, wish to abandon all this and live according to some very traditional model. This paradox can be understood as part of the concept of a deliberative person. Such a person takes responsibility for her choice.

It might sometimes happen that some defenders of cultural rights would like to oppose some other types of right. Going to school, for instance, is an obligation based on the view that people need education in order to be fully able to enjoy their rights in their adult life. Some traditional communities might not see the usefulness of such an idea, and might wish to leave their children home.

We could, more generally, expect to see clashes over rights at every level (freedom rights, political rights, welfare rights), and we could also presume that at least some cultural conflicts will arise in the context in which defenders of a tradition are enforcing a traditional morality that clashes with the rights of the individual. There are incidents of honour offences concerning forced marriages in which the father or brothers have violently forced an unwilling bride to marry or even killed her when

21 Honneth, Axel, *Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte*. Suhrkamp, Frankfurt a.M. 1992, esp. 174 ff.

she has insisted on marrying someone of her own choice. Is it not rather contradictory if a person who herself fully enjoys all the rights and protection granted to her in a modern society strives to defend a cultural practice that is not compatible with such rights? We live in an iron cage, prisoners of our legal framework which has developed over many centuries.

5 Rejected identities

Cultural conflicts often have to do with the fact that different meanings are associated with actions and events by their various participants. The key question is then whether we must guarantee that the legal imputations always respect such cultural sensitivities. Are we generally entitled to have our own personal world-view respected by the courts when they decide cases in which we are involved? Would other solutions mean that some aspects that are constitutive of our identity will be publicly rejected?

The conflict may often be between the two expressions: that of the action itself, and that of its legal interpretation. Criminal law aims at replacing the meaning and evaluation of the act given by the actor himself or herself, or the community, by a legal assessment of it. This might turn into a conflict of interpretation. Criminal law is a sort of institutionalized denial, taking standpoints and presenting them over the heads of the individuals in question as it communicates and allocates blame.

Criminal law and criminal justice both recognize and consciously refuse to recognize at the same time. They recognize wrongs, they label actions as wrongful, and they deny the worth of wrongful actions. They do not necessarily recognize the interpretation of the perpetrator of his or her act as binding in the last instance. But at the same time criminal law and criminal justice recognize the convicted person as responsible for her actions, as a rational member of the legal community. The legal responsibility and legal liability structures resemble issues of moral responsibility and liability in an important sense. Responsibility and liability for crimes cannot rest on mere moral blameworthiness. What I would like to stress is that the political person, the citizen, needs to be involved in the picture. The duty to respect the law rests on the civic role of a person as a member of a political community. The modern positive law needs to be understood from this perspective, because it cannot guarantee its legitimacy otherwise. The two concepts of person, that of citizen and that of a legal person, need to be brought into contact with each other.²²

22 See Günther, Klaus, *Schuld und kommunikative Freiheit. Studien zur personalen Zurechnung strafbaren Unrechts im demokratischen Rechtsstaat*. Vittorio Klostermann, Frankfurt a.M. 2005.

Actions may be wrong, not persons. The legal imputation should never, however, appear as fully accidental and surprising. Legal imputation requires a sociological back-up. People need to understand what has happened and why the legal system intervened. The criminal law provisions defining various offences are deemed to refer to actions in an understandable way, all of which takes place under the fundamental challenge of legitimacy and justice.

Criminal laws do not speak directly about identities, as this field of law limits itself to issues concerning actions. But certain actions that are prohibited as criminally wrong might be relevant for the identity of particular persons. Issues related to sexual crimes produce quite strong images of sexual manners and sexual identities. Such issues are being dealt with in modern criminal justice by a more fine-tuned approach than before. The protected interest is sexual autonomy, not public morals.

I have chosen this perspective of recognition of the connections between criminal justice and its cultural significance and meaning. We may loosely connect this with the philosophical discussion concerning different aspects of recognition,²³ which has an active and a passive side. We actively give recognition to persons, but we also strive to get recognition from others as persons. Practices and structures of mutual recognition are of particular importance in a multicultural society. The law plays an important role as a structure normatively defining interpersonal relations in various ways. It has ramifications for social practices and various kinds of interpersonal relationships. Without some kind of mutual legal and factual recognition of one another as persons, ordered and peaceful life would certainly not be possible. We should strive for an understanding of what the consequences of such an understanding are to the general thinking on criminal justice in a multicultural context.

The legal system's formality might prove to be a myth. Of course the justice that criminal justice may deliver is always formal in some sense. Predictability and legal certainty are of high value. Like cases should be treated alike. From this point of view, cultural aspects could be fully excluded from criminal justice as irrelevant. But again, justice also requires that we recognize relevant differences. We should treat different cases differently. This is the point that paves the way for cultural differences in the design of legal institutions.

Charles Taylor has made this point very clearly. In a multicultural society, the recognition struggles involve both of these aspects. People wish both to be recognized as equals and as different. Criminal justice should be able to do both as well. Failing to recognize important differences could turn the legal system itself into a problem. Formalism could institutionalize discriminatory practices. This tension between formalism (universality) and concreteness is probably a fundamental one, if

23 See, e.g., Ricoeur, Paul, *The Course of Recognition*. Harvard UP, Cambridge 2005.

we think about the legal status and legal strategies of those who are different on cultural grounds.

A person whose beliefs are strange to us might be measured with false yardsticks if we do not take this fact into account. A person with irrational beliefs might even be regarded as insane and lacking the capacity to be a responsible person. This possibility of complete denial is surely an extreme example of not recognizing someone as a person. We should become aware that our concept of a person is filled with rationalistic presumptions. It is the law's internal rationality that we are imposing on people and that could, at least in some regards, be the most fundamental problem here. As people's world-views are sometimes not rational, as they believe in gods and witches, their reasons for action are not always rational either.

The effort of making people responsible for their doings is vulnerable in many ways, even without specific regard to multicultural issues. We might end up labeling people instead of actions as bad and ill-intentioned. We might at the same time destroy conditions relevant for mutual recognition in legal and factual terms. It has been one of the achievements of modern criminal justice theory to restrict penal liability to acts and omissions only. And yet, as things are, even prohibitions of a general nature might have consequences in regard to the constitutive aspects of mutual understanding and recognition.

The multicultural setting renders it more difficult than ever to agree on the substance of prohibitions. Conflicts of interpretation might also emerge. Unless the various related conflicts can be resolved, unpleasant consequences might follow. We might get tired of searching for common rules and resort to some darker legacies of criminal justice. We might no longer seek for mutual understanding, but label some actors as dangerous, as irresponsible, and treat them accordingly. If communication across the borders of various small communities no longer works, the political and legal communities can become endangered. People would no longer see each other as having rights and as taking responsibilities, but rather as enemies and as sources of evil. Issues such as fundamentalism and international terrorism pose such extreme challenges to criminal justice thinking. I would like to defend the view that legitimate authority in criminal justice requires the adoption of an internal community perspective, a we-perspective that does not allow for fundamental divides. Recognition as a (political) person with a status and with rights has a great variety of restrictive consequences as to the possibility of construing the criminal law order.

Criminal law has expressive functions as it communicates blame as well as many other things to the community. Criminal law has to do with actions and omissions, and actions and omissions generally are ways of authentically expressing ourselves. They are central to our identity. The issue should thus be raised: should criminalizations be allowed to be contested on the ground that culturally legitimate prescriptions require the opposite? Could a criminalization violate cultural rights and be harmful to cultural identities? How should we analyse such a situation legally?

Such conflicts are probably not very common, but are not entirely unknown either. If we do not allow for the production of kosher meat at all, this would hit the Jewish community hard. Still, the production of kosher meat or halal meat might require the acceptance of treating animals badly, if no technical solutions are available.²⁴ Typically the non-regard for cultural rights could mean a kind of discrimination, seen from another angle. However, cultural groups could often claim to have certain group rights that justify such practices. Such group rights should then have to find their ways into criminal law doctrines. Most of these conflicts are not new, but rather long-standing debates. Criminal laws have often just silently been adapted to avoid such difficult issues of principle by burying them below the surface. Criminal law is much more flexible than it might seem at first sight.

From the point of view of an individual who faces the question of whether to follow the law or the »inner voice«, the inner obligation, the situation would of course be problematic if no correction is possible by means of legal interpretation. The dilemma would be that of Antigone. The legislatures necessarily have to aim at balanced solutions, trying to respect traditions as long as possible, but assessing their worth normatively. The same principle could also be useful as a guideline in deciding cases.

We should, I suggest, distinguish between acts committed *for* cultural reasons and acts committed *in order to* defend a culture. The former may include many types of actions that are traditional, and the actor needs almost by definition to be someone who belongs to the culture. In many cases a criminalization actually aims at changing cultural patterns of behaviour. This may be painful, but here criminal laws openly and deliberately clash with tradition.

Acting in defence of cultural values is a broader issue, and we might become sensitive to claims presented by others even though we are not directly involved and even though we do not personally share the same values. The issue might attract our attention as a matter of principle, for instance. The latter case may include actions that are traditional, and not particularly deliberated, but which are now being defended on cultural grounds. We might even consider cases in which such claims may be backed up by rights arguments. Cultural rights could also be defended by others than those directly involved in the practices.

In an open society, consciously breaching the law is of course always an option. I would, at any rate, not say that breaching the law for cultural reasons generally equates with civil disobedience, despite obvious similarities. Civil disobedience could usually be termed political action which has expressive functions, since it represents a public denial of the legitimacy of some valid legal rule. Culturally motivated deviance may of course also be politically motivated as well, but need not be.

24 In fact the Finnish legislation on protection of animals expressly notices some practices of religious slaughter. See § 33 Animal Protection Act.

The idea that criminal justice has a connection with the concept of citizenship is important here. I would say that notions of modern criminal justice thinking almost necessarily need to operate with some concept of a deliberative person. Holding a person responsible and liable for crimes rests on the idea that all people have the capacity to deliberate on the nature of the act in question. The same goes for citizenship. The citizen also needs to be regarded as a deliberative person capable of forming political views and participating in the public life of the community. This deliberativeness entails some sort of supposed ability to critically assess traditions and cultures as well. In that sense, I believe that we should not protect cultures and tradition merely because they exist, but because they have survived a kind of internal reform and critique. We should not take culturally committed persons as having a reduced capacity for deliberation and critique. On my account, the person concept serves as a basis for constant review and criticism, and a source of dynamics in the »evolution« of cultures.

6 Beyond cultural diversity

Criminal law is rough law, repressive law. Criminal investigations and criminal proceedings are far removed from anthropological field research in which sensitive researchers try to approach and understand foreign cultures. Charles Taylor formulates the very sympathetic ethical requirement that we should understand the presence of many differing cultures and actually presume that there might be something valuable for us in each and every one of them. Learning from them changes our personal horizons. Preserving cultures sounds attractive in times when many traditional cultures are dying out.

All this is somehow very correct and fine, at least for anyone who has had an interest in hermeneutic thinking. The problem that I have here is that it is really a demanding requirement to say that the criminal justice system should adapt to such high ethical yardsticks and be able to respond to each and every person appropriately to the circumstances. I have already referred to the necessity of building the legitimacy of criminal justice on its political legitimacy, and here the concept of a citizen is central. What is then the relationship between the generalized concept of a person as a citizen and the fact of cultural diversity? Do they mutually exclude each other? Is the only thinkable ethics the ethics of difference?

It is far from clear that what we have at the bottom line of such an ethical requirement of recognizing diversity is diversity itself. Beyond cultural diversity we might perhaps find true humanity, the uniting feature, the respectable person, and make sure that our hard criminal law does not bring harm to the vulnerable core of humanity present in every human being. If we follow this line of thinking, we would again reduce the significance of the fact of cultural diversity. It might be hu-

manism that directs our attention towards issues of cultural sensitivity in the first place. Cosmopolitanism as a citizen concept referring to the membership of humanity would reflect such an aspiration. I will not build on such strong membership views in this article, but limit myself to the state context.²⁵

Criminal justice as a practice of denial and recognition is deeply tied to the general legal scheme in which people have rights and legitimate expectations that their primary interests are respected. The law's double exercise in denying and recognizing simultaneously builds on the premises of mutual legal recognition; otherwise we would not be included in a web of mutual legal obligations. It is in this context of (normatively) pre-existing recognition structures that the struggles over recognition of new aspects, new interests and new rights need to take place.

We have many examples of crimes reported that are precisely at the focal point of a cultural conflict. We might even have to think of other ways of ensuring that such facts are being noted during the investigations and proceedings. This is also a matter of recognition and identification. We should become aware of such contexts. In terms of legal theory, we could say that sensitiveness, a context-bound and context-sensitive application of law, requires the use of soft hermeneutic tools. In this respect the lessons of cultural sensitivity could reach far beyond merely general cultural issues, to the routines of ordinary legal adjudication. We should include topics such as pardon and amnesty in our discussions. We should discuss the role of anthropological knowledge in criminal proceedings.

7 Regulating cultural conflicts

Cultural conflicts deepen easily. These days the Western liberalist countries are increasingly involved in ideological struggles on a global scale. The Islamic world has become very sensitive to Western criticisms. When the *Gyllands Posten* published some caricatures of the Prophet Mohamed, this led to a massive uproar in the Islamic countries. The Western media replied that this was a question of freedom of speech unrelated to cultural or ideological matters. What is typical of such disputes is that also the communities split into traditional and progressive parts as the debate continues. There might be Islamic groups defending the freedom of speech, and there might be non-Islamic groups supporting the more radical Islamic views.

Could this have been a case of blasphemy? And what should the law on blasphemy be like nowadays in order to capture the phenomenon correctly? I think such a

25 Interestingly enough, the current discussions concerning the protection of human dignity by means of criminal law render it likely that such a deep value-orientation may in fact easily lead to a new kind of moralism.

case would allow for a useful study of how to regulate things in a multicultural society that can entail fundamentalist communities.

In the Finnish Penal Code the relevant provision reads as follows:

Chapter 17 Section 10. A person who

(1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community, as referred to in the Act on the Freedom of Religion, or

...

shall be sentenced for a *breach of the sanctity of religion* to a fine or to imprisonment for at most six months.

The provision which requires a punishable intent, covers defaming of what is otherwise being held as sacred by a religious community in addition to blasphemy against Christian God. The existence of such a provision makes it clear that certain institutionally shared beliefs are protected by the law. The freedom of the press to publish caricatures on religious matters is not unrestricted. In Islamic culture, or in some parts of it, sacred personages should not be pictured at all. This makes the Islamic religious communities feel hurt by public expressions that connect their holy figures with terrorism. The Danish case did not lead to prosecution.²⁶

The Finnish law of 1889 was based on the idea that blasphemy was directed primarily against the religious feelings of a community, not against God himself, although this was not quite clear. Today, the provisions protect feelings, a sort of religious peace. The provisions are not quite explicit about whether »God« could mean »Allah« or his prophet as well, or whether it only means the Christian God.²⁷

The current provision prioritizes the protection of the belief in the Christian God, because such blasphemous acts need not be carried out with the purpose of offending. This additional requirement has been set for the protection of the sacred objects of other churches and religious communities against defaming. In any case, by taking this route a certain respect for other cultures and the feelings of sanctity cherished in them will also be safeguarded. The dominant religious beliefs are prioritized, but in effect this prioritization is relatively weak and of a context-sensitive nature. In fact, in the law reform of 1998, the special mention of God was about to be abolished, but the general assembly of the Parliament brought it back at the last stage of decision-making.

I am not saying that we should specifically try to define such problems as criminal, quite the contrary. But we might have to look at our penal provisions in a new context of massive cultural conflict. The Finnish or Danish prosecutors and judges

26 Greve, Vagn, *Bånd på band och mund – strafforfølgning eller ytringsfrihed?* København 2008, p. 82-83.

27 Gov. Bill 6/1997, at p. 127ff.

probably need to study the Islamic tradition closely in order to understand whether a particular expression really hurts the shared beliefs of that community.

The Finnish provision makes it clear that such cultural conflicts might be phrased in terms of the protection of the beliefs of certain defined communities. We need a very context-sensitive interpretation of blasphemy rules. In applying this law, we will also necessarily be redefining what actions are justified on the basis of the freedom of expression.

I do not think that it would be useful to describe the problems that we face in encountering such issues (in cases that are so far only hypothetical) as being rooted in our presumptions of assimilation, or the like.²⁸ The law is designed to be neutral and open to various instantiations of the aspects of sacredness, and thus calls for close scrutiny. This does not mean that it would be easy for an ordinary (secular) court to understand fully all such features in their diversity and totality.

We might also speculate whether we should try to »understand« the reaction of the radical people who were incensed about the Mohammed pictures if they started to demonstrate violently, burn cars, etc., or simply regard their actions as ordinary crimes. I am not sure. Issues of criminal justifications deal with social conflicts, and cultural conflicts would certainly add another dimension, which is relevant if it brings legally relevant aspects to the surface. In order to find them, we would have to go through the whole set of issues of our doctrine of penal liability.

8 »Social adequacy« as a label for tacitly accepted cultural practices?

Finnish and Swedish legal doctrine recognizes an unwritten ground for exemption from liability, namely the »social adequacy« of the act in question. Cross-checking in ice hockey constitutes an assault, but it is not punishable because such behaviour has been socially accepted. This sort of exemption from liability could be seen as based on normative cultural grounds. In our culture, sport counts as valid, and if adults wish to fight following such ceremonial forms, why should it not be allowed?

Serving wine to those underage in a religious ceremony could fall under this exemption as well. Some cultural defences could be construed in a similar fashion. The notion of social acceptance is an open one, and does not require the acceptance of each and every person. It is a matter of institutional acceptance. The Germans could speak of »the normative force of the factual«. This legal institution of social acceptance might fit cultural issues quite well. It is an expression of customary law

28 Dundes Renteln, Alison, *The Cultural Defense*. Oxford, Oxford University Press 2003, at p. 6.

of some kind, which Nils Jareborg has called a »security valve« that is needed to get rid of cases that just do not belong to the domain of criminal justice for whatsoever reason.²⁹

In fact I believe that this unwritten principle could gain importance as we discuss culturally motivated practices from the point of view of the dominant culture in terms of criminal justice. Jeremy Waldron has raised important questions of equality before the law that must also be solved when operating with doctrines that draw on cultural and social realities.³⁰ We would certainly not be willing to compromise the whole system by making cultural exceptions to the rules, but in individual instances this may be acceptable. Social adequacy is an important idea because it basically ascribes importance to customs and practices that are already there. There is a sense of legal pluralism in this that might often go unnoticed.

Social adequacy also means of course that the legislator recognizes certain limits to what it can do. Some living practices should not be touched upon. Should this be done, however, for important reasons, such interventionism would need to be backed up with good reason. Sport, for instance, can be regulated and prohibited. For example, professional boxing is not allowed in Sweden.

Studying social adequacy is therefore also important because the reasons why we recognize certain practices as worth preserving differ. Sometimes the reason is plain harmlessness, sometimes respect for tradition, sometimes respect for the autonomy of some aspect of life that already has internal rules (sport, medical ethics, the ethics of the media, etc.). However, the appreciation of a practice always needs the support of normative principles.

What are being called the general doctrines of penal liability in continental Europe, the general definitional elements of a crime, are legal norms and principles of a general nature. It is not quite clear what the exact relationship between such doctrines and rights is. Murder and willful killing are wrongs, but many types of factors may influence the legal evaluation of even *prima facie* wrongful acts. Do I as a victim, or as a potential victim, or simply as a member of the polity, have the right to demand that no new doctrines be developed to mitigate the liability of the perpetrator of a wrongful deed?

I am not quite sure what to say about it. Criminal justice is rights-oriented in many ways, but it is not quite directly so. If an act has been committed in self-defence and is therefore regarded as justified, the rule must apply to others in a similar

29 Jareborg, Nils, *Allmän kriminalrätt*, Uppsala, Iustus Förlag 2001, at p. 291. Jareborg places circumcision of boys under this concept: the Supreme Court of Sweden had also followed this line of argument. This is one of the very few occasions on which a cultural argument has been openly raised and even accepted in the Nordic judicature and doctrine.

30 Waldron, Jeremy, »One Law for All? The logic of cultural accommodation'. 59 *Washington & Lee Law Review*, 2002, p. 3.

situation as well. Such a defence expresses a rule. But still, the protection of even absolute liberalist rights-based values such as life by means of criminal law could leave some room for discretionary elements of doctrine. Flexibility increases as we move towards sentencing principles. If some aspect of the act is relevant from the point of view of the definition of its penal value,³¹ then it should be taken into account.

Continental criminal law distinguishes between justification and excuse much more clearly than common law does. This has been regarded as indicating different views concerning the law itself. Anglo-American legal thinking builds on reasonableness, whereas Continental legal thinking builds on »*richtiges Recht*«, the law as Right.³² Justification renders the act justified, whereas an excuse only renders it understandable. Introducing cultural grounds for justification would have an effect on the way the system of rights functions in criminal law. It would be easier to introduce such grounds as excuses only. However, this solution would also mean that the cultural aspects could significantly influence what we expect of people.

The Finnish law recognizes one legal institute that may be relevant here, namely necessity in terms of conflict of interest. Cultural context could mean that individual actors run into severe conflicts of obligation if the customary law that the group considers valid requires something other than what the Penal Code requires. But here as well, it is far from self-evident that all conflicts of interest are relevant. There are many interests that could be regarded as valuable by some, but that still do not enjoy general respect. Some kind of a test of the rationality of the obligation would need to be part of the assessment.

9 Cultural sentencing?

Another level of decision-making at which cultural settings could be of importance, is sentencing. Cultural grounds could operate as mitigating or aggravating factors in sentencing. In fact, following a recent legal amendment, the Finnish Penal Code (Ch. 6 Sect. 5) now recognizes a racist motive as an aggravating factor in sentencing.³³ This reflects the view that national and ethnic groups are in need of protection against hostile actions by others. But in Finnish law this is not symmetrical. If a member of such a group attacks outsiders for related reasons, this has not been regarded as relevant.

31 This concept has been used in the doctrine of the Nordic countries as a sort of guarantee that punishment should never go beyond proportionality.

32 George P. Fletcher, »The Right and the Reasonable'. 98 *Harv. Law Rev* 949 (1985).

33 See, generally, Finnish Gov. Bill 44/2002, at p. 192 – 193.

Recognition of racist motives as legally relevant does not mean recognizing them as worthy of support; quite the contrary. They are recognized because of their dangerousness and blameworthiness. They are recognized in terms of their consequences for the rights of certain protected minorities.

The introduction of hate crime laws in the 1980s and 1990s in the US has been called identity politics.³⁴ The idea gained political support because the message of such policies was easy to understand. It was a politics of recognition that turned into symbolic criminal-policy action. The other line of identity politics, bringing in a cultural defence, is not likely to be backed up by such political enthusiasm. Recognizing by taking the cultural identity of the perpetrator into account has an abolitionist sense as it mitigates liability. It is not so tempting politically, because this sort of symbolical action could be regarded by many as replacing normative blaming and attribution of responsibility by a mere understanding.

10 Positive general prevention?

One general issue which could become a problem as the idea of a single culture breaks down is that of general prevention. The so-called positive general prevention theory emphasizes the internalizing of moral messages on the part of the members of society.³⁵ We are all participating in communications concerning right and wrong on the various symbolic aspects of penal liability. This idea rests on the assumption that we all have the ability to develop our moral and ethical ideas in this environment as members of society. What follows is that we are law-abiding not only for the reason that this is better for us, that we do not want to risk getting caught and being punished, but that we are also law-abiding for the sake of sharing most of the morals that criminal justice wants us to share. The fact that we are not killing each other is thus not merely a matter of successful deterrence, but of our own choice, our own concerns. We are thinking rationally, we see the common rules from an abstract perspective; we do not appropriate rights that others cannot have either, and so on.

The theory of positive general prevention seems to require that the community of people is able to share a substantial understanding and that they see the main rationale behind the rules and standards that have been applied. They can thus see the value of defending the validity of commonly agreed rules. In a multicultural society,

34 Jacobs, James A. – Potter, Kimberly, *Hate Crimes. Criminal Law & Identity Politics*. New York, Oxford UP 1998, Ch. 5.

35 See the discussions in Schünemann, Bernd – von Hirsch, Andrew – Jareborg, Nils (Eds.), *Positive Generalprävention. Kritische Analyse im deutsch-englischen Dialog. Uppsala-Symposium 1996*. Heidelberg, C.F. Müller Verlag 1998.

these communications might break down into smaller circles that read the messages sent by the criminal justice system very differently. This might exacerbate the conflicts of interpretation between groups and cultural communities when sensitive cases are being handled. Such an effect might diminish the legitimacy of legal decisions, especially in circles that for whatever reason do not accept moral and legal values that the legal system incorporates and expresses. The symbolic functioning of the criminal justice system is not always a success story. The story might well end in a crisis of the perceived legitimacy of the actions of the authorities.³⁶

A theory of positive general prevention might also be problematic because if we think that cultural customary law is of equal importance to state law, then we might conclude that the criminal justice system is indeed a hegemonic order, and that the general prevention effect is the clearest example of how the legal system tries to override its competitors.

We should not, however, accept such a criticism without further consideration. It is not at all self-evident that we should have to resort to relativist thinking as soon as we have realized that the society entails communities that possess strong views about right and wrong themselves. We could say that the hegemony that reigns in law is not the mainstream cultural thinking, but something else, namely, the artificial culture of law. The values that the legal system expresses are internal to law, and legal. It is the value-hegemony of the legal system that is at stake, and whether this hegemony is legitimate or not is something for political philosophy to scrutinize. Every polity probably needs to be able to decide legitimately on issues that are morally sensitive, and the culture-based values do not present any further difficulty. Of course we need to be able to convince everybody of their duty to obey the law, and we can even allow for protests for political reasons.

We should also note that the traditional communities with strong specific cultural values of their own need a back-up if they wish to represent themselves as legitimate in their use of power. The environment of such strong elements of culture has changed, and this makes every community open to at least internal criticism. There must be a possibility of cultural development even within the confines of traditional cultures.

36 Garland, David, in his *Punishment and Modern Society* (Clarendon Press, Oxford 1989), at p. 252, stated: »... penalty communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters. Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organize our moral and political understanding and to educate our sentiments and sensibilities.«

11 Modern contexts

Not all criminal law has to do with cultural conflict. Modern criminal justice deals with economic crimes, environmental crimes, and the like. These are crimes that often occur in systematic, organizational contexts. Companies breach the law, and companies as well as individual perpetrators may be punished. Determining the individual liabilities may require that we study the cultural conditions of the company. Safety at work depends on a safety culture that the legislative framework and administrative control seek to cultivate. A culture of good safety at work, and a good atmosphere may be even more important than the threat of a criminal sanction as such. Theorizing about multiculturalism does not usually focus on such cultural pressures and factors. It may be of importance to point out that many communities and many belongings are not really problematic from the point of view of criminal justice. They could, however, be made more visible if we looked closely at such practices.

We might also say that the rationalistic presuppositions that the law builds on presumably fit well in the strongly systematic context. Economic actors are rational, they maximize their profit, and a bigger company that would think quite differently would probably not live very long. This does not preclude companies and economies that are very differently organized from existing.

Not even truly international law is devoid of cultural aspects. Quite the contrary, the core area of international criminal law has specifically ethical contents. It mirrors the ethics of mankind. The system of international criminal law wishes to define certain crimes as crimes against mankind, and it does not accept compromises in regard to these definitions. The law on defenses, justifications and excuses is very strictly construed, as we see in the provisions of the Rome Treaty establishing the International Criminal Court.

Cultural excuses do not count, at least expressly, when we are talking about genocide or crimes against humanity. They probably should, if we think about the contexts in which genocide takes place these days. The system of international criminal law and criminal justice builds to a great extent on the domestic legal systems and domestic actors. The ICC has been called on to be a global projection of the neo-liberal minimal state.³⁷

The system of international criminal law is a very »European product«. Its development has been significantly triggered by events in European political history. International criminal law is very liberalistic in its approach. Neither states nor indi-

37 Mégret, Frédéric, »Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project«, in *Finnish Yearbook of International Law*. Volume XII, 2001. Martinus: Leiden 2003, p. 193 – 247 (208).

viduals have to consider each other in other respects, but certain crimes must be avoided. Only a very limited consensus lies behind it.

International criminal law reads phenomena such as terrorism as crimes directed against collective security interests. The law on terrorism excludes political justifications and cultural defences. Terrorism is not being understood by this system as symbolic action that challenges the legitimacy of foreign or domestic powers. The law on terrorism is part of law's formal program.