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## How law can recognize culture? The examples from different legal systems

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### 1. Introduction

The notions “culture” and “society” shouldn’t be equated, because “culture is an abstraction whereas society is the collection of individuals in the community”<sup>1</sup>. Almost all legal systems recognize either on the constitutional level or on in the legislations the right to equality before the law. This rule means that all the members of the society, every individual is given the same rights and duties before the law. On one hand, the right to equality should protect especially these groups of the population which are minorities and for this reason can be somehow discriminated by the dominant group. On the other hand, this rule should also prevent these minorities from applying for privileges in the field of law. Nevertheless, as the former point is considered to be the one of the most relevant principles in every democratic state, the latter is sometimes liberalized to adhere to special needs of these part of the society. This attitude can be the reason for many social disputes and legal

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<sup>1</sup> A.D. Renteln, *Cultural Bias in International Law*, “Proceedings of the Annual Meeting” 1998, vol. 92, p. 233.

problems as well. The goal of this paper is to point the results of codifying the cultural distinctions in the society.

The first part of the article deals with the issue of Yeshiva students in Israel and discusses the judgments issued by the Israel's Supreme Court. The second part focuses on the situation of Malays in Singapore, taking into account the historical background of this minority and the present legal regulations relating to them. The last example concerns the indigenous people in Canada and refers mostly to the provisions of the Canadian criminal law. Finally, the conclusions are drawn, taking into consideration findings of the presented instances.

## 2. Yeshiva students and the deferment of military service

The Yeshiva is the name of the Talmud school for the unmarried boys, where they study starting from the age of 13–14 till their twenties. In the school, students absorb the Talmud and the rabbinic literature<sup>2</sup>. In 1948, the first project deferring Yeshiva students from military service occurred, but the issue was ultimately decided a year later<sup>3</sup>. Then, the Israel Minister of Defence at that time, David Ben Gurion, granted Yeshiva students this very special privilege<sup>4</sup>. This act was the result of both the recognition of the religious significance of the group and the need for the protection of this group because of the substantial losses during the Holocaust<sup>5</sup>. The legal grounds for the Gurion's decision were to be found in section 12

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<sup>2</sup> J. Jedlicki, *Jesziwa*, w: *Polski słownik judaistyczny* red. Z. Borzymińska, R. Żebrowski, t. 1, Warszawa 2003, p. 678.

<sup>3</sup> *Major (Res.) Yehuda Ressler v. Minister of Defence*, HCJ 910/86, judgment of June 12, 1988, par. 1 (Ressler v. Minister of Defence).

<sup>4</sup> I. Ruggiu, *Acquisimulticulturale e principio di uguaglianza: l'obbligo di servizio militare per gli ebrei ultra-ortodossi*, "Quaderni Costituzionali" 2012, vol. 3, p. 644.

<sup>5</sup> R. Levush, *Israel: Supreme Court Decision Invalidating the Law on Haredi Military Draft Postponement*, <http://www.loc.gov/law/help/haredi-military-draft.php#f22> (access: 15 December 2013).

of the Defence Service Law, which gave the Minister of Defence the power to order “that a person of military age shall be released from the obligation of regular service”<sup>6</sup> (section 12 (a)). Even though for years this privilege was not expressly included in any legal instrument, it was considered to be binding law. However, this unequal treatment was the subject of many social disputes<sup>7</sup> and legal cases as well. Moreover, the number of deferrals for Yeshiva students rose massively from 400 when the law started to be exercised to several thousand today<sup>8</sup>.

The first case in this field adjudicated by the Supreme Court of Israel was probably *Becker v. Minister of Defense* from 1970; then, cases were heard i.a. in 1981, 1986 and 2002<sup>9</sup>. In 1997, the Supreme Court, in *Rubinstein v. Minister of Defence*, noticed that the disproportional treatment of Yeshiva students creates many social problems connected e.g. with the considerable unemployment among them as they try to avoid being drafted into military service because of joining the workforce<sup>10</sup>. The Supreme Court reached the conclusion that “Israeli Yeshivas are thriving and there is no real danger that drafting Yeshiva students within any particular framework would lead to the disappearance of these institutions”<sup>11</sup>. The Court referred also to the contemporary justification for the special treatment of Yeshiva students, as “the effectiveness of these student” military service is questionable, due to the difficulties they would encounter in adjusting to the Military and the difficulties that the Military would have adjusting to them<sup>12</sup>, rejecting it.

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<sup>6</sup> *Ressler v. Minister of Defence*, par. 7. Contemporary regulation is not far from the one of that time, as only the phrase ‘or that the period of regular service of such a person shall be reduced’ was added.

<sup>7</sup> I. Ruggiu, op.cit., p. 645.

<sup>8</sup> *Amnom Rubinstein v. Minister of Defense*, HCJ 3267/97, judgment of December 9, 1998, par. 1 (Rubinstein case).

<sup>9</sup> R. Mazor, *Religious Exemption from Israel’s National Draft and its Impact on Israeli Constitutional Law*, “The Columbia Undergraduate Law Review” 2008, vol. 3, issue 2, p. 2, 6.

<sup>10</sup> Rubinstein case, par. 37.

<sup>11</sup> Ibidem, par. 1

<sup>12</sup> Ibidem.

In 2002, the Knesset passed a new statute, which was supposed to regulate the current situation – The Deferment of Military Draft for Yeshiva Students Whose Occupation Is the Study of Torah Law (so called “the Tal Law”). This act not only pointed who is authorized to exemption but also made special provisions in case that Yeshiva students, who were previously granted with the deferment, would no longer qualify for the deferment. In such a situation, Yeshiva students could apply for the performance of civil service or so called “combined service” (which was the combination of active military service with the study in the Yeshivas)<sup>13</sup>.

The Supreme Court examined the constitutionality of the Tal Law twice, in 2002 and in 2012. In the latest case decided on this subject, *Movement for Quality of Government v. The Knesset*, the Supreme Court stated once again that the deferment of military service is no longer necessary in terms of religious requirements faced by Yeshiva students<sup>14</sup>. First of all, according to the Supreme Court, such a treatment is disproportional, despite the recent changes in law, because Yeshiva students are still entitled to choose between too many options when it comes to deferment from military service<sup>15</sup>. Then, the Court noticed that the Tal Law does not face the equality standards since the other young citizens do not have similar possibility of deferment<sup>16</sup>. Finally, the Court repeated the thesis included in the abovementioned judgment of 1997 and few others issued in similar cases, i.e. that the exemption from military service had mostly political background which is no longer relevant and that it is not obligatory for Yeshiva students to resign from the service because of the orders of the religion<sup>17</sup>.

Because of this recent judgment and the derogation of the Tal Law, the schedules were made envisaging that Yeshiva students would join gradually military service till December 2013<sup>18</sup>. These

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<sup>13</sup> R. Levush, op.cit.

<sup>14</sup> I. Ruggiu, op.cit., p. 644.

<sup>15</sup> Ibidem, p. 645.

<sup>16</sup> Ibidem.

<sup>17</sup> Ibidem, p. 646.

<sup>18</sup> *Haredim Protest Jailing of Yeshiva Student Refusing IDF Draft*, ‘The Jewish

changes caused the angry reaction of this religious group. One of the most reported protests took place at the beginning of December 2013 when the 19-years old Yeshiva student was arrested after refusing to approach the Israel Defence Forces enlistment center<sup>19</sup>.

At least three conclusions can be drawn from the example of the deferment from military service of Yeshiva students in Israel. First of all, awarding Yeshiva students this special privilege had strong political background, connected on one hand with the beginnings of the State of Israel (as the Supreme Court in Rubinstein case stated, "The history of granting deferral of military service to full-time Yeshiva students [...] is in truth the history of the State of Israel itself"<sup>20</sup>), on the other hand with the pressure from the ultra-orthodox environment<sup>21</sup> and the recognition that the Yeshivas "safeguard Israel's religion and heritage"<sup>22</sup>. As the Supreme Court noticed many times afterwards, the deferment was not necessary from the standpoint of the religious requirements and, especially contemporary, could not be defended by the possible disappearance of the group because of small number of students.

Secondly, the law deferring Yeshiva students from military service was not only commonly exercised by these students but also abused by those who wanted to evade military service. Already in 1950, the Deputy Speaker of the Knesset minded that "some young men had been entering yeshiva solely in order to evade serving in the IDF, which was giving yeshiva study a bad name"<sup>23</sup>. Studying at the Yeshivas created a comfortable situation not only when it

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Daily Forward', <http://forward.com/articles/188832/haredim-protest-jailing-of-yeshiva-student-refusin/> (access: 15 December 2013).

<sup>19</sup> J. Sharon, *Extremist haredim violently protest arrest of yeshiva student by army*, "The Jerusalem Post", <http://www.jpost.com/National-News/Jerusalem-haredi-protest-over-imprisonment-of-yeshiva-student-turns-violent-334110> (access: 15 December 2013).

<sup>20</sup> Rubinstein case, par. 1.

<sup>21</sup> *Army Service by Ultra-Orthodox Yeshiva Students in Israel's First Years – Four Documents from the Personal Archives of Chief Rabbi Yitzhak HaLevi Herzog*, Israel State Archives, [http://www.archives.gov.il/ArchiveGov\\_Eng/Publications/ElectronicPirsum/ArmyService/](http://www.archives.gov.il/ArchiveGov_Eng/Publications/ElectronicPirsum/ArmyService/) (access: 15 December 2013).

<sup>22</sup> Ibidem.

<sup>23</sup> Ibidem.

comes to military service, but also from the social point of view – Yeshiva students do not work and altogether with their families are subsided by the state and private sources<sup>24</sup> (even though unemployment among Yeshiva students causes poverty, they are still placed in more favorable situation, as their unemployment is mostly their choice). Thus, it can be observed that the legislator did not manage to draft this special religious privilege in such a way to avoid abuses and only assure the preservation of this group.

Finally, regardless of legal and social arguments pointing the unfairness of the exemption given to Yeshiva students, as well as long term critical discussion upon this issue, Yeshiva students are still determined to defend their privilege. Bearing in mind that in Israel every female and male citizen of any age from eighteen years old to certain age need to go into military service, the inequality of treatment of citizens at the same age is clearly visible. As a result, one can notice that Yeshiva students recognize themselves as an independent and separate group in Israeli society and demand special approach, not only in social relations but also in the legal field.

### 3. Malays in Singapore vs. Singapore's national identity

Apart from Chinese majority (76,8%), in Singapore there are two important minorities: Malay (13,9%) and Indian (7,9%)<sup>25</sup>. The Malay minority is the reminiscent of the Singapore's history, as in the time of the Islam's growth in the Southeast Asia, Singapore was in Muslim-Malay possession<sup>26</sup>. Only in nineteenth century, after Singapore became British territory, it was settled by Chinese immigrants, and as a result, Malays became minority<sup>27</sup>.

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<sup>24</sup> Rubinstein case, par. 37.

<sup>25</sup> *Singapore*, The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html> (access: 15 December 2013).

<sup>26</sup> A. Nanji, *Dictionary of Islam*, London 2008, p. 173.

<sup>27</sup> *Ibidem*.

The Singapore's society from the nineteenth century to the half of twentieth century posed a paradox when it comes to the approach toward different cultural groups. On one hand, the British colonial power took into account the diversity existing within the groups of Chinese coming to Singapore and for instance, arranged their settling as to maintain the ethnic distinctions between them e.g. in the field of dialects<sup>28</sup>. Nevertheless, on the other hand, the sole Chinese were not able to fully respect the needs of the distinct groups living next to them, as they were not willing to grant Malays the same privileges which they held in the Malay peninsula. These cultural clashes led to the Singapore's separation and independence in 1965<sup>29</sup>.

Then, after some ethnical disturbances, the Singapore's government started to promote the idea of "Singapore's national identity", independent from any cultural or ethnical factors, even though this project targeted a very tough task to "distinguish between illegitimate ethnic loyalties, admirable ethnic cultural values and legitimate ethnic interests"<sup>30</sup>. This strategy is represented by the four M's' – multiracialism, multilingualism, multiculturalism and multireligiosity<sup>31</sup>. However, contemporary, the presence of different cultural groups is undoubtedly apparent not only in social and cultural structure of the Singapore's society but it also influences on law.

First and foremost, general remarks should be made, starting from the Singapore's Constitution<sup>32</sup>. In art. 15 (1), the Constitution guarantees every person the "right to profess and practice his religion and to propagate it". "Every religious group has the right

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<sup>28</sup> A. Ackermann, *They Give Us the Categories and We Fill Ourselves In – Ethnic Thinking in Singapore*, "International Journal on Minority and Group Rights" 1996–1997, vol. 4, issues 3–4, p. 452, <http://dx.doi.org/10.1163/15718119620907283>.

<sup>29</sup> Ibidem.

<sup>30</sup> Ibidem, p. 453.

<sup>31</sup> Ibidem, p. 455.

<sup>32</sup> <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%22cf2412ff-fca5-4a64-a8ef-b95b8987728e%22%20Status%3A-inforce%20Depth%3A0;rec=0> (access: 10 December 2013).

to manage their own religious affairs, to establish and maintain institutions for religious or charitable purposes and to acquire and own property and hold and administer it in accordance with law" (art. 15 (2)). This provision is even enhanced by "the right to freedom of speech and expression" (art. 14), "the right to equal treatment before the law and the equal protection of the law" (art. 12).

Nevertheless, it is hard not to notice the special treatment of the Malay minority. In 1959, the special agreement was reached between the government of Great Britain and the Singapore's government of that time, which resulted in the inclusion in the Constitution articles ensuring special provisions for Malays<sup>33</sup>. Article 152 (1) states that "the Government is responsible for care for the interests of the racial and religious minorities in Singapore". It "shall exercise its functions in such manner as to recognize the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language" (art. 152 (2)). As it is constitutional provision, all state's organs need to exercise their powers pursuant to this regulation<sup>34</sup>. It is worth to notice that this particular provision is neutral when it comes to religious questions, as it marks out Malays with no reference to Islam (thus, a further conclusion can be drawn that the whole Singapore's Constitution has the secular character)<sup>35</sup>.

Article 153 goes further in terms of special approach towards Muslims, providing that "the special legislation shall be enacted to regulate the Muslim religious affairs and to constitute a Council to advise the President in matters relating to the Muslim religion". This "special legislation" was passed in 1966 as "Act relating to

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<sup>33</sup> C.S. Keong, *Cultural Issues and Crime*, "Singapore Academy of Law Journal" 2000, vol. 12, p. 9–10.

<sup>34</sup> C.L. Lim, *Race, Multi-Cultural Accommodation And The Constitutions Of Singapore And Malaysia*, "Singapore Journal of Legal Studies" 2004, vol. 2004, issue 1, p. 118.

<sup>35</sup> *Ibidem*, p. 130.



Muslims and to make provision for regulating Muslim religious affairs and to constitute a council to advise on matters relating to the Muslim religion in Singapore and a Syariah Court” (short title Administration of Muslim Law Act). This instrument, apart from regulating the functioning of the Majlis Ugama Islam, special council advising in Muslim affairs (Part II), constitutes the Syariah Court for Singapore under the provisions of Part III. This Court has “jurisdiction to hear and determine all actions and proceedings in which all the parties are Muslims or where the parties were married under the provisions of the Muslim law and which involve disputes relating to specified family law and property law institutions”. What is more, offences enlisted in Part IX, shall apply only to Muslims, including registration of marriages or revocation of divorce (art. 130), cohabitation outside marriage (art. 134), no payment of zakat or fitrah (art. 137) or reference to any doctrine or performance of any ceremony or act relating to the Muslim religion in any manner contrary to the Muslim law (art. 139) etc.

The Administration of Muslim Law Act is the only regulation in Singapore’s legal system that refers to the offences committed only by representatives of one cultural group. The Penal Code<sup>36</sup> does not pertain to the cultural, religious or ethnical issues of any group. It contains only general provisions connected with the offences relating to the religion or race in Chapter XV. Thus, the prohibited acts are: injuring or defiling a place of worship with intent to insult the religion of any class, disturbing a religious assembly, trespassing on burial places, uttering words with deliberate intent to wound the religious or racial feelings of any person and promoting enmity between different groups on grounds of religion or race and doing acts prejudicial to maintenance of harmony.

The Singapore’s penal law is also unfavorable toward the concept of the cultural defense. It is said that law may protect certain groups but making any of them immune from general legal obligations would “deny the democratic values of equality before the law

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<sup>36</sup> <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=CompId%3Ae40d5913-c2dc-4284-bf68-eb315c55c8fa;rec=0> (access: 10 December 2013).

and the equal protection of the law”<sup>37</sup>. Such a statement does not seem to be inconsistent with the regulation of the Administration of the Muslim Law Act, as this instrument does not immune Malays from accountability but rather it intensifies the force of law imposing new obligations upon Malays because of their cultural background.

The Singapore legal system is a very peculiar example of the recognition of the multiculturalism in law, since it would appear that two completely different approaches toward culture are included in it. Thus, on one hand, there are special provisions concerning Malays whose position is determined by the historical and political background. Not only they are the only group among minorities distinguished by the Constitution, with two articles referring only to their culture and religion, but there is also a separate act that constitutes their own Court, its rules of procedure and even offences. Seemingly, the situation of Malays is comparable to the privileged treatment of Yeshiva students in Israel. Nevertheless, these two groups are in fact approached in considerably different way.

The difference is made especially by the second factor that occurs in the field of Singapore’s legal system. Analyzing articles: 152 and 153 of the Constitution, one should still bear in mind that the whole idea of multiculturalism in Singapore is not only reflected in these two provisions but has also strong roots in the abovementioned rights and freedoms guaranteed under art. 12–15 of the Constitution<sup>38</sup>. As a result, the concept of multiculturalism is not only limited to the treatment of Malays. Indeed, the Singapore’s law rather reflects the idea of “Singapore’s national identity” then places any cultural minority on a special position. Malays consider themselves to be discriminated in the whole range of issues in the field of law, starting from the ban on wearing headscarves at schools (contrary to Sikhs, who are entitled to do so), through the ban on newspapers published in Malaysia, ending with the restrictions imposed upon Malay private religious primary

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<sup>37</sup> C.S. Keong, *op.cit.*, p. 22.

<sup>38</sup> C.L. Lim, *op.cit.*, p. 132.

schools<sup>39</sup>. Summing up, it seems that regulations referring specifically to Malays are focused more on their recognition as indigenous people of Singapore, like it is underlined in the Singapore's Constitution, than are aimed at granting them any kind of privileged treatment in comparison to other minorities. And even this distinguishing approach towards Malays is fragmentary and does not face the real needs of Malays in Singapore.

#### 4. Aboriginal people in the Canadian legal system – the examples of the Criminal Code and the Nunavut Court of Justice

The Canadian Charter of Rights and Freedoms guarantees among many rights and freedoms, i.a. the freedom of conscience and religion, thought, belief, opinion and expression (art. 2 (a, b)). It refers also to democratic rights, mobility rights, equality rights and special provisions relating to languages spoken in Canada. Due to art. 27, the “Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”. According to the Aboriginal Affairs and Northern Development Canada, about 4% of Canadian population declare themselves as indigenous people, where 53% are Indians, 30% – Métis, 11% non-status Indians and 4% are Inuits<sup>40</sup>. Part II of the Charter refers to this part of the population as it recognizes and affirms the rights of aboriginal people of Canada (art. 35 (1)). However, it contains only two articles of rather formal character. In art. 35 (2), “aboriginal peoples of Canada” are said to mean “Indian, Inuit and Métis peoples of Canada”. Apart from Part II,

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<sup>39</sup> Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples – Singapore: Malays*, 2008, available at: <http://www.refworld.org/docid/49749cb046.html> (accessed 8 December 2013).

<sup>40</sup> <http://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795> (access: 15 December 2013).

in the Charter, there are provisions relating to aboriginal peoples land claims (art. 25 (b)) and to the constitutional conference that deals with the aboriginal peoples affaires (art. 37 (2)).

The assumption of art. 35 (1) of the Charter is reflected i.a. in the Canadian Criminal Code<sup>41</sup>. In section 718.2(e), it provides that a court which “imposes a sentence shall take into consideration all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders”. As the Supreme Court of Canada stated, this section “is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing [...] it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders”<sup>42</sup>. What is more, the Supreme Court noticed that this section should help in overcoming problems with racial discrimination towards Aboriginal people<sup>43</sup>. The Supreme Court also referred to two factors which should be considered passing a sentence when the member of aboriginal community is an accused. Thus, firstly, the judge must adhere to the fact that “the unique systemic or background factors [...] may have played a part in bringing the particular Aboriginal offender before the courts”; secondly, he/she must comply with “the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection”<sup>44</sup>.

Section 718.2(e) is the legislative response to the incarceration problems faced by the Aboriginal community in Canada. As it was said, Aboriginal people constitute about 4% of the Canadian population but in the meantime they represent 16,5% of the federal prisons population<sup>45</sup>. Such proportions in the incarceration rates

<sup>41</sup> <http://laws-lois.justice.gc.ca/eng/acts/c-46/> (access: 10 December 2013).

<sup>42</sup> R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, p. 6.

<sup>43</sup> Ibidem, p. 7.

<sup>44</sup> R.v. Wells, [2000] 1 S.C.R. 207, p. 208.

<sup>45</sup> *The State of the World's Indigenous Peoples*, ST/ESA/328, United Nations publication, New York 2009, (State of World's Indigenous People), <http://>

are said to be a form of the discrimination of Canadian indigenous people<sup>46</sup>. The factors which contribute to this situation can be divided into two groups. The first group consists of the social problems: “poverty, substance abuse, lack of education, and the lack of employment opportunities”<sup>47</sup>; the second one concerns the problems connected with the rights granted during the criminal procedure. For instance, a proceeding is conducted in English even though the accused who derives from the Aboriginal community speaks only his native language; often, interpreters are not available<sup>48</sup>.

Section 718.2(e) was introduced into the Criminal Code “to encourage courts to look at alternatives where it’s consistent with the protection of the public alternatives to jail”<sup>49</sup>. Thus, at least two conclusions can be drawn from essence of section 718.2(e). First of all, the imprisonment should be treated as the *ultima ratio*; secondly, the judge, when passing a sentence, should pay attention to the unique circumstances arising from the aboriginal roots of the offender (nevertheless, it is not a principle indicating judges any kind of preference towards Aboriginal people<sup>50</sup>).

One of the most important legal instruments concerning the affairs of Aboriginal people is the Nunavut Act of 1993. Nunavut is the name of the territory in the Northern Canada, with Inuits constituting the majority of the population<sup>51</sup>. This act is a part of group of legislations enacted in order to support the Inuits claims for self-government<sup>52</sup>. The Nunavut Act, in section 31 (1), establishes “The Nunavut Court of Justice and the Court of Appeal of

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[www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf), p. 206, (access: 10 December 2013).

<sup>46</sup> Ibidem.

<sup>47</sup> R. v. Glaude, [1999] 1 S.C.R. 688, par. 65.

<sup>48</sup> State of the World’s Indigenous People, p. 206.

<sup>49</sup> “Minutes of Proceedings and Evidence” 1994, issue 62, November 17. 1994, p. 62.

<sup>50</sup> R. v. Glaude, par. 36–37.

<sup>51</sup> Qikiqtani Inuit Association v. Canada (Minister of Natural Resources), 2010 NUCJ 12 (CanLII).

<sup>52</sup> L. Nowlan-Card, *Public Governemnt And Regulatory Participation in Nunavut: Effective Self-Government for the Iuniu*, “Dalhouse Journal of Legal Studies” 1996, vol. 5, p. 32.

Nunavut as superior courts that have and may exercise in relation to Nunavut all the powers and jurisdiction that the Supreme Court of the Northwest Territories and the Court of Appeal of the Northwest Territories". This regulation resulted in the provisions of the Criminal Code and its Part XIX.1, which concerns this Court.

Nunavut Court of Justice hears both the civil law and criminal law cases, what is indicated by the Nunavut Act. As far as criminal law cases are considered, in section 35 (1) it states that "A judge of the Nunavut Court of Justice has and may exercise and perform, anywhere in Canada, all the powers, duties and functions of the Court with respect to any criminal offence committed or charged to have been committed in Nunavut". The criminal cases constitute the substantial number of all tried cases<sup>53</sup>. In years 2011–2012, about 2000 cases were concluded in the Court in adult criminal proceedings<sup>54</sup>. Nevertheless, the court is not in any mean "culturally" oriented as there are no special provisions of the Rules of Court which would indicate any particular attention towards the situation of Aboriginal people. What is more, the judges of the Court are not Inuits and they learn about the aboriginal culture from the readings and their practice within the aboriginal communities.

However, the Nunavut Court of Justice is culturally sensitive and recognizes the special situation of Aboriginal people. In this term, *Qikiqtani Inuit Association v. Canada* is considered to be the landmark case. Its legal grounds constitutes the Nunavut Land Claims Agreement (which is, together with the Nunavut Act, one of the most important legal documents connected with the rights of Aboriginal people). The Court had to examine the application of the *Qikiqtani Inuit Association* which demanded "the interlocutory injunction to stop Canada from conducting seismic testing in waters of North Baffin Island". The Court examined not only the environmental factors but also the possible influence upon the Inuit community. It noticed that the mammals important for Inuit

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<sup>53</sup> *Ingirranivut Our Journey: A Statistical and Comparative Review of Crime and Court Operations in Nunavut 2000–2012*, [http://www.nucj.ca/files/2013\\_AnnualReport\\_English.pdf](http://www.nucj.ca/files/2013_AnnualReport_English.pdf) (access: 10 December 2013), p. 3.

<sup>54</sup> *Ibidem*, p. 16.

diet could be driven away from the previous habitats because of the tests. It could result in many aspects of Inuit tradition, e.g. “the opportunity to make traditional clothing”, “the cultural tradition of sharing country food with others in the community”, “the opportunity to participate in the hunt”. The Court concluded that the possible loss caused by the tests “extends not just to the loss of a food source, but to a loss of culture”, and decided to issue an injunction.

Taking into account the amount of legal instruments referring to Aboriginal people in Canada, it can be undoubtedly affirmed that Canada is aware of the needs of this part of the society and is actively acting in the interest of Aboriginal people. All of the above-mentioned regulations and judgments are aimed at ameliorating the situation of First Nations, not only basing on the politically correct statements towards different cultures but also considering the real problems of the aboriginal communities. Nevertheless, these efforts are insufficient. The endeavors and their unsatisfactory results were also noticed by James Anaya, the United Nations Special Rapporteur on the rights of indigenous peoples, who visited Canada in October 2013. In his *Statement upon conclusion of the visit to Canada*, the UN Special Rapporteur noticed that “Canada is aware of and concerned about these issues, and that it is taking steps to address them. [...] However, it is equally clear that these steps are insufficient, and have yet to fully respond to aboriginal peoples urgent needs”<sup>55</sup>. Even though Canada introduced many programs and projects to cope with the social exclusion of Aboriginal people, it would be hard to affirm that Aboriginals are fully the rightful members of the society.

The most sharp example of the discrimination is the merit of the incarceration rates among First Nations. As the UN Special Rapporteur noticed, Canada passed many legal instruments concerning Aboriginal people but these acts are not exercised or they are not

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<sup>55</sup> Statement upon conclusion of the visit to Canada by the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13868&LangID=E> (access: 10 December 2013).

exercised adequately. The case of Aboriginal people in Canada is an example of the proper legal approach towards different cultures but with little or too few practical results. In comparison to situation of Malays in Singapore, it would be untrue to say that Aboriginal people in Canada face the same discrimination problems as Malays. Nevertheless, there is the discrimination in the Canadian example, but it reaches the level of enforcing law, not passing legislations or granting rights.

## 5. Conclusions

The three presented examples show diverse approaches towards the recognition of different cultures in the field of law. In the case of Yeshiva students, the privilege was granted to the part of the society not so culturally distant from the majority of Israeli population, although definitely more orthodox in terms of religion and that is why treated extraordinarily. The Malay instance drew the situation when the state affirms the rights of the cultural minority and reflects it in legal regulations. Nevertheless, in the meantime, it forms the program which supports the unification of all cultural groups and creates the artificial identity connected with the statehood, disregarding the cultural roots. The third example depicts that even a state like Canada, democratic and praised for respect towards human rights, protects cultural minorities in the legal instruments, but with unsatisfactory results in practice.

Taking into consideration these three situations, the first conclusion which can be drawn is that combining the protection of cultural minorities in the field of theory and practice poses a serious problems for legislations. Not only there is no single way of codifying the political and social recognition of minorities but it seems that even after years of inter-cultural relations, particular states face difficulties with adhering the legislation and the level of the enforcement of law with the needs of every part of the population.

The main issue which hinder these processes is the approach of this part of populations which dominates in terms of culture and as it does not want to grant any kind of special treatment to



distinct groups in minority. In Yeshiva students case, the attitude of the society is determined by the exemption from one of the most important responsibilities of the Israeli citizens towards the state. In Malay example, the state endeavors to marginalize this part of the population which previously dominated the region and on these grounds seeks for special treatment. In Canadian society, the poor level of the development of the indigenous people seems to be the reason for unfavorable treatment, even in legal proceedings.

The rights of cultural minorities are in every of the abovementioned cases recognized and legally granted. However, even the most satisfactory legislation cannot resolve the problem when the majority of the population (altogether with the government, as in the Singapore's case) only tolerates but does not support these groups. The examples of Israel, Singapore and Canada are different in details but in real expose the same problem – law is the social phenomenon and with no social engagement law will rest only in books.

## **STRESZCZENIE**

### **Jak prawo uznaje kulturę?**

#### **Przykłady z różnych systemów prawnych**

Niektóre systemy prawne uznają zarówno na poziomie konstytucji, jak i ustawodawstwa odrębne prawa i obowiązki mniejszości kulturowych. Dla zilustrowania tego zagadnienia artykuł posługuje się trzema przykładami. Po pierwsze, omówiono legislację zwalniającą z obowiązku służby wojskowej uczniów szkół Jesziwa. Przedstawione zostało orzecznictwo izraelskiego sądu najwyższego, który kilkakrotnie rozpatrywał sprawę z tym związane, ostatecznie uznając przepisy pozwalające na zwolnienie za niekonstytucyjne. Po drugie, została pokazana sytuacja Malajów w Singapurze, którzy mimo wyróżnienia w konstytucji i w akcie poświęconym wyłącznie tej mniejszości, uważają się za dyskryminowanych w niektórych dziedzinach. Po trzecie, jest także mowa o ludności autochtonicznej Kanady. Główny nacisk skierowano na omówienie regulacji kodeksu karnego, który nakazuje brać pod uwagę przy wydawaniu wyroków specyficzną sytuację ludności autochtonicznej. W podsumowaniu wskazano na problemy krajowych legislacji związane z uwzględnieniem w prawie specyficznych potrzeb mniejszości kulturowych.

**Słowa kluczowe:** Kanada, kultura, ludność autochtoniczna, Izrael, prawo, prawo karne, Singapur

## SUMMARY

How law can recognize culture?  
The examples from different legal systems

There are legal systems which recognize on both the constitutional and legislative level the rights and duties of the cultural minorities. The paper deals with three examples. First of all, the legislation connected with the deferment from military service of Yeshiva students is discussed. The case law of the Supreme Court of Israel is depicted, including the last judgment finally pointing the unconstitutionality of the instrument concerning the deferment. Secondly, the situation of Malays in Singapore is presented. The attention is focused on the fact that despite of being distinguished in constitution and special act devoted only to them, Malays consider themselves to be discriminated in some fields. Thirdly, the Canadian indigenous people example is discussed. This part especially elaborates on the regulation of the Criminal Code and its provisions regarding indigenous people. In the sum up, one needs to underline the problems of national legislations with recognizing fully the needs of cultural minorities.

**Keywords:** Canada, criminal law, culture, indigenous people, Israel, law, Singapore

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