

*Hamish Stewart*

University of Toronto, Canada

## Group-differentiated rights: a challenge to penal law\*

DOI: <http://dx.doi.org/10.12775/SIT.2014.032>

### 1. Introduction

The multicultural nature of most large modern states has frequently produced conflicts between the generally applicable law of the state and the customs or practices of certain minority groups. Sometimes, those conflicts create pressure on the penal law; that is, they give rise to demands that members of minority groups should on cultural grounds be excused from punishment or exempted altogether from certain prohibitions. Multiculturalism has also given rise to a large academic literature that offers reasons for supporting, or opposing, the accommodation of cultural customs and practices in the face of general laws that would (intentionally or not) prohibit, discourage, or damage those practices. In this paper, I outline a liberal version of the argument for accommodation-Will Kymlicka's case for "group-differentiated rights"<sup>1</sup> – and consider its implications for penal law. In a modern multicultural state, laws of general application may damage some of the cultures within the state. But, Kymlicka argues, access to and participation in a culture is necessary for every individual's freedom. Therefore, equal

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\* W. Kymlicka, *Multicultural Citizenship*, Oxford 1995. For related arguments, see: I.M. Young, *Justice and the Politics of Difference*, Princeton 1990; A. Shachar, *Multicultural Jurisdictions*, Cambridge 2001.

treatment of individuals who are members of different cultures may require the state to modify the way that the law applies to individuals, depending on their cultural membership: even the liberal state should recognize group-differentiated rights. Discussions of the implications of this argument for penal law have tended to revolve around the “cultural defence”, that is, the question whether and to what extent the penal law should excuse offenders or mitigate their punishment on grounds related to their cultur<sup>1</sup>. But if Kymlicka’s general case is correct, the accommodation of multicultural differences in penal law cannot be limited to recognizing culture-based excuses but must extend to exempting members of minority groups from certain generally applicable prohibitions. Yet this implication in turn threatens the liberal ideal of “one penal law for all” – the ambition of the penal law to be uniform throughout a given state. I suggest that the accommodation of multicultural difference in penal law can be reconciled with the ideal of one penal law for all by distinguishing between a class of true crimes and a class of regulatory offences. Excessive variation in the application of true crimes threatens the legitimacy of the state’s claim to govern in the interest of everyone because it threatens the claim of the state to protect everyone’s basic interests and the basic elements of the legal order. So, presumptively, the criminal law applies to everyone. But regulatory penal law can vary for many reasons without threatening the legitimacy of the legal order. So, presumptively, regulatory penal law should be open to variation to accommodate cultural difference.

## 2. The liberal case for group-differentiated rights

Liberalism, as a political ideal, is associated with a constellation of values that might be summed up as “neutrality”: the idea that the state and the law should be neutral as between different con-

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<sup>1</sup> See the papers in *Criminal Law and Cultural Diversity*, eds. W. Kymlicka, C. Lernestedt, M. Matravers, Oxford 2014 (forthcoming) and in *Multi-*

ceptions of the good life. Versions of this idea can be seen in the work of thinkers who are in other respects quite different from each other: in Kant's claim that the law should concern itself only with the "form" of a person's choice and not its "matter"<sup>2</sup>, in Mill's "harm principle"<sup>3</sup>, and in Rawls's effort to define a conception of "public reason" suitable for political debate in a society where people disagree profoundly about the good<sup>4</sup>. But liberalism is also associated with a constellation of values that might be summed up as "autonomy": the idea that the political subject, the individual who both participates in political life and is subject to the legitimate political decisions made by the state, is a person who has the ability to formulate and act upon his or her own conception of the good life and to revise that conception from time to time<sup>5</sup>. Neutrality creates space for autonomy by reducing the degree of state coercion exercised over the liberal subject when he or she is formulating and acting upon his or her conception of the good. But neutrality by itself does not give the autonomous liberal subject any particular abilities or tools with which to formulate and act upon a conception of the good. And so some liberals have emphasized the things the autonomous self needs for this purpose. Rawls's "primary goods" and Sen's "capabilities" are attempts to define the means that any autonomous choosing self needs for its project and that public policy might therefore legitimately be concerned with<sup>6</sup>. Another version of this approach is Raz's emphasis on the need for the autonomous self to have social conditions under which it is

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*cultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, eds. M.-C. Foblets, A. Dundas Renteln, Oxford 2009.

<sup>2</sup> I. Kant, *Practical Philosophy*, ed. and transl. M. Gergor Cambridge 1996, p. 387.

<sup>3</sup> J.S. Mill, *On Liberty*, in: *Collected Works of John Stuart Mill*, vol. 18, Toronto 1977, p. 223–224.

<sup>4</sup> J. Rawls, *Political Liberalism*, New York, 1993, lecture 6.

<sup>5</sup> I. Kant, op.cit., p. 291; Rawls, *Political Liberalism*, lecture 2; W. Kymlicka, op.cit., p. 80–82.

<sup>6</sup> J. Rawls, *A Theory of Justice*, rev. ed., Cambridge 1999, § 11; idem, *Social Unity and Primary Goods*, in his *Collected Papers*, Cambridge 1999, p. 359; Amartya K. Sen, *The Idea of Justice*, Cambridge 2009, pp. 225–290.

possible for him or her to pursue valuable projects, and therefore on the need for the state to promote those social conditions<sup>7</sup>. On these approaches, public support for autonomy inevitably compromises any public commitment to neutrality.

Kymlicka's liberal argument for group-differentiated rights is closely connected with this second constellation of liberal values (though in the end he believes it is not seriously in conflict with the first). Kymlicka argues that the autonomous self needs what he calls a "societal culture" for its project of formulating and acting upon its own conception of the good. While the notion of "culture" is contestable, Kymlicka understands it as "an intergenerational community, more or less institutionally complete, occupying a given territory sharing a distinct language and history"<sup>8</sup>. A societal culture is a culture that "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life". It tends to be "territorially concentrated and based on a shared language"<sup>9</sup>. A societal culture is necessary for the liberal self not only because it provides instances of ways of life from which the self can choose but also because it makes those ways of life "meaningful to us"<sup>10</sup>. Indeed, it is difficult to imagine how a person could develop from childhood into adulthood, along the way acquiring the attributes of the autonomous self, outside any societal culture, without participating in at least one societal culture, learning its language and history, and without participating in its characteristic forms of thought, including perhaps its religion or at least its religious traditions and rituals. There is no culturally neutral standpoint from which to raise a child or from which an adult can exercise his or her autonomous choices about the good life. So the state cannot be neutral between all possible cultures, and indeed normally provides strong support for at least one societal culture: the culture of the majority.

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<sup>7</sup> J. Raz, *The Morality of Freedom*, Oxford 1986, chapter 12.

<sup>8</sup> W. Kymlicka, *op.cit.*, p. 18.

<sup>9</sup> *Ibidem*, p. 76.

<sup>10</sup> *Ibidem*, p. 83.

It is conceivable that a state, particularly a small one, might be so homogeneous that it could be said to have only one societal culture; but as a matter of fact, most modern states, particularly the large ones, are multicultural, that is, they have authority over people who belong to more than one societal culture. Kymlicka notes that multiculturalism can arise in (at least) two ways. First, some states are multinational: they contain “more than one nation, where «nation» means a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture”<sup>11</sup>. A multinational state may have a majority culture, but will always have one or more national minorities as well. Second, some states are, in Kymlicka’s terms, polyethnic: they contain a number of ethnic minorities in addition to the majority ethnic group. These states have welcomed or at least accepted significant numbers of immigrants from other parts of the world, immigrants who are generally willing to integrate into their new state and so do not seek to establish a “nation” within the state, but who also wish to retain some aspects of their original culture. That is, immigrants from one part of the world may, in another part of the world, constitute an “ethnic group”, a “loosely aggregated” cultural group within the larger society<sup>12</sup>. Canada and (Kymlicka argues) the United States are both multinational and polyethnic; China is polyethnic<sup>13</sup>; France is polyethnic but perhaps not multinational; Belgium is multinational; and there are many other examples of both types of multicultural states.

Laws of general application, if enacted and applied by members of the majority culture without regard to the languages, beliefs, and practices of national or ethnic minorities, may damage those

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<sup>11</sup> Ibidem, p. 11.

<sup>12</sup> Ibidem, p. 15.

<sup>13</sup> Some might argue that China is multinational as well; though it is not a federal state, its autonomous regions and special administrative regions were intended in some measure to accommodate national minorities. But any argument to this effect would have to take account of the overwhelming political role of the Communist Party of China not only at the national level but also in all subnational units. Compare the discussion in Q. Zhang, *The Constitution of China*, Oxford 2012, p. 97–118.

minority cultures. But, as we have seen, everyone belongs to some societal culture or another; no child can develop as a person and no adult can act as an autonomous agent outside the context of all societal cultures. As Kymlicka puts it, “access to a societal culture is essential for individual freedom”<sup>14</sup>. So, unless the state deliberately (and wrongfully) sets out to promote one societal culture to the exclusion of all others, Kymlicka argues that equal treatment as between individuals, as members of different societal cultures, requires the state to recognize that different individuals may formally have different legal rights on account of their group membership; that is, the law should recognize “group-differentiated rights”<sup>15</sup>.

One of the most interesting and compelling examples of a group-differentiated right relates to language. There can be no question that language is central to culture. Yet the state must choose one or more languages in which to carry out its works: the conduct of legislative debate and judicial proceedings, the publication of laws, the provision of services to the general public, the schooling of children. Normally the state does, and in most situations probably should, choose the language of the majority national group (or a relatively small number of languages spoken by the largest national groups) for these purposes. But this choice is inevitably non-neutral between the various cultural groups that it governs: “When the government decides the language of public schooling, it is providing what is probably the most important form of support needed by societal cultures, since it guarantees the passing on of the language and its associated traditions and conventions to the next generation”<sup>16</sup>. So, Kymlicka argues, the state should support minority language rights so as to ensure “that all national groups have the opportunity to maintain themselves as a distinct culture, if they so choose”<sup>17</sup>. There are various institutional means by which

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<sup>14</sup> W. Kymlicka, *op.cit.*, p. 107.

<sup>15</sup> *Ibidem*, p. 108–115.

<sup>16</sup> *Ibidem*, p. 111.

<sup>17</sup> *Ibidem*, p. 113.

this can be accomplished; it may be that a national minority has or is granted jurisdiction over a particular geographical area so that it has the power to support its language in that area; or it may be that the national government commits itself to supporting a minority language by requiring the provision of both government and private services in that language as well as in the majority language. Both of these techniques have been used in Canada. The majority of the population of the province of Quebec is Franco-phone and the legislature of Quebec has taken steps to protect and enhance the use of the French language (though Anglophones living in Quebec are constitutionally entitled to certain protections for their language as well)<sup>18</sup>. At the same time, the federal government and some provincial governments are constitutionally or statutorily committed to respect certain linguistic rights. These approaches create group-differentiated rights. For example, in Canada, everyone charged with an offence has a right to an interpreter<sup>19</sup>, which is a straight forward adjunct of the right to a fair trial; but speakers of English or French who are accused of crimes have very powerful rights concerning the language, or languages, in which the trial is conducted. These rights go well beyond the requirements of a fair trial and are not available to speakers of other languages<sup>20</sup>. The English and French communities of New Brunswick have a constitutional right to “distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities”<sup>21</sup>, and the right to receive government services in English or French<sup>22</sup>, a right that the French and English communities of other provinces lack (though they often have statutory rights to receive government services in either English or French).

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<sup>18</sup> *Constitution Act, 1867*, s. 133; Canadian Charter of Rights and Freedoms, s. 23.

<sup>19</sup> Canadian Charter of Rights and Freedoms, s. 14.

<sup>20</sup> The relevant statutory provisions are found in the *Criminal Code*, R.S.C. 1985, c. C-46, part 17; see also *R. v. Beaulac*, [1999] 1 S.C.R. 768.

<sup>21</sup> Canadian Charter of Rights and Freedoms, s. 16.1(1).

<sup>22</sup> Canadian Charter of Rights and Freedoms, s. 20(2).

### 3. One law for all

If neutrality and autonomy are core liberal values, so is the ideal of the rule of law. The content of this ideal is deeply controversial—conceptions of the rule of law available in the literature and in political discourse include the minimal notion that state action must be authorized by valid law, the maximal notion that state action should comply with a rich set of political values, and every possible position in between. But a common theme in most conceptions of the rule of law is that no-one, public or private, is above the requirements of the law or beyond the reach of the legal process<sup>23</sup>. This conception of the law's reach typically goes along with the idea that the law is uniformly applicable to everyone; it would be odd to celebrate a legal system that made everyone subject to the legal process if at the same time the system made radically different demands on different individuals for no apparent reason. We expect the law's requirements, at least at the most general level, to apply to everyone: everyone should, for example, comply with his or her contractual obligations and with the criminal law. We do not expect the law to say that the members of a particular religion can enter into contracts and then refuse to carry out their obligations on religious grounds; if a contract would cause some religious difficulty, we expect them not to enter into it in the first place. Similarly, we expect the penal law to distinguish between different types of conduct, not different types of persons; we would find it odd for the penal law to permit members of one culture or age group to help themselves to others' property while members of another culture or age group are prohibited from doing so under the law of theft. Nor is it just for the rich to have, beyond all the material advantages that flow from their wealth, the additional advantage of being exempted from the law's requirements.

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<sup>23</sup> Compare A.V. Dicey, *The Law of the Constitution*, ed. J.W.F. Allison, Oxford 2013, p. 100; J. Waldron, *One Law for All*, "Washington & Lee Law Review" 2002, no. 59, p. 3.



That said, there is an inevitable degree of variability in the law's application. The law can vary considerably from one location to another, particularly in a federal state; some laws apply to people in a particular role and not to everyone; some laws apply to persons above or below a certain age and not others. But under the rule of law, these kind of variations have to be justified in some rational way, and if they are so justified, they do not seriously compromise the ideal of one law for all. Geographical variation is an inevitable result of the territorial jurisdiction of states and subnational units; role-based and age-based variations are unobjectionable as long as properly related to the role or age in question. Put another way, the ideal of one law for all does not require uniformity but does require good reasons for variations in the law's requirements.

#### 4. Group-differentiated rights and penal law

The ideal of one law for all seems particularly compelling in penal law. The rule of law is not seriously, if at all, impaired by regional or local differences in matters such as the formalities for making a will or the permissible uses of land, as long as those differences are not too finely drawn. But the imposition of a penal sanction is one of the harshest things that a state can do to an individual subject to its authority. Moreover, more than any other branch of the law, the penal law is plausibly understood as prohibiting certain conduct outright. So it seems anomalous that if the state can prove that two people committed the same prohibited act, with the same level of fault, and without any generally recognized defence, one person would be punishable and the other not, on account of some personal characteristic that has nothing to do with the definition of the offence or of standard defences. Yet, Kymlicka's argument for group-differentiated rights has precisely that implication.

The basic implication is straightforward: if Kymlicka's argument for group-differentiated rights is correct, it cannot be confined to such matters as electoral procedures, language rights, and school-

ing policy<sup>24</sup> but must extend to penal law. This is particularly so because penal law is so widely used as a method for regulating behaviour in modern states. Regardless of the particular legal subject-matter in question—murder, sexuality, elections, liquor control, agriculture, language, highway traffic—in modern states one is likely to find that the law’s requirements are routinely enforced or ultimately backed up by a threat of penal sanctions. Given this reality, it is hard to see how the recognition of group-differentiated rights would not lead to differential applications of penal law. To see this, consider three types of cases.

First, imagine that a member of an ethnic minority commits an offence of some kind and, while admitting the commission of the offence, offers some fact about his or her culture that explains his or her conduct. If a court accepts that fact as providing him or her with a partial or full excuse for committing the offence, when the same fact would not excuse a member of the majority culture, then the penal law does not apply uniformly to all persons who are subject to the state’s authority. The right to raise culturally relevant facts in defence to a criminal charge would be a group-differentiated right; members of some ethnic minorities would have a procedural right to assert certain excuses that members of the dominant cultural group, or indeed members of other ethnic minorities, would lack.

This first kind of example has received extensive study under the rubric of the “cultural defence”<sup>25</sup>. Some scholars have argued that, contrary to appearances, the cultural defence is a way of promoting equality in the application of the penal law because, on a proper understanding of criminal responsibility, cultural motives and reasons for violating the law do reduce the moral culpability

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<sup>24</sup> For discussion of the relevance of group-differentiated rights to these topics, see: W. Kymlicka, *op.cit.*, chapter 7 (electoral law), p. 111–113 (language), p. 58–60 (schooling); A. Shachar, *op.cit.*, p. 154–160 (schooling).

<sup>25</sup> Most of the contributors to the volumes cited in note 2 above focus on questions of criminal responsibility rather than on questions of criminalization.

of the offender<sup>26</sup>. This argument assumes a particular account of retributivism, specifically that the purpose of criminal punishment is to give the offender what he or she deserves, morally speaking<sup>27</sup>. It may be possible to adapt the argument to fit other accounts of the purpose of punishment, such as responding to wrongs that have a specifically public or juridical character rather than moral wrongs<sup>28</sup> or deterring wrongdoers (with or without constraints based on fairness). But in any event, the cultural defence, on this reading, operates as an excuse (complete or partial) rather than a justification for committing the act. The act remains wrongful, but the actor is not punished where a member of the majority culture would be, or is punished less severely than a member of the majority culture who commits the same crime would be<sup>29</sup>. The debate about the scope of the cultural defence as an excuse is an important one, but rather than entering into it, I explore questions of criminalization rather than questions of responsibility. If the liberal argument for group-differentiated rights is correct, the liberal case for “one law for all” is compromised, not just at the stage

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<sup>26</sup> A. Dundes Rentelen, *The Cultural Defense*, New York 2004, p. 47; idem, *What Do We Have To Fear from the Cultural Defense*, in: *Criminal Law and Cultural Diversity*; B. Parekh, *Cultural Defense and the Criminal Law*, in: *Criminal Law and Cultural Diversity*. A related approach is to recognize cultural factors as relevant to standard questions of criminal liability; for example a cultural factor might negate an offence element or contribute to defences such as provocation or necessity: see, for example, C. Lernestedt, *Criminal Law and Culture*, in: *Criminal Law and Cultural Diversity*.

<sup>27</sup> For a prominent defence of this variety of retributivism, see M.S. Moore, *Placing Blame*, Oxford 1997.

<sup>28</sup> As argued, in different ways, by A. Ripstein, *Force and Freedom*, Cambridge 2009, Chapter 10; A. Brudner, *Punishment and Freedom*, Oxford 2009, chapter 1; S.E. Marshall, R.A. Duff, *Criminalization and Sharing Wrongs*, “Canadian Journal of Law and Jurisprudence” 1998, no. 11, p. 7.

<sup>29</sup> A. Dundes Rentelen, *The Cultural Defense*, p. 187–201. In more recent work, Alison Renteln has used the expression “cultural defence” in a broader sense that encompasses the criminalization issue as well as the criminal responsibility issue: see A. Dundes Renteln, *What Do We Have To Fear from the Cultural Defense*. For a discussion of how the perspectives of a minority culture might be brought to bear in the sentencing process (without formal recognition of a “cultural defence”), see A. Shachar, op.cit., p. 160–165.

of assigning responsibility but also at the stage of defining who is prohibited from doing what. While recognizing a criminal law excuse may go some way to giving effect to cultural difference in criminal law, if Kymlicka's argument is correct, the more fundamental point is that group-differentiated rights may give rise to differential application of criminal prohibitions to members of different groups. Put another way, group-differentiated rights create issues of both criminalization and criminal responsibility.

Suppose that there are some acts that are important to a particular societal culture but are prohibited with penal consequences. Suppose further the only way that cultural diversity influences the penal law is through culture-based excuses. Then the fact that the act might be excused later would not deprive it of its legally wrongful character. This approach would have two closely related consequences that are quite undesirable from the point of view of multicultural accommodation. First, a conscientious citizen who was also a member of that societal culture would face an uncomfortable choice between complying with the law and denying the importance of the act to his or her cultural identity, or committing the act and risking prosecution. Second, an agent of the state could intervene to prevent the citizen from committing the act. There are many scenarios in which a member of an ethnic or national minority does not want to be told: "Do not commit this act (though we may excuse you later)"; rather, he or she wants to be permitted to commit the act, even if it is forbidden to members of the majority culture<sup>30</sup>. Imagine a butcher who has a religious obligation to slaughter cattle in a manner forbidden by the general law governing the slaughter of animals for food, or a person who wishes to wear a turban instead of the required helmet while riding a motorcycle, or a person who wishes to consume a controlled or prohibited substance for religious or cultural reasons. If the best the penal law can offer to these individuals is an excuse, then the state could refuse to authorise the operation of a slaughter-house that for religious reasons does not comply with the general law; a police officer could, perhaps, order a turban-wearing motor-cycle rider

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<sup>30</sup> Compare J. Waldron, *op.cit.*, p. 10.

to get off the public highway; and a drug enforcement team could raid and seize a cache of drugs maintained for religious reasons. The conduct would remain unlawful and could be systematically prevented by the state.

Many examples fall into this second category of concern. In such cases, offering an excuse is inadequate to take account of the importance of the act to members of a national or ethnic minority, so the law must provide some kind of accommodation. This is a familiar idea in the application of human rights law in contexts of employment or schooling<sup>31</sup>. But when applied to penal law, it immediately suggests that some people might have the right to perform acts that others may be punished for performing, and thus derogates from the ideal of one penal law for all. And if the original prohibition can be rationally justified, any accommodation is inevitably going to detract from the legitimate purposes of that prohibition. But other cultural or religious practices are risky or harmful to others, or rights-violating, and therefore not so easily accommodated. Male Sikhs have a religious obligation to carry a dagger; efforts to accommodate this religious obligation in Western countries have generally emphasized the possibility of reducing the risk of the dagger's being used<sup>32</sup>, but as Waldron reminds us, there is a way in which this type of accommodation does not fully recognize the religious meaning of the dagger: it may be that the dangerousness of the kirpan is part of its religious significance<sup>33</sup>. Similarly, the circumcision of infant males is, for some, a religious obligation; clitoridectomy of young girls is, for some, a cultural practice<sup>34</sup>. Both practices would be very serious offences if committed on an adult who did not consent<sup>35</sup>, and it has to my knowledge never been

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<sup>31</sup> See, for instance, *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6.

<sup>32</sup> As in *ibidem*.

<sup>33</sup> J. Waldron, *op.cit.*, p. 7.

<sup>34</sup> See *Female Circumcision: Multicultural Perspectives*, ed. R.M. Abusharaf, Philadelphia 2006.

<sup>35</sup> An adult male can probably consent to circumcision, but it is questionable whether consent to clitoridectomy would be recognized by law in the Western world unless there was a very sound medical reason. For a discussion of when,

argued that a member of an ethnic or national minority should be permitted to commit them on an adult without his or her consent. Should the penal law nonetheless recognize the right of some parents to commit them on a child for religious or cultural reasons, while prohibiting other parents from doing so? Must the argument for group-differentiated rights extend as far as these seemingly core areas of criminal law?

As a third type of case, imagine a national minority that has been given jurisdiction over an area where it constitutes a majority, either as a unit in a federal state or as an autonomous region within a unitary state. The government of this region is likely to enact laws to protect some aspects of the national minority's culture, notably its language, and it may prove necessary to use penal sanctions in support of these laws. For example, the regional government might require the use of the national minority's language in publicly visible signs and might enforce that requirement with penal sanctions<sup>36</sup>, while in other regions such laws are not required (because the majority language can maintain itself quite effectively without them)<sup>37</sup>. So residents of this region will be subject to penal laws that do not apply to residents of other regions. Perhaps this difference is not alarming in itself; in any federal system, the penal law is likely to vary from one unit to another, particularly where the constitution assigns authority over criminal law to the legislatures of subnational units such as states and provinces rather than to the federal legislature. But the larger the differences between the penal law of one region and the penal law of another region, the more the ideal of one penal law for all might be compromised<sup>38</sup>.

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and why, the law will recognize consent as a defence to the infliction of bodily harm, see H. Stewart, *The limits of consent and the law of assault*, "Canadian Journal of Law and Jurisprudence" 2011, no. 24, p. 205.

<sup>36</sup> Compare the laws at issue in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

<sup>37</sup> An objection to a regional law mandating the use of a particular language in certain contexts might be that it was an unjustifiable interference with freedom of expression. But that is not the same objection as the derogation from the principle of one penal law for all.

<sup>38</sup> The recent legalization of marijuana in the state of Colorado and Washington will provide an interesting test case for the viability of differing penal laws

## 5. Resolving the tension

Cases in the second and third category show the difficulty of confining the implications of group-differentiated rights for penal law to the domain of the cultural defence (understood as an excuse). If cultural identity is as important for the liberal self as Kymlicka argues, and if certain practices that the penal law generally forbids are important to the identity of an ethnic or national minority, then it may well be the case that members of ethnic or national minorities should be permitted to commit acts that members of the dominant culture are forbidden to commit, or that an ethnic or national minority, particularly in a federal state, should be permitted to punish its members, and perhaps others under its jurisdiction, for conduct that is not an offence for members of the dominant culture. But these implications are troubling for anyone who takes the principle of “one law for all” seriously, particularly in the domain of penal law.

There are at least four strategies for resolving these tensions. First, one might entirely give up the ideal of one penal law for all and accept any differential application of the penal law that flowed from the broader argument for group-differentiated rights. But that is a troubling prospect. The rule-of-law requirement that everyone be subject to the same law, particularly in penal matters, is a powerful ideal and a significant political achievement, or at least aspiration, of modern states<sup>39</sup>. Moreover, it is an important protection for cultural minorities and their individual members themselves. The

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in a federal jurisdiction, particularly since possession of marijuana remains an offence under U.S. federal criminal law.

<sup>39</sup> Compare J. Waldron, p. 12–13. For an interesting description of some cases where prosecutorial and judicial discretion in dealing with quite serious crimes achieved what was in essence an accommodation of the practices and beliefs of certain minority groups in China, see Du Yu, *The Customary Law in the practice of Criminal Law: A Real and Powerful Role*, “Peking University Law Journal” 2013, no. 1, p. 37. Some of these cases illustrate the dangers for individual members of minorities of allowing cultural accommodations in the application of criminal law.

liberal case for group-differentiated rights has always recognized the possibility that a proposed legal accommodation that helps to sustain a particular ethnic or national minority should be rejected if it is oppressive for individual members of that minority<sup>40</sup>.

Second, going to the other extreme, one might maintain that the principle of one law for all should apply without exception throughout the penal law; that is, one might seek an argument for exempting penal law altogether from the demands of group-differentiated rights, while accepting the possibility of religious and cultural accommodations in other contexts. But that would require rejecting the case for group-differentiated rights in general<sup>41</sup>. Penal law is so pervasive in modern states that it is difficult to imagine a legal response to cultural diversity that does not implicate the penal law at some point.

The third strategy is a kind of combination of the first and second, more concerned than the first about than uniformity and more concerned than the second about claims of cultural difference. The state might take particular claims for accommodation of cultural practices as occasions for revisiting the rationale of the relevant prohibitions. So, for example, if members of a particular societal culture asserted a right to wear turbans rather than helmets when riding motorcycles, or to smoke marijuana during a religious service, the state would take that assertion as an opportunity to revisit the rationale for requiring helmets or prohibiting marijuana. If the state concluded that the rationale was after all not as strong as it first seemed, the prohibition would be repealed and anyone could wear a turban while motorcycling or smoke marijuana, whether their reasons were religious or not<sup>42</sup>. But this kind of solution is

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<sup>40</sup> W. Kymlicka, *op.cit.*, p. 152–55; A. Shachar, *op.cit.*, chapter 6; J. Waldron, *op.cit.*, p. 12–13.

<sup>41</sup> As Brian Barry does. His general case against multicultural accommodation, if correct, applies *a fortiori* to penal law. See B. Barry, *Culture and Equality*, Cambridge 2001, p. 334.

<sup>42</sup> This was, roughly, as far as Locke would go to accommodate cultural difference: J. Locke, *An Essay on Toleration*, in: ideme, *Political Essays*, ed. M. Goldie, Cambridge 1997, p. 134. Compare B. Barry, *op.cit.*, p. 39ff.



not really distinct from the second, in that it gives absolute priority to the generality of law over cultural accommodation.

Fourth, one might pursue the thought that group-differentiated rights should not extend so far as to impair some set of core interests protected by penal law. These interests might include, for example, the basic rights of every individual (including individual members of national and ethnic minorities) to make decisions about such fundamental matters as bodily integrity, mobility, religion, opinion, and so forth. To the extent that the penal law protects the most basic rights of each individual, the liberal case for group-differentiated rights would not extend as far as permitting, e.g., a differential application of the law of homicide, assault, kidnapping, or theft. Nor would it extend as far as allowing the law of a sub-national unit, set up to permit self-governance of a national minority, to infringe those basic rights. In this vein, Kymlicka supports group-differentiated rights but rejects what he calls “internal restrictions”, i.e., legal rules that would “restrict the basic civil or political liberties of [a minority culture’s] own members”<sup>43</sup>, while Shachar’s account of governance procedures in multicultural societies is intended to resolve what she calls the “paradox of multicultural vulnerability”, i.e., the fact that individual members of a minority group “can be injured by the very reforms that are designed to promote their status as group member [...]”<sup>44</sup>. The core interests protected by penal law would also include the basic elements of the legal order. We would expect the legislature to criminalize activity such as treason, obstruction of justice, and tax evasion. The theme common to these two sets of core interests is that a state that didn’t protect basic individual rights and the basic elements of the legal order, both formally and effectively, would jeopardize its legitimacy, perhaps even its claim to be a state at all. In contrast, there are many tasks that a state can choose to do or not, or can do in different ways, that go well beyond its basic functions. The state probably cannot avoid altogether such tasks as regulating economic activity, establishing and regulating highways and other means of transport,

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<sup>43</sup> W. Kymlicka, *op.cit.*, p. 152.

<sup>44</sup> A. Shachar, *op.cit.*, p. 3.

and protecting the environment. And modern states typically use penal law as part of its regulatory apparatus for these tasks. But there is a great variety of ways that these tasks can be carried out without compromising the state's basic functions, and unlike the laws implementing those basic functions, the laws that implement these tasks are likely to vary considerably from place to place and time to time, depending on the circumstances. The reasons for having an offence of murder – a general prohibition on intentional unlawful killing – do not seem to vary much from time to time and place to place, even if there are often significant cultural differences (sometimes reflected in law) as to what circumstances might justify or excuse departures from this general prohibition<sup>45</sup>. But the reasons for controlling emissions of particular chemicals, or establishing particular rules of the road, are very dependent on the circumstances. Driving at a particular speed neither violates the rights of others nor threatens the basic elements of the legal order; yet, depending on the circumstances, this activity may be quite dangerous, and so driving speeds are regulated with reference to the condition and usage of particular roads in light of the competing needs of everyone's safety and convenience.

Along these lines, criminal law scholars have long distinguished between a core of penal law-call it "criminal law" strictly speaking – and a periphery of penal law-call it "regulatory penal law". This distinction may help define the scope of group-differentiated rights in penal law. The criminal law should be reluctant to recognize group-differentiated rights. Because criminal law protects everyone's most basic rights and the basic elements of the legal order, generally speaking everyone should be equally bound by its prohibitions and equally entitled to its protections. But the application of regulatory penal law might vary so as to accommodate group-differentiated rights. Departures from the ideal of "one law for all" in regulatory penal law are far less threatening to the legiti-

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<sup>45</sup> And so the defence of provocation has frequently been discussed in connection with the cultural defence, conceived of as an excuse: see, for example, K. Amirthalingam, *Culture, Crime and Culpability: Perspectives on the Defence of Provocation*, in: *Multicultural Jurisprudence*, p. 35.

macy of the legal order than departures from that ideal in criminal law. Consider the following examples.

Suppose a particular ethnic minority has a practice of body modification and that this practice is for some reason central to its religion and/or culture. For concreteness, suppose that this culture has a religious ritual in which a small tattoo is placed on a person's forehead; traditionally, this ritual is performed on children at a relatively early age, but can be performed at any age if, for example, someone wishes to join or rejoin the religion<sup>46</sup>. Suppose further that this practice is one normally governed by the criminal law of assault; that is, it is lawful to modify an adult person's body in this way with his or her consent, but unlawful without consent. Anyone can consent to a tattoo, but it is an assault, and a rather serious one at that, to tattoo someone without his or her consent<sup>47</sup>. Now, suppose that members of this culture assert a group-differentiated right to tattoo members of their culture, with or without consent. Since this practice involves the right to bodily integrity, one of the most basic individual rights protected by the criminal law, the practice should be accommodated only as far as permitted by the general law of assault. There is one law of assault for all. So the practice would be permitted if consensual, but a member of the culture who tattooed another adult without that person's consent would be guilty of a serious offence. Whether members of the culture could tattoo their children, that would depend on the extent to which this practice fell within the parent's right to use force for proper purposes<sup>48</sup>; it would be no different in this respect from the practice of male circumcision.

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<sup>46</sup> There is of course no lack of real examples of practices of this kind, but the purpose of this paper is to lay out a framework for thinking about the application of group-differentiated rights to penal law, not to resolve specific real-life examples.

<sup>47</sup> Under Canadian law, tattooing someone without consent would be an assault because it would be an intentional touching without consent, and it would be an aggravated assault as it would disfigure the complainant.

<sup>48</sup> This doctrine sometimes goes under the heading of the implied or deemed consent of the child, but that is potentially a misleading way of looking at it. For further discussion, see H. Stewart, *Parents, Children, and the Law of As-*

The Canadian case of *Thomas v. Norris* provides an interesting example of this kind of limit on accommodation<sup>49</sup>. The plaintiff and the defendant were all aboriginal persons<sup>50</sup> who lived on Canada's West Coast; specifically, they were descendants of the Coast Salish people. The plaintiff had, however, never participated in the cultural traditions of the Coast Salish. The defendants seized him from his home and brought him to a Long House where he was forced to participate in a ceremony to initiate him into the Coast Salish Big House Dancer Tradition. He was, over a period of four to five days, confined, deprived of food and water, and assaulted in various ways. The defendants argued (among other defences) that their conduct was the exercise of a constitutionally protected aboriginal right. Put briefly, the constitution of Canada protects aboriginal rights that existed at the time of contact and that were not explicitly extinguished before 1982; legislation that infringes those rights can nonetheless be justified if the government can establish a legitimate purpose and if the means used are consistent with the "honour of the Crown", that is, the state's special duties towards aboriginal peoples<sup>51</sup>. The trial judge rejected the claim of an aboriginal right on the ground that even if this kind of non-consensual initiation ceremony had been an aboriginal practice, it was extinguished by the arrival of the English common law on Canada's west coast in the mid-1800s<sup>52</sup>. The judgment has been criticized for failing to engage adequately with the requirement that an extinguishing law

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sault, "Dalhousie Law Journal" 2009, no. 32, p. 1. For a recent case where the doctrine was raised but rejected on the facts (which involved a botched male circumcision), see *R. v. D.J.W.*, 2011 BCCA 522, aff'd 2012 SCC 63.

<sup>49</sup> *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C.S.C.).

<sup>50</sup> The most appropriate term would be "members of the First Nations"; however, Canada's First Nations are legally referred to as "Indians" under the *Indian Act*, R.S.C. 1985, c. I-5, and as "aboriginal" under the *Constitution Act, 1982*, s. 35.

<sup>51</sup> Section 35(1) of the *Constitution Act, 1982* provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The leading case is *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The defendants in *Thomas v. Norris* asserted an aboriginal right but not a treaty right.

<sup>52</sup> *Thomas v. Norris*, par. 103.

be specifically directed at the aboriginal practice in question and for setting up a simplistic opposition between collective and individual rights<sup>53</sup>. But even had the trial judge been more attentive to these issues, it is hard to imagine that the result would have been different. Assuming the defendants could establish that forcing someone to participate in Big House Dancer Tradition initiation was an aboriginal right and that the right was not extinguished in the 19<sup>th</sup> century by the impact of English law, the government would likely be able to demonstrate that the infringement or limitation of that right by the general law of assault was justified. The limit would have the legitimate purpose of protecting every person's ability to decide for himself or herself what happens to his or her body. A number of considerations would support its consistency with the honour of the Crown, notably the fact that the tradition could continue with consent and the fact that both the persons claiming the right and the persons resisting the assertion of the right (here, the plaintiff and defendants) were all members of the aboriginal group in question.

In contrast to the situation in *Thomas v. Norris*, consider a sub-national unit of a federal state, where a national minority has effective control over political institutions. The government of this sub-national unit might enact laws to protect and foster its local language and culture. Some of those laws might be enforced with penal sanctions. Residents of the federal state outside this sub-national unit might not be subject to similar laws; perhaps the majority language and culture does not need this kind of protection. So, once again, the ideal of one penal law for all is compromised. But under the approach proposed here, this kind of regulatory penal law should be presumptively treated as an acceptable variation in the law for the purpose of protecting a cultural minority-

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<sup>53</sup> See, for example, T. Isaac, *Individual versus Collective Rights: Aboriginal People and the Significance of Thomas v. Norris*, "Manitoba Law Journal" 1992, no. 21, p. 618; A. Eisenberg, *The Politics of Individual and Group Difference in Canadian Jurisprudence*, "Canadian Journal of Political Science" 1994, no. 27, p.1, <http://dx.doi.org/10.1017/S0008423900006193>; J. Borrows, *Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution*, in *Law and Religious Pluralism in Canada*, ed. R. Moon, Vancouver 2008, p. 182–83.

provided it does not go so far as to interfere with basic individual rights. A law requiring business to provide signs and information in the local language would be presumptively acceptable; a law prohibiting the use of other languages altogether would have such a serious impact on personal freedom that it would compromise the ideal of one law for all<sup>54</sup>.

Now, suppose an ethnic minority has a practice of animal slaughter that is important to its culture or religion but not compliant with the general law governing the slaughter of animals. Suppose further, as is typical in modern states, the general law on this matter is supported in part by penal sanctions; the law provides not only for licencing, inspection, and certification of slaughterhouses but also for punishment for departure from its requirements. Once again, members of this minority assert a group-differentiated right, in this case to slaughter animals in accordance with their own practices; they seek an accommodation in the form of an exemption from the general law. The law governing animal slaughter is a classic instance of regulatory law; so, on the model proposed here, an exemption should in principle be available for this departure from the general requirements of regulatory law to accommodate a group-differentiated right. The possibility of an exemption would depend on how remote the group's practices were from achieving the (presumably valid) purposes of the general law; if too remote, an exemption would not be possible. But assuming it was, the details of the exemption would depend on many factors, including the culture's own definition of the practice. Under these conditions, the accommodation in question would not be a mere *ad hoc* exemption from the general law but a permission to slaughter animals in accordance with an alternative set of norms<sup>55</sup>. There would likely be some derogation or compromise of the objectives that prompted the

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<sup>54</sup> Compare *Ford v. Quebec*.

<sup>55</sup> This would be an example of Shachar's "joint governance" model, i.e., the idea that jurisdiction over an issue can sometimes be divided between the state and a "*nomoi* group", though it is unrelated to Shachar's specific concern about the situation of vulnerable or traditionally subordinated individuals within minority groups. For an outline of the model, see: A. Shachar, *op.cit.*, p. 88–92; J. Waldron, *op.cit.*, p. 15.

enactment of the general law in the first place (if not, there would be no need for an exemption from it), and some assessment would have to be made as to whether this compromise was acceptable in light of the objectives of the general law and the case for accommodation; but that is just the kind of assessment that is required for any legal accommodation of cultural difference, whether the law at issue is penal or not. And along these lines, the Supreme Court of Canada has on several occasions held that various aboriginal groups are entitled to various structured exemptions from the regulatory law that would otherwise prevent them from exercising certain aboriginal rights<sup>56</sup>.

Invoking the distinction between true crimes and regulatory offences as a solution to the problem of group-differentiated rights in penal law may seem merely like substituting one intractable problem for another. The distinction is clear enough in principle<sup>57</sup>. A true crime is a *malum in se*, a wrong in itself, typically a serious wrong or harm to the core interests protected by criminal law, conduct that is hard to imagine a state deciding not to prohibit. A regulatory offence is a *malum prohibitum*, conduct that is not wrong and perhaps not even harmful in itself, but that is prohibited and punished to support a regulatory scheme, such as a highway traffic code, or to promote a general public good, such as safety or environmental protection. This not to say, as Duff and others remind us, that violations of criminal law are always harmful or serious and violations of regulatory law are always harmless and trivial<sup>58</sup>. Depending on the prohibition at issue, commission of a *malum prohibitum* can create very serious dangers, which in turn can cause serious harms, while the wrongs and harms of a *malum in se* can

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<sup>56</sup> Many cases, including *R. v. Sparrow* itself, involve aboriginal hunting and fishing practices, some of which are treaty or aboriginal rights, depending on the case. Cases where the aboriginal right was upheld, thus effectively creating a group-differentiated right to hunt or fish, include *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Morris*, 2006 SCC 59.

<sup>57</sup> Compare A. Brudner, p. 169–73; R.A. Duff, *Answering for Crime*, Oxford 2007, p. 81–93; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, p. 216–222.

<sup>58</sup> R.A. Duff, *op. cit.*, p. 90; A. Brudner, *op. cit.*, p. 170–73.

be trivial. But, unless we are going to go down the path of treating risks and dangers as serious harms or wrongs in themselves<sup>59</sup>, there is a difference between, on the one hand, conduct that is plausibly prohibited because of its inherently wrongful nature or harmful effect on the basic interests protected by criminal law and, on the other hand conduct (including violations of regulatory schemes) that is prohibited because of the risks it creates<sup>60</sup>.

But if the distinction is clear in principle, the task of classifying particular offences sometimes seems hopeless; while the existence of borderline cases does not in general invalidate a distinction, in this case the borderline cases seem so large as to threaten the distinction itself<sup>61</sup>. Drug offences look as though they should fall into the regulatory category; possessing or trafficking in a prohibited substance does not in itself violate anyone's rights or cause any harm to the legal order, so the justification for these prohibitions typically lies in the systematic detrimental effects of the substances in question<sup>62</sup>. Yet drug offences are prosecuted and punished, sometimes ferociously, in the same way as true crimes. Similarly, many firearms offences look regulatory. The essence of a firearms offence is usually possession of a firearm without a proper licence, not possession as such; and in the abstract, mere possession of a firearm is equally dangerous whether one has a licence or not, therefore, so it looks as though the purpose of the offence is to support the regulatory scheme, not to punish behaviour that is inherently wrongful or harmful or even risky. The fact that fire-

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<sup>59</sup> Compare C. Finkelstein, *Is Risk a Harm?*, "University of Pennsylvania Law Review" 2003, no. 151, p. 963, <http://dx.doi.org/10.2307/3312883>. This approach unhelpfully blurs and extends a notion of harm that us already rather blurry and extensive.

<sup>60</sup> Compare R. A. Duff, *op.cit.*, chapter 7, deploying a distinction between "attack" and "endangerment", though in a somewhat different way.

<sup>61</sup> Compare the difficulties that the Supreme Court of Canada encountered in applying the distinction between criminal and regulatory penal law in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

<sup>62</sup> Whether these really exist, or whether they could be abated through policies other than criminalization, are important questions; the very fact that they are plausible questions only reinforces the thought that drug offences are regulatory rather than truly criminal.



arms create risks of serious harm to the core interests protected by criminal law is certainly a good reason to regulate them, but does not itself show that the enforcement of the regulatory scheme should be part of criminal law or even of regulatory penal law. Yet firearms offences are very often treated as true crimes and punished accordingly<sup>63</sup>. The *mala in se* side of the distinction seems to be threatened in other ways, notably by shifting moral attitudes that seem to make conduct that was inherently wrong yesterday acceptable if harmless or even constitutionally protected today<sup>64</sup>.

These objections are important but not decisive against the distinction. Any legal idea that depends on notions of right and wrong, even if best understood juridically rather than in terms of all-things-considered morality, will to some extent be vulnerable to shifting moral attitudes. And large borderline cases like drug and weapons offences are, in my view, best understood as in essence regulatory offences that the state has chosen to enforce with criminal sanctions; that is, the characterization of the offence as regulatory has not in practice limited the means through which it can be punished<sup>65</sup>. At any rate, for the purposes of understanding the impact of group-differentiated rights on penal law, it should be possible in any given legal order to apply the distinction along the following lines. A core set of criminal law prohibitions must apply uniformly to everyone, either because of the role of those prohibitions in protecting the basic rights of all individuals (e.g., prohibitions on murder, assault and theft) or in protecting the basic elements of the legal order (e.g., prohibitions on evading taxes and corrupting public officials). Any damage that those prohibitions cause to the societal culture of an ethnic or national minority must be accepted by that minority. But there is a vast domain of penal

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<sup>63</sup> Compare *Reference re Firearms Act*, 2000 SCC 31.

<sup>64</sup> I am thinking specifically of same-sex activity, which in Canada was not decriminalized until 1988, but only a few years later was effectively given constitutional protection when sexual orientation was recognized as a prohibited ground of discrimination under the equality provision of the Canadian Charter of Rights and Freedoms (see *Vriend v. Alberta*, [1998] 1 S.C.R. 493).

<sup>65</sup> Contrast A. Brudner, *op.cit.*, p. 173–178 (arguing that regulatory offences committed without subjective fault should be punished only by fines).

prohibitions of a regulatory nature that can admit of exceptions to protect societal cultures, without denying any individual his or her basic rights and without damaging the legal order, and therefore without compromising the principle of one penal law for all.

## 6. Conclusion

If the liberal case for group-differentiated rights is powerful, its implications for penal law are disturbing. The argument for group-differentiated rights seems to require the prohibitions and permissions of the penal law to apply differently to different people, depending on their cultural identity. This implication threatens the salutary ideal that the penal law, at least, should apply uniformly to everyone who is subject to the state's authority. In this paper, I have suggested that the tension between the liberal case for group-differentiated rights and the demand of one penal law for all can be mitigated, if not entirely eliminated, by recognizing a distinction between core cases of criminal law and a wide range of regulatory penal law. When a court or regulatory agency or legislature is considering whether to permit a differential application of the penal law on cultural grounds, thus creating group-differentiated rights in penal law, there should be a strong presumption against varying the requirements of the core of criminal law, but also a presumption in favour of varying the requirements of regulatory penal law. This approach leaves considerable scope for accommodation of cultural difference without compromising the legitimacy of the legal order.

### **STRESZCZENIE**

Prawo zróżnicowane dla grup: wyzwanie dla prawa karnego

Liberalny projekt tolerowania wierzeń i praktyk mniejszości kulturowych oraz religijnych stanowi poważne wyzwanie dla zwykłego, liberalnego rozumienia prawa karnego. Chociaż w innych gałęziach prawa dopuszczalne są różne rodzaje prawnego zróżnicowania, często uważa się, że prawo karne

powinno być takie samo dla wszystkich. Pogląd ten został zakwestionowany przez zwolenników „obrony kultury”, którzy twierdzą, że prawdziwie równe traktowanie wymaga uwzględnienia dowodów dotyczących przyczyn kulturowych działań danej osoby. Większość zwolenników różnych form „obrony kultury” traktuje to jako osobne usprawiedliwienie, a nie jako powód do zróżnicowania wymagań prawa karnego lub zwolnienia członków mniejszości kulturowych z jego przepisów. Ale najsilniejsze i najbardziej przekonujące argumenty dotyczące uwzględniania kultur mniejszości zakładają, że członkowie mniejszości kulturowych mogą być w istocie uprawnieni dowłączenia spod działania niektórych norm prawa karnego. Czy postulaty te zostaną zaakceptowane czy nie, konieczność ich rozważenia pokazuje, że problem uwzględnienia różnorodności kulturowej dotyka serca tego, co rozumiemy przez prawo karne.

**Słowa kluczowe:** prawo zróżnicowane dla grup, liberalizm, obrona kultury, Kymlicka, prawo karne wykonawcze, rządy prawa.

## SUMMARY

### Group-differentiated rights: a challenge to penal law

The liberal project of tolerating and accommodating the beliefs and practices of minority cultures and religions poses a serious challenge to the usual liberal understanding of penal law. Whatever accommodations may be available in other areas of the law, it is often thought that the penal law should be the same for everyone. This view has been challenged by advocates of “cultural defences”, who argue that truly equal treatment requires evidence concerning the cultural reasons for a person’s actions to be considered rather than ignored. Most advocates of some form of cultural defence have treated it as relevant to existing criminal law defences, or as a distinct excuse, rather than as a reason to vary the demands of the penal law or to exempt members of minority cultures from it. But the strongest and most persuasive liberal arguments for accommodating minority cultures imply that members of minority cultures may indeed be entitled to exemptions from penal law. Liberal arguments in favour of group-differentiated rights apply as much to the demands of penal law as to the demands of any other kind of law. So the argument for group-differentiated rights appears to be inconsistent with the claim that there should be one penal law for all. There are (at least) three possible ways of resolving this inconsistency. First, one might give up the ideal of one penal law for all; second, one might seek an argument for exempting

penal law from the demands of group-differentiated rights. In this paper, I explore a third possible resolution: the distinction between a core of penal law-call it “criminal law” strictly speaking – that does indeed apply to all and is not open to group-based differentiation and a periphery of penal law-call it “regulatory penal law” – that need not apply to all and can therefore be differentiated to accommodate group rights. Whether this resolution succeeds or not, the need to consider it shows that the problem of accommodating cultural diversity goes to the heart of what we mean by criminal law.

**Keywords:** group-differentiated rights, liberalism, cultural defence, Kymlicka, regulatory penal law, rule of law.

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