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Indigenous Peoples and Immigrants: the Multicultural Challenge of Criminal Law

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Submitted in Fulfilment of the Requirements for the Degree of PhD

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ABSTRACT

This thesis is the conclusion of doctoral research that pursued to examine whether indigenous peoples' demands for access to their cultural practices can be accommodated within criminal law. In a globalised context in which states become increasingly multicultural this question raises fear of social fragmentation and the anxiety for achieving unity. Certainly, Rwanda and Kosovo evidence that claims to access culturally diverse practices may lead to war or even genocide. The context of the thesis is a more benign form of response to these claims: accommodation. While accommodation in general has received great attention from scholars (Kymlicka 1989, Gutmann et al 1994, Tully 1995), within criminal law the only focus has been cultural defences (Renteln 2004, Kymlicka et al 2014). However, little research has been conducted to understand the broader implications of this phenomenon for both the accommodated and the accommodating. The research aims to shed light on these broader implications of accommodation by exploring it within criminal law. Certainly, the simplicity and individualised nature of cultural defence conceals what is at stake for both the accommodated and the accommodating. Specifically, it conceals how criminal law cannot be responsive to the claims of minorities because it seeks to maintain the practices of the constitutional order of which criminal law is part. The result is that the claims of indigenous peoples cannot be accommodated. In order to uncover these implications, the research employs social holism (Pettit 1998) to develop a broader understanding of criminal law as a socio-cultural practice, which enables an adequate description and assessment of the diversity of claims to recognition that minorities make to the state of which they are part. In broadening the view the claims of minorities become linked to their position within the constitutional order (Tully 1995), and then the question arises as to whether minorities have been unjustly excluded or included (Lindahl 2013) in that order, which may lead to recognise a new plurality of responses that the state and its criminal law should provide to them. By broadening the understanding of criminal law it is enabled an adequate framework for the assessment of the phenomenon of accommodation. Certainly, this is necessary for claims to access diverse cultural and social practices to be met with justice, for the state's responses need to be sensitive to the diversity of claims put forward by minorities, without overlooking that the state as well need to access its particular social and cultural practices.

TABLE OF CONTENTS

ABSTRACT	2
TABLE OF CONTENTS	3
AUTHOR’S DECLARATION	6
INTRODUCTION	7
CHAPTER 1	15
CRIMINAL LAW: CULTURE AND SOCIAL STRUCTURE	15
1.1 First Step in Understanding Criminal Law as a Socio-Cultural Practice: Law and Culture.....	21
1.1.1 The Critical Function and Criminal Law	22
1.1.2 Unidirectional Understandings of Law and Culture	25
1.1.3 Bidirectional Understanding of Law and Culture	27
1.1.4 First Problem For The Bidirectional Approach: It Neglects Legal Institutions.....	30
1.1.5 Second Problem for the Bidirectional Approach: it is Biased Against Groups	32
1.2. Second Step in Understanding Criminal Law as a Cultural Practice: the Reproduction and Transformation of Socio-Cultural Life	37
1.2.1 Culture Beyond the Bidirectional Approach.....	37
1.2.2 Margaret Archer and the Dynamics of Culture and Social Structure	39
1.2.3 From the Dynamics of Culture to Wittgensteinian Social Practices.....	42
1.2.4 Understanding Criminal Law as a Cultural Practice.....	45
1.3. Excluding Accommodation from SS	51
CHAPTER 2	57
MULTICULTURALISM AND POLITICAL THEORY, CRIMINAL LAW AND THE CONSTRUCTION OF SOCIAL REALITY	57
2.1. Will Kymlicka’s Theory of Multiculturalism	59
2.1.1 Autonomy and Equality	59
2.1.2 Societal Cultures and Special Rights	62
2.2. The Problem of Liberal Neutrality.....	65
2.2.1 Neutrality as Individual Autonomy and Individual Equality	65
2.2.2 Collective Political Equality	70

2.3 Neutrality and Criminal Law	72
2.3.1 Neutralists and Perfectionists on the Neutrality of the Harm Principle	72
2.3.2 Neutrality and the Critical Function.....	76
2.4 Meaning and the Social Construction of Social Reality	80
2.4.1 Separating the Individual From Social Practices	80
2.4.2 Reconnecting the Individual to Social Practices.....	84
2.4.3 From Non-Neutrality to the Responsive Nature of Social Reality	90
CHAPTER 3	95
CRIMINAL LAW, CONSTITUTIONAL IDENTITY AND CONSTITUTIONAL	
DIALOGUE	95
3.1. Constitutional Order.....	96
3.1.1 Constitutional Order and Social Practices	96
3.1.2 Nationalism and Constitutional Order	101
3.2 Constitutional Identity.....	108
3.2.1 Hans Lindahl's Theory of Constitutional Identity	108
3.2.2 Criminal Law and Constitutional Identity	112
3.3. Minorities and Constitutional Identity	120
3.3.2 James Tully and Constitutional Diversity	120
3.3.2 Distinguishing Collective Self-Determined Agents From Cultural Distinctiveness	
.....	127
CHAPTER 4	134
CRIMINAL LAW AND CULTURAL DEFENCE.....	134
4.1. Criminal law and the Constitution	134
4.1.1 The Relationship Between the Constitution and Criminal Law	134
4.1.2 Criminal Law and Meaning in the Constitutional Order	137
4.1.3 Choice, Character and Pluralism.....	140
4.2. Criminal Law and Weak A-Legality.....	148
4.2.1 Cultural Defence	148
4.2.2 Agency and Social Determinism.....	152
4.2.3 Character and Excuse.....	157
4.2.4 The Impossibility of Radical Pluralism	162

4.2.5 Distinguishing the Other and the Limits of Pluralism	165
CHAPTER 5	172
CITIZENSHIP AND THE SUSPENSION OF CRIMINAL LAW	172
5.1. Citizenship and Criminal Law	173
5.1.1 Criminal Law, the Subject and the Subjected	173
5.1.2 Criminal Law and the Construction of Citizenship	178
5.2. Integrating Citizens in Theory	180
5.3. Integrating Citizens in Practice	186
5.3.1 Lakeside Colony of Hutterian Brethren et al v. Hofer et al	188
5.3.2 Thomas v. Norris.....	194
5.3.2.1 Citizenship and Indigenous Peoples' Rights.....	194
5.3.2.2 Repoliticising Indigenous Peoples Rights.....	198
5.4. Suspending Criminal Law.....	203
CONCLUSION.....	207
BIBLIOGRAPHY	214
LIST OF CASES	251

AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: **Jose Manuel Fernandez Ruiz**

Signature: _____

INTRODUCTION

We live in an increasingly multicultural world, in which the diversity of values and conceptions of “the good” are becoming challenges to traditional forms of democratic legitimacy. Multiculturalism, as a broad social phenomenon, makes explicit a diversity of values which dispute the claim that democracy protects and fosters “shared goods.” This is indeed a multicultural turn in society’s self-description. Far from being an isolated phenomenon experienced by only a few countries, all societies across the world are either becoming multicultural due to increasing immigration or realising that they already were multicultural. Within this context, the grounds for asserting that there is a shared conception of the good and the right become unclear, with implications that go far beyond the mere assertion of difference. Certainly, they extend to the very foundations of state and society, sometimes ingraining claims which engender division and hostility. Cultural diversity buttresses some of the most violent conflicts of the last 50 years, some of which have evolved into secession, whilst others have descended into war and genocide. The cases of the Serbians and Albanians in Kosovo and the Tutsis and Hutus in Rwanda illustrate how deeply these conflicts of diversity can cut through societies. In so doing, diversity threatens not only which views of the good should be fostered, but also potentially fragments modern states and the unity of their legal systems.

An alternative to elimination, genocide or war, one which falls short of secession, has been put to work: the accommodation of culturally-diverse practices. This alternative promises to reconcile diversity with unity. States not only describe themselves as multicultural, but also claim to value the diversity that accompanies this. Moreover, in some areas accommodating culturally-diverse practices is considered a matter of justice, and thus, permissible and sometimes required. It is significant that the reconciliatory alternative has not abandoned the idea of unity; on the contrary, it seeks accommodation as a way of defending its unity. It is within this context of multiculturalism that the research takes place: the seemingly benevolent version of the modern state that accommodates culturally-diverse practices. Whilst there has been extensive research concerning the accommodation of minorities within the legal system by political and social philosophers¹, political

¹ The discussion ranges from the morality of group rights to the limits of accommodation in terms of achieving social justice; see, among the most influential writers, the following: Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994), Chandran Kukathas (ed.), *Multicultural Citizens: The Philosophy and Politics of Identity* (Centre for Independent

scientists² and legal scholars³, this topic has received considerably less attention in criminal law⁴, where the focal point - if not the exclusive focus - has been “cultural defences”. However, scholars have paid little attention to the broader implications of this phenomenon for both majorities and minorities, and how these claims are connected internally to the social practices both regard as fundamental. The present thesis adopts a broader understanding of the phenomenon and seeks to develop a framework that allows for assessing and identifying the limits of accommodation, specifically, within criminal law.

The general purpose is to explore the challenges posed by culturally-diverse practices to the legal system, yet the enquiry is directed to tackle a specific issue. The specific purpose is exploring how the process of accommodation within criminal law impacts on indigenous peoples. Thus, while the general aim is to contribute to the wider debate concerning the implications of accommodating the legal system in a context of multiculturalism, the

Studies 1993), Will Kymlicka (ed.), *The Rights of Minority Cultures* (OUP 1995), Ian Shapiro and Will Kymlicka (eds.), *Ethnicity and Group Rights* (New York University Press 1997), Christian Joppke and Steven Lukes (eds.), *Multicultural Questions* (OUP 2002), Bruce Haddock and Peter Sutch (eds.), *Multiculturalism, Identity and Rights* (Routledge 2003), Anthony Laden and David Owen (ed.), *Multiculturalism and Political Theory* (CUP 2007), Seyla Benhabib (ed.), *Identities, Affiliations, Allegiances* (CUP 2007), Michel Seymour (ed.), *The Plural States of Recognition* (Routledge 2010).

² Political scientists have focused more on the conditions of social cohesion, nationalism and the existence of sub-state autonomies; see, among the most influential writers, the following: Ian Shapiro and Will Kymlicka (eds.), *Ethnicity and Group Rights* (New York University Press 1997), Alain Gagnon and James Tully (eds.), *Multinational Democracies* (CUP 2001), Stephen May, Tariq Modood and Judith Squires (ed.), *Ethnicity, Nationalism and Minority Rights* (CUP 2005), Stephen Tierney (ed.), *Accommodating Cultural Diversity* (Ashgate 2007), Alain Gagnon and Michael Keating (eds.), *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings* (Routledge 2012), Raymond Taras (ed.) *Challenging Multiculturalism: European Models of Diversity*, Jaime Luch (ed), *Constitutionalism and the Politics of Accommodation in Multinational Democracies* (Routledge 2014).

³ Legal scholars have focused their attention on many topics, ranging from ethnic and sexual discrimination to minority rights, and many others. On collective rights, see Judith Baker (ed.), *Group Rights* (University of Toronto 1994), Ian Shapiro and Will Kymlicka (eds.), *Ethnicity and Group Rights* (New York University Press 1997), Duncan Ivison et al (eds.), *Political Theory and the Rights of Indigenous Peoples* (CUP 2000). On other topics, see Richard Shweder et al (eds.), *Cultural Differences: The Multicultural Challenge in Liberal Democracies* (SAGE 2002), Rachel Sieder (ed.), *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Routledge 2002), Avigail Eisenberg and Jeff Spinner-Halev (eds.), *Minorities within Minorities: Equality, Rights and Diversity* (CUP 2004), Barbara Arneil et al (eds.), *Sexual Justice/Cultural Justice: Critical Perspectives in Political Theory and Practice* (Routledge 2006), Omid Payrow Shabani (ed.), *Multiculturalism and Law: A Critical Debate* (University of Wales Press 2007), Gideon Calder and Magali Bessone and Federico Zuolo (eds.), *How Groups Matter: Challenges of Toleration in Pluralistic Societies* (Routledge 2014).

⁴ See note 3; also Alison Renteln, *The Cultural Defense* (OUP 2004), Marie-Clarie Foblets and Alison Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009), Will Kymlicka et al (eds.), *Criminal Law and Cultural Diversity* (OUP 2014).

specific contribution concerns the accommodation of indigenous peoples within criminal law. More specifically, the research question consists in whether criminal law can accommodate indigenous peoples' demands for access to their cultural practices. The hypothesis is that criminal law cannot achieve such accommodation. In the explication of this failure, it is nonetheless considered the conditions that would be necessary to achieve not accommodation, but equality. The key condition to be explored consists in furthering equality through the *suspension* of criminal law. The reason why accommodating indigenous peoples' demands fails is that the legal system's standard response to those who demand recognition of their practices simply cannot go further than the cultural defences. Let us first begin with an example to illustrate the problem.

Assume that some cultural rights can protect important collective dimensions of the cultural life of a group. This can be so, for cultural rights, loosely understood, can assist the protection of a group's cultural practices. If recognised constitutionally or legally, these cultural rights may conflict with criminal law. In the clearest case, the exercise of cultural rights may involve the commission of a crime. In 2012, in the Valparaiso Region, Chile, a group of Rapa-Nui indigenous people, were criminally investigated for exercising their cultural rights. Though they were initially prosecuted, the indictment was later dismissed. Nevertheless, the police were deployed and the offenders were brought to jail and indicted, causing social unrest and fear in the population that they could be criminalised for practising their traditions. The events took place on Rapa-Nui Island (Easter Island). While today, the island is Chilean territory, it was formerly part of the independent nation, Rapa-Nui. The facts were as follows: a group of Rapa-Nui were fishing inside a cave, in conformity with their traditional practices, implicating the exercise of their cultural rights. However, they were prosecuted for allegedly having caused damage to the cave, which was under protection by the Law of National Natural Monuments. From the point of view of the prosecutor, the law explicitly aimed at protecting natural monuments, in this case the cave, by forbidding all types of access. Damages caused to the cave and mere trespassing were criminal. From the point of view of the Rapa-Nui, this was a criminalisation of their cultural practices, achieved by the criminalisation of their cultural rights⁵ to fish in the cave.

⁵ In Chile, the ILO Convention 169 has the status of law and aims to protect these practices as an expression of indigenous peoples' cultural rights.

In relation to the aim of this thesis, the case illustrates that there are two different points of view concerning accommodation within criminal law: one for which access to the cave should be forbidden, because of the value of preserving national monuments; and the other for which access should be permitted because of the value of engaging in traditional practices. While these points of view are normally quite visible, the connection between these values and the groups that give them authority is rarely recognised. Indeed, it is seldom recognised that both make a claim to what they regard as valuable, and that part of what explains that worth derives from the recognition of a group having authority over its members. From this point of view, the conflict would be misdescribed if reduced merely to cultural conflict. An adequate understanding requires considering the connection between both: the *cultural* - the values some seek to preserve - and the *political* - who is entitled to set those values as ends.

The interconnection between these components is rarely taken into consideration when describing the process of accommodation⁶, and the thesis argues that this is the key for understanding the phenomenon and its implications. An appropriate understanding should include the observation that accommodation has implications for both the group that seeks accommodation, as well as the group that makes the accommodation. Certainly, by observing the connection between the cultural and the political, it is possible to establish that the social practices of both indigenous peoples⁷ and the state are at stake, and thus, so too are the meanings which guide their interactions as participants in them. What is peculiar about this phenomenon is that it occurs between two groups that can legitimately claim to be regarded as self-determined. Accordingly, the thesis will attempt to show that indigenous peoples' demands are qualitatively different with regards to the treatment criminal law might dispense to other minorities when they call for their practices to be accommodated.

⁶ There have been valuable efforts that reveal the connection between culture and politics. However, this thesis aims to go further by proposing a framework that uncovers the broader implications and how they relate each other specifically in the case of minorities seeking accommodation within criminal law; see David Schneiderman, 'Theorists of Difference and the Interpretation of Aboriginal and Treaty Rights' (1996) 14 *International Journal of Canadian Studies* 35-52, and also Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto University Press 2001).

⁷ The thesis adopts a general view, which seeks to capture the central components of the demands made by most indigenous peoples of the states they live within. On the diversity of understandings of "indigenous", see Jeff Corntassel, 'Who is Indigenous? Peoplehood and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9 *Nationalism and Ethnic Politics* 75-100.

Method

In building a framework that captures the interconnection between cultural and political components, it is employed and developed a particular method throughout the research: social holism⁸. Social holism is a method for examining social events from a broader point of view, while simultaneously seeking to understand them within their own context. More specifically, social holism understands social events in terms of a mutual relationship between social practices and meaning. According to social holism, social events, like individual actions, beliefs, intentions and choices, have meaning to the extent that they are located within a particular context of social practices. It takes the position that social events are autonomous, in the sense that insofar as social practices are constitutive of meaning⁹, they cannot be reduced to something located outside of those practices. Accordingly, it holds that understanding meaning and social practices requires inquiring from “within”, placing the participant’s point of view at the centre¹⁰.

Many anthropologists and social theorists have adopted this approach, to varying degrees: Clifford Geertz, Marshall Sahlins and Sherry Ortner in anthropology; Pierre Bourdieu, Anthony Giddens, Hans-Georg Gadamer and Jurgen Habermas in social theory; all in some way or another rely on social practices for understanding social interactions and meaning. Social holism places the emphasis on public performances more than individual attitudes for understanding social events. While social actions may be explained by the intentions, beliefs, and desires of those who engage in social practices, the latter are taken to be prior to the former¹¹. Social performances are taken as meaningful in their own right, and individual attitudes are explained in terms of those practices. This, as this thesis will

⁸ While this idea differs from other accounts in that it emphasises meanings in terms of a practical mastery, it has many affinities with those who seek to vindicate “social causation” through social holism; see Philip Pettit, ‘Defining and Defending Social Holism’ (1998) 1(3) *Philosophical Explorations* 169-184; Keith Sawyer, ‘Non-reductive individualism I -Supervenience and Wild Disjunction’ (2002) 32 *Philosophy of the Social Sciences* 537-559; Raimo Tuomela, ‘Holistic Social Causation and Explanation’ in Dieks et al (eds.), *Explanations, Prediction, and Confirmation* (Springer 2010) 305-317; Christian List and Kai Spiekerman, ‘Methodological Individualism and Holism in Political Science, A Reconciliation’ (2013) 107 *American Political Science Review* 629-643.

⁹ John Gunnell, *Social Inquiry After Wittgenstein and Kuhn: Leaving Everything as It Is* (Columbia University Press 2014) 62.

¹⁰ This, of course, focuses attention on the particularity and relativity of social phenomena, Gunnell, *Social Inquiry* (n 5) 153.

¹¹ See Roger Trigg, ‘Wittgenstein and Social Science’ (1990) 28 *Royal Institute of Philosophy Supplement* 209-222; Sebastian Rodl, ‘Practice and the Unity of Action’ in George Meggle (ed.), *Social Facts and Collective Intentionality* (Dr. Hansel-Hohenhausen 2002) 323-342.

show, bridges social theory and the philosophy of language. As Barbara Fultner has argued, both are naturally interconnected¹². Although both take communicative meaningful social events as their object, they nonetheless emphasise different aspects: whilst social theory focuses more on the role of communication, philosophy of language addresses the role of meaning¹³. Yet it is obvious that a theory of meaning matters for a theory of communication, for communication assumes the transmission of meaningful expressions¹⁴. Nevertheless, meaning also depends on communication, for participants communicate when interacting through social practices. Chapter 1 develops a framework that links both for an adequate understanding of socio-cultural practices.

The thesis will draw substantially on the later work of Ludwig Wittgenstein, to support a view of meaning that unites both the points of view of social theory and the philosophy of language. Social holism aims to synthesise these disciplines, emphasising that meaning is part of participants' practical mastery of the practices they engage in¹⁵. While this is not specifically a "legal method", it can be applied in a fruitful way to reveal how the law in general, and criminal law in particular, depend on broader contexts of social practices. In so doing, it clarifies what state criminal law is doing when it criminalises the demands of indigenous peoples who claim access to their social practices. Generally speaking, it advances an understanding that what the Rapa-Nui seek by accessing the cave is access to their own social practices, and thus access to their own meanings, which is just what state criminal law aims to do. Social holism demonstrates how underlying the conflict, there is a continuous recreation of social practices of *self-determination* on both sides. This makes salient a further conclusion: that the conflict is a political conflict for self-determination.

¹² Of course, not all philosophers of language suit this task, especially those who emphasise semantics over pragmatics, like Paul Grice, *Studies in the Way of Words* (Harvard University Press 1989) and Stephen Schiffer, *Meaning* (Clarendon Press 1972). For a critical examination, see Joseph Rouse, 'Practice theory' in Stephen Turner and Mark Risjord (eds.), *Philosophy of Anthropology and Sociology* (Elsevier 2007) 639-683

¹³ Barbara Fultner, 'Do Social Philosophers Need a Theory of Meaning? Social Theory and Semantics after the Pragmatic Turn' in William Regh and James Bohman (eds.), *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory Essays in honor of Thomas McCarthy* (MIT Press 2001) 145.

¹⁴ Fultner, 'Do Social Philosophers' (n 13) 145.

¹⁵ Not, of course in those interpretations that see in Wittgenstein a form of linguistic idealism according to which "words" constitute meaning. For such misguided, yet quite common, understandings see Ian Jarvie, 'Philosophical Problems of the Social Sciences: Paradigms, Methodology, and Ontology' in Ian Jarvie and Jesus Zamora-Bonilla (eds.), *The SAGE Handbook of The Philosophy of Social Sciences* 1-36; Frank Hindriks, 'Language and Society' in Ian Jarvie and Jesus Zamora-Bonilla (eds.), *The SAGE Handbook of The Philosophy of Social Sciences* 137-152.

Finally, and more specifically as regards criminal law, by employing social holism the thesis may be situated within a recent trend in criminal law theory that seeks to understand criminalisation as a historical and institutional phenomenon¹⁶, instead of a primarily moral or philosophical enquiry into its “nature”. The general purpose is to develop further this line of research by theorising about criminal law in terms of social and cultural processes, how they can be distinguished, the role they play and how they operate in an interrelated manner. To this end, social holism introduces many different kinds of materials, cases, statutes and different methods, spanning not only legal disciplines, but also social history, social theory and more generally philosophical methods¹⁷. Finally, while the thesis does not include empirical research, it aims to be empirically informed.

Outline of the Chapters

Chapter 1 aims to contextualise criminal law within a broader context of social and cultural practices, and thus seeks to provide a framework for understanding criminal law as a socio-cultural practice. To accomplish this, the chapter first examines how the legal literature understands the relationship between culture and law. Second, it turns to social theory and social philosophy to develop from the previous examination a framework with which to understand criminal law as a socio-cultural practice. With the framework in place, it investigates to what extent criminal law can be extended to accommodate minorities’ demands to access their cultural practices. Chapter 2 changes the focus to political philosophy and multiculturalism, in aiming to elucidate the problem that accommodation addresses, and how the solution is conceived of in terms of individual inequality. The chapter proposes a broader understanding of accommodation within criminal law, in terms of how both phenomena take part in a more general process of the social construction of reality. Chapter 3 explores the political components of accommodation, by examining the constitutional order. The chapter provides an historical interpretation of the origins of the state-form, upon which the constitutional order emerges, and details how this process involved the formation of a “constitutional identity”. It develops a theory of constitutional

¹⁶ Alan Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (OUP 2000); Marcus Dubber, *Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press 2005); Lindsay Farmer, *Making the Modern Criminal Law: Criminalisation and Civil Order* (OUP 2016), Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP 2016).

¹⁷ Philosophical or conceptual methods are important for they are part of social practices and thus may provide insights about them; see John Gunnell, *Political Theory and Social Science: Cutting Against the Grain* (Routledge 2011) 100.

identity, accounting for processes of the exclusion and inclusion of minorities, and then explores the significance of criminal law within this identity through the lens of on-going debate in EU law. It raises scepticism regarding the potential of constitutional dialogue as a way of making the legal system more responsive to cultural diversity. It concludes by proposing a principled distinction for the differentiated treatment the state should provide to the claims of different minorities.

Chapter 4 explores the relationship between criminal law and the constitutional order, and specifies further how criminal law secures meanings within the identity of the constitutional order. Finally, it examines how criminal law handles the challenges offered by one type of minority through what are standardly designated “cultural defences”. Lastly, Chapter 5 explores how criminal law responds to the challenges advanced by indigenous peoples. It starts by drawing on the relationships between citizenship and criminal law, in order to identify how criminal law shapes and constructs membership of the political community. The chapter includes two Canadian cases to illustrate how criminal law assists integration into the political community to which it belongs, and concludes with the impossibility of accommodating indigenous peoples’ claims. The chapter ends by remarking upon the reasons for this, and proposes what is required to treat indigenous peoples equally: reinstating them with self-determination. Additionally, it also specifies a basic condition for attaining self-determination, which requires that indigenous peoples have an independent penal practice; independent, that is, from the state of which they have been forced to be part.

CHAPTER 1

CRIMINAL LAW: CULTURE AND SOCIAL STRUCTURE

Introduction

This chapter aims to describe the socio-cultural components of the process of accommodation by examining criminal law through social holism. Specifically, the chapter starts from two implications of social holism and uses them progressively to uncover those components. Recall social holism, the view that holds that individual actions and choices have meaning within a context of social practices. This applies to cultural practices as well, which given that they involve individual actions and choices, require a context of social practices in order to have meaning. Thus, the claim is that criminal law is a socio-cultural practice and so depends on a broader context of socio-cultural practices. This is the first implication: the meaning of criminal law depends on socio-cultural practices. The second implication is linked to the first: criminal law itself achieves meaning through its contribution to the meaning of those practices. This is the second implication: criminal law contributes to the meaning of socio-cultural practices. The holistic method enables an understanding of criminal law in terms of a two-way feedback relation; it has meaning by virtue of being part of a broader context of social practices, yet it contributes to those practices having meaning.

Stating that criminal law depends on broader contexts of social practices and that they depend in turn on criminal law re-describes in a richer way the fact that criminal law is state law¹⁸. The purpose of social holism is to show that criminal law cannot be explained only within state dynamics, for the state itself is a social practice. That is, the state also depends on broader contexts of social practices. Understanding criminal law as a socio-cultural practice shifts the focus to the multiple ways in which human social interactions make criminal law intelligible. Thus, social holism does not reduce the meaning of criminal law to the state of which it is part. Social holism understands criminal law by widening the point of view to include the broader social practices that give it meaning and how in turn criminal law impacts on the meaning of the practices on which it depends. To

¹⁸ See in general Christopher Tomlins, 'How Autonomous is Law' (2007) 3 *Annual Review of Law and Social Science* 45-68.

understand criminal law as a two-way, socio-cultural practice involves considering it as a pervasive relationship. One may overlook it, but then, while no less pervasive, it becomes invisible. The focus in this chapter is mainly on how criminal law contributes to socio-cultural practices, without overlooking how socio-cultural practices contribute to criminal law.

Let us examine two prominent legal theorists' views about the accommodation of diversity within criminal law and how the aforementioned relationship becomes invisible in them, which has an important implication. To the extent that the relationship remains invisible, they become unable to see the connection between the cultural and political claims that underlie the demand to access cultural practices. Because the connection remains unclear, the individualisation of the demands of indigenous peoples appears natural. Let us see how this happens. The first theorist is Nicola Lacey, who develops her views on diversity and criminal law in her essay "Community, Culture, and Criminalization"¹⁹. In this essay, Lacey adopts Anthony Duff's *communicative* view of criminal law in order to suggest how diversity might be accommodated. According to Lacey, criminal law adopts an evaluative stance towards the values that criminal conduct expresses. I will designate this stance as the "critical function" of criminal law. When criminal law applies, it reaffirms the validity of shared values by criticising conducts that depart from them. It also reaffirms that those values are shared by the political community.

Lacey places the critical function as a fundamental component of criminal law, and to this end she employs Duff's theory of communicative criminal law. Duff understands criminal law as fundamentally involving the capacity to question and sanction wrongdoings committed against the political community. This generalises the types of standards that can be questioned. Thus, the political community can challenge any pre-existing cultural standards through criminal law. It appears then that the critical function is at the core of criminal law. Certainly, it is democratically legitimated and expresses which values are shared by the political community. In so doing, it also determines the space for the recognition of practices and standards that depart from those shared values. Indeed, the position of the critical function entails that the level of recognition of cultural practices

¹⁹ Nicola Lacey, 'Community, Culture, and Criminalization' in Rowan Cruft et al (eds.), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (OUP 2011) 294.

depends on whether they undercut the communicative function of criminal law²⁰. That is, the space afforded to cultural diversity ends where the maintenance of the communicative function of criminal law begins.

Lacey proposes as an example a case in which a young man rapes a woman, yet is acquitted because he is considered to have a reasonable belief that when the woman said “no”, she was saying “yes”²¹. Holding this belief is supposed to be related to the man’s cultural upbringing²². That is, the man’s cultural background is the source of the standard that motivated him to act. Thus, a practical problem appears in recognising cultural diversity. If the court bases a defence upon this person’s subjective belief, which is grounded in his particular cultural background, there would be no objective standard guiding the critical function. The critical function would be undermined. According to Lacey, this cannot be right. Laws are democratically legitimated. They express the position of the political community in which values are shared and, more importantly, through the critical function evaluate which standards of conduct are reasonable and unreasonable, and thus criminal. Now, underlying this account, the unit to which criminal law applies is the individual, understood as having a capacity to act²³ and a particular character²⁴. Thus criminal law evaluates “...the ‘reality’ of the defendant’s choice, the ‘fairness’ of his or her opportunity to conform; the ‘reasonableness’ of his or her perceptions”²⁵. Finally, the same is true of what can limit criminal law, for these limitations that refer to the system’s efficacy need to be balanced with treating its basic unit, the individual, with fairness²⁶. Both the unit that justifies criminal law and that which limits it are defined in terms of individuals having certain characteristics.

The second theorist is Jeremy Waldron. Waldron frames the question around accommodation within the values of the rule of law. In particular, he considers that in principle recognising diversity within criminal law may undermine the ideal of equal

²⁰ Lacey, ‘Community, Culture’ (n 19) 296.

²¹ Ibid 295.

²² Ibid 295.

²³ Ibid 298.

²⁴ Ibid 299.

²⁵ Ibid 303.

²⁶ Ibid 308.

application of the law²⁷. Indeed, to the extent that only the members of a cultural minority are awarded with a defence, this would make the law unequal: it then becomes the case that not all individuals are subjected in the same way to criminal law. Though Waldron is sceptical of admitting this kind of defence in order to make the legal system more responsive to diversity²⁸, he considers other grounds for accommodation. What Waldron seeks to defend is a ground compatible with the values of the rule of law. In contrast to Lacey, Waldron is more explicit in expanding the horizon of considerations that may come to bear on the acceptance of such a defence. Waldron holds that defences that only minorities can enjoy may express the values of the rule of law because they may actually help to realise such values, and so they should be permitted.

Waldron considers as a ground for accommodating cultural diversity the existence of other “agencies”, aside from the state, with authority over persons for deciding how they ought to live.²⁹ Although Waldron is not entirely clear as to what he means by “agencies”, it seems they are some form of association or group. Criminal law might endanger members’ allegiances to these groups when it criminalises their cultural practices. Members would be unfairly placed in a moral dilemma; they would be “torn”³⁰ between respecting the law and respecting their group. This cannot be fair and the rule of law requires fairness in criminal law. For this reason, in these cases exemptions may be accepted³¹. However, Waldron agrees with Lacey that these exemptions are limited. Waldron also believes that criminal law has a “critical function”. Criminal law can therefore seek to change cultural standards, like cultural norms concerning domestic violence. Moreover, exemptions cannot be granted where the laws are right-based. Norms concerning homicide are right-based. They impose deontological constraints on actions and are exemption-less. However, other norms, such as the prohibition of hunting, only appeal to utilitarian considerations and are susceptible to exemptions. Thus, Waldron, like Lacey, frames where diversity cannot be accommodated by criminal law: individual rights. Accordingly, only individual interests

²⁷ Jeremy Waldron, ‘One Law for All? The logic of cultural accommodation’ (2002) 59 *Washington Law Review* 3. For a defence of this view, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001).

²⁸ Waldron, ‘One Law’ (n 27) 12.

²⁹ *Ibid* 15.

³⁰ *Ibid* 24.

³¹ *Ibid* 17.

can become the ground for limiting criminal law, for the justification for the exemption owes to the fact that there is an individual with conflicting allegiances³².

As regards understanding criminal law as a two-way feedback relation, both Lacey and Waldron consider criminal law's contribution to the meaning of social practices. After all, this is what the critical function is all about. This evaluative function aims to reproduce or transform the standards individuals use as guidance for their actions. Nonetheless, neither of them pay much attention to how criminal law is informed by broader contexts of social practices. In truth, they consider some aspects of this relation insofar as they refer to values such as fairness and freedom, not just as constraints on what can be achieved, but as values that inform criminal law. Yet the connection remains underdeveloped. Notably, while both agree these values have authority by virtue of expressing, democratically, the views of a group, neither draws the connection between these cultural values and the group that values them. There are two connections here: between the values shared by a group, and these values having democratic authority. Now, if a group shares values, and the group has some form of political authority, this leads one to wonder why the individual cultural values of freedom and fairness should have authority for this group. This seems to be the case for indigenous peoples. It seems that if they are entitled to choose which values have authority for them, then they can legitimately question the values which the larger group claims have authority for them. Neither Lacey nor Waldron consider this. The reason seems to be that they have in mind non-self-determined groups facing criminal law. However, once self-determined groups like indigenous peoples are taken into consideration, things become less simple than whether they may enjoy an exemption or not.

As can be observed, identifying the connection between cultural and political claims was facilitated by understanding criminal law as a two-way feedback relation. Both Lacey and Waldron implicitly grasp another feature of how criminal law is informed by social practices that is relevant here. They consider that criminal law is not culturally neutral. According to Lacey, the law is marked by "cultural assumptions"³³, and according to Waldron, knowing the law implies the individual is "culturally equipped" to that end.

³² Waldron, 'One Law (n 27) 27.

³³ Lacey, 'Community, culture' (n 19) 307.

However, it is unclear how to understand the status of these “cultural assumptions”; that is, whether they are necessary for understanding the practice or whether they can be dispensed with. One might hold that cultural assumptions are at work in the critical function only when it seeks to challenge cultural practices. For instance, if it seeks to change individuals’ views on the preservation of national monuments, then in other cases those cultural assumptions could be considered dispensable. This seems not to be the position of Lacey and Waldron. They seem to hold that those cultural assumptions are always at work in criminal law and that more often than not, they might place minorities at a disadvantage. Certainly this is what accommodation in the form of exemptions is supposed to remedy. However, this commits them to sustaining that, notwithstanding those cultural assumptions, indigenous peoples can be treated equally by criminal law. More specifically, if all there is to their claims is avoiding discrimination or reverting to what is thought to be the application of non-neutral laws, then their claims become individualised. It results that collective claims to self-determination are reduced to individual claims to equal treatment, and thus to defences and exemptions. Chapter 1 and 2 seek to contest both this conclusion and its premise.

Essentially, the argument is that if partial defences are the solution to indigenous peoples inequality in criminal law, then it is unclear how imposing punishment can be regarded as an appropriate response. Furthermore, if the alternative is some form of justification, then it is unclear how relief from punishment can be regarded as an appropriate response by those making the accommodation. It seems that it is necessary, first of all, to achieve some clarity on the role played by cultural assumptions before assuming that equality can be achieved; and second, if they generate disadvantage, whether any group can be entitled to any form of relief. In other words, it is necessary to unpack the understanding of criminal law as a socio-cultural practice if the aim is to avoid joining Lacey and Waldron in construing equality in the narrow terms of defences and exemptions. Once that understanding has been unpacked, it will appear, first, that the claims of indigenous peoples should be distinguished from the claims of other minorities. Second, that the former cannot be treated equally if the solution is conceived of individualistically. To begin, it is provided a general understanding of criminal law as a socio-cultural practice. Basically, this considers criminal law as taking part in a process of the socio-cultural construction of reality, whereby it reproduces and transforms pre-existing cultural meanings and social structures. Once fully clarified and developed, the proposal will

provide a novel way for understanding the implications that accommodation in criminal law represents for both the accommodated and the accommodating.

This chapter is divided into three sections. Section 1.1 examines the legal literature, in order to outline different positions for obtaining the basic elements to understand criminal law as a socio-cultural practice. Section 1.2 goes beyond the legal domain and adopts a view of cultural dynamics from social theory and social philosophy. From this, it develops an understanding of criminal law as a socio-cultural practice. Drawing on the previous sections, Section 1.3 considers what would constitute a strong form of accommodation in criminal law and how this would be limited by the critical function. The chapter concludes with scepticism that accommodating indigenous peoples can be accomplished through defences in criminal law.

1.1 First Step in Understanding Criminal Law as a Socio-Cultural Practice: Law and Culture

This section examines the legal literature in order to gather the basic materials to understand criminal law as a socio-cultural practice. Two positions are examined, which effectively span most of the literature. One is presented by Roger Cotterrell in “The Struggle For Law: Some Dilemmas of Cultural Legality”³⁴ and the other by Naomi Mezey in “Law and Culture”³⁵. Whilst neither of these positions consider criminal law as a socio-cultural practice, their general approaches to the topic develop many important ways for accomplishing such an understanding. More importantly, they allow for broadening the traditional focus that understands culture and diversity within criminal law in terms of defences and exemptions. Expanding the focus provides a richer account of the place of culture in criminal law, and establishes the bases for starting to unpack criminal law as a socio-cultural practice.

³⁴ Roger Cotterrell, ‘The Struggle for Law: Some Dilemmas of Cultural Legality’ (2008) 4 *International Journal of Law in Context* 373-384.

³⁵ Naomi Mezey, ‘Law and Culture’ (2001) 13 *Yale Journal of Law and Humanities* 35-67.

1.1.1 The Critical Function and Criminal Law

According to Roger Cotterrell, legal theorists have not generally engaged with the idea of culture. Although there have been important works, these have only explored particular domains: legal culture, tribal law, cultural defences, cultural heritage, the experiences of minorities³⁶ and others. This seems to be confirmed in the works of two of the most influential social and legal theorists, Niklas Luhmann³⁷ and Jürgen Habermas³⁸. Indeed, culture does not figure prominently in their theoretical work. Cotterrell proposes not to fill the gap, but to delineate a possible starting point for that endeavour. In particular, he proposes understanding law as a form of communication or dialogue³⁹. In the context of cultural diversity, the focus becomes how the law addresses the challenges posed by diversity, by virtue of being a medium of communication. Cotterrell's objective is to make the law more responsive to the experiences faced by minorities in the legal system, and believes that this can be accomplished because the law can facilitate communication⁴⁰. Indeed, for Cotterrell, the law can be an open medium of communication.

Before relating Cotterrell's proposal to the preceding examination of Lacey and Waldron, it seems necessary to explain why the mere fact of diversity pulls the legal system towards accommodation. The pull in Waldron, as in Lacey, is explained by the need to respect the principle of equal treatment, in the sense of the equal application of laws⁴¹ or in terms of fairness⁴². Cotterrell, on the other hand, claims that the legal system should be more responsive because this would improve the likelihood of achieving the benefits of mutual co-existence⁴³. All of these values facilitate the view that minorities may be in a situation of disadvantage, and therefore, that they require some form of accommodation, to either

³⁶ Cotterrell, 'The Struggle' (n 34) 374.

³⁷ In Luhmann, culture figures as the memory of the social system. See Niklas Luhmann, *Social Systems* (Stanford University Press 1995) 163, 293, and *Theory of Society*, Volume 1 (Stanford University Press 2012) 354-355.

³⁸ Habermas identifies culture with the lifeworld; Jürgen Habermas, *Theory of Communicative Action, Volume I, Reason and the Rationalization of Society* (Beacon Press 1984) 45, and *Theory of Communicative Action, Volume II, Lifeworld and System, A Critique of Functionalist Reason* (Beacon Press 1987) 134.

³⁹ Cotterrell, 'The Struggle' (n 34) 380.

⁴⁰ Cotterrell, 'The Struggle' (n 34) 381.

⁴¹ Waldron, 'One Law' (n 27) 3.

⁴² Lacey, 'Community, culture' (n 19) 308.

⁴³ Cotterrell, 'The Struggle' (n 34) 380.

realise equality or establish a framework for mutual advantage, broadly understood. One should note that these ends do not place considerable restrictions on accommodating the claims of minorities. However, Lacey and Waldron's individualising strategy represents a considerable restriction to the repertoire of possible alternatives, at least in criminal law. Thus, a gap appears between equality and defences and exemptions. Certainly, more is needed to explain why equality demands accommodation only in terms of individual defences and exemptions.

It appears that what seems to be limiting accommodation has to do with the importance Lacey and Waldron ascribe to the critical function. It is because they ascribe a fundamental importance to the critical function that they place it beyond the reach of accommodation. In effect, this is what reduces the latter to defences and exemptions; the aim is to defend the role played by the critical function. Now, notice that Cotterrell would agree on locating the critical function beyond the reach of accommodation. This is because Cotterrell defends the communicative features of law, and by defending those features he implicitly defends the critical function. This is the key point. If what is deemed important are the communicative features of criminal law, then so is the critical function. Certainly, there would be no point in defending the critical function, if it were not possible to communicate with the accused about the wrongs committed against the political community. In other words, the critical function entails the communicative features of law, for there cannot be a critical function without communication.

Cotterrell's endorsement of the House of Lords' position in *Shabina Begum's* case⁴⁴ illustrates the point; that is, that the critical function entails the communicative properties of law. For Cotterrell, this case is an example of successful legal communication. In *Shabina*, the House of Lords rejected the claim that the respondent's right to freedom of religion was breached. Shabina was expelled from the school after insisting on wearing a jilbab in classes. For Cotterrell, what was important in the decision was the way in which the court addressed Shabina's claim, which demonstrated that the court engaged in successful communication and thus dialogue: first, by addressing Shabina as an "individual"; and second, by considering her entitled to be recognised as autonomous and equal. Yet, as occurred with Lacey and Waldron, a gap emerges between the value of

⁴⁴ *R (Shabina Begum) v Headteacher and Governors of Denbigh High School*, [2004] EWHC 1389 (Admin), [2004] ELR 374; [2005] EWCA Civ 199, [2005] 1 WLR 3372; [2006] UKHL 15, [2007] 1 AC 100.

mutual co-existence and the court's ruling. Indeed, it is not clear why mutual co-existence is supposed to require rejecting Shabina's claim. Nonetheless, Cotterrell has responded by making explicit the connection between the critical function and the communicative features of law. It is this particular form of communication that explicates the rejection of Shabina's claim.

Cotterrell accepts, as do Lacey and Waldron, that the law is not culturally neutral⁴⁵. The law conveys many cultural assumptions about how to understand fairness, equality and mutual co-existence. Yet none of them link the role of those cultural assumptions to the communicative properties of law, and thus the reason why accommodation is limited remains in the dark. Once cultural assumptions are linked to the communicative features of law, it appears that communication cannot get started without them. It is not only that the way in which legal communication is effected embodies the cultural conceptions of the political community, but that communication itself is a social practice, and thus, in itself involves cultural assumptions without which the content of what is communicated would not be intelligible. More specifically, in most western liberal states, legal communication is geared towards constructing in a particular way the objects on which it predicates respect, equality and autonomy. The law does this because it is structured to construct its object in a particular way: it constructs the legal subject as an "individual", and criminal law does the same. Criminal law espouses an individualised understanding of the social world by expressing that only individuals can commit crimes, that only individual interests can be wronged and harmed, and that only individuals can be punished. It appears then that the communicative features of criminal law are part of a broader context of social practices. Surely, they are directed to provide an individualised understanding of the social, by specifying who can be the object of legal concern and how they should be characterised. It is this process that neither Shabina nor the Rapa-Nui can reach *because* they are accommodated, that is, because accommodation is part of that process of individualisation.

Now, the reason why Lacey and Waldron reduce accommodation to defences and exemptions becomes clear: because they defend the communicative properties of criminal law, the critical function. As highlighted above, criminal law contributes to the meaning of the social practices on which it depends. By defending the critical function, they defend the

⁴⁵ Cotterrell, 'The Struggle' (n 34) 381.

social construction criminal law contributes to. Surely, this is an important task, for the socio-cultural practices criminal law contributes to allow individuals to engage in particular forms of social interaction. Thus, when a crime is committed the responsible would be necessarily one or more than one individual, and not a force of nature or another natural or supernatural event. Chapter 2 elaborates on this point. For now, it suffices to note that criminal law assists in defining who may have interests susceptible to being wronged and harmed, who may commit crimes and who may be punished. This is what the critical function achieves when it protects the values of the political community. Accommodation cannot reach the critical function, for if it could it would undermine the contribution of criminal law, that is, its contribution to the process of individualised social construction.

Understanding criminal law as part of a process of social construction aims to make explicit that cultural assumptions are always at work because the critical function is continuously reconstructing the legal subject. In western states, amongst inheritors of European modernity, criminal law can be broadly understood as a socio-cultural practice that contributes to reproduce liberal social practices. Social holism has provided the starting point for examining criminal law as a cultural practice. However, more is needed in order to get clarity on the “social” and the “cultural” in criminal law, and thus, to be able to answer more specific questions concerning the accommodation of indigenous peoples. The framework needs to be further refined. A first step towards the response has been provided, for the critical function was identified as one essential aspect of criminal law that limits accommodation. Additionally, it was recognised that it takes part in a process of individualised social construction. Identifying both marks the first step towards a response. Now it is necessary to explore more closely the “cultural” and “social” aspects of criminal law.

1.1.2 Unidirectional Understandings of Law and Culture

According to Mezey, there are at least three ways to understand culture in law, which implicitly indicates three ways to understand the cultural aspects of criminal law. The first way considers exclusively the role of law, confining culture to a passive role in the configuration of the legal system. For this conception, it is the law that determines the

content of culture⁴⁶. Importantly, the claim is not that law generates a *legal culture*, but that the operation of the legal system extends beyond its own domain and reaches individuals' cultural self-understandings. According to Mezey, this is the position of some legal realists and critical legal scholars⁴⁷. On this interpretation, law secures relations of power that in turn structure social relations. These can be relations of gender, social class or race; hence the law becomes primarily a tool for ideological use. In a different, albeit related way, this is also Ronald Dworkin's conception of the law⁴⁸. On this interpretation, the law embodies the ideal of individuals choosing autonomous lives, which are guaranteed through individual rights. Legal discourses about rights become part of how individuals define themselves and how they understand their relations with one another. All of these positions agree that the law structures how individuals understand themselves, and thus see the law playing a role in determining cultural meanings. In line with the basic dynamic in this depiction of the relationship between law and culture, this conception can be named the first uni-directional approach.

The second conception considers exclusively the role of culture, and takes the relationship to be the other way around: it is culture that determines the content of law⁴⁹. One way of thinking about this involves focusing on what the law needs in order to be minimally effective in social life. In order to regulate, modify or even confirm pre-existent patterns of social interaction, the law needs to at least address them in the proper way. Indeed, if the law aims to be minimally effective, then it needs to consider the cultural pre-understandings of the addressees⁵⁰. More to the point, to be effective the law needs to be informed by cultural standards, practices and norms⁵¹, in such a way that they determine

⁴⁶ Mezey, 'Law and Culture' (n 35) 48.

⁴⁷ Ibid 49-50. Mezey considers among these the work of Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault' (1991) 15 *Legal Studies Forum* 327-366, but it is also possible to consider the position of Roberto Mangabeira Unger, 'Legal analysis as institutional imagination' (1996) 59 *Modern Law Review* 1-23, for the idea of institutional imagination is supposed to effect legal change from the law itself as if it were autonomous from the political system.

⁴⁸ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986), this is so to the extent it is predominantly legal rights which determine how individuals understand themselves as citizens of modern liberal states.

⁴⁹ Mezey, 'Law and Culture' (n 35) 51.

⁵⁰ Ibid 52.

⁵¹ Whilst not specifically cultural, these accounts consider that there are forces at work that determine the content of law. If the force is the capitalist mode of production, then some Marxists legal scholars can be considered here insofar as they understand the law as a reflex of the capitalist mode of production, see Isaac

the content and operation of legal norms. These accounts share the common assumption that there is something external to the law that determines its content. Thus, whilst this conception also offers a unidirectional understanding of the relationship between law and culture, it reverses the relation. Whereas the first unidirectional conception considers that law determines culture, the second unidirectional conception holds that culture determines law.

1.1.3 Bidirectional Understanding of Law and Culture

Thus far, two conceptions for understanding the relationship between law and culture have been examined. According to the first, the law produces its own cultural meanings, whereas for the latter, the law merely registers cultural meanings that are produced elsewhere. Both conceptions involve different understandings of criminal law. The first reading suggests that criminal law determines cultural meanings by itself and conveys them outside the legal domain. If the law generates culture, then criminal law only protects the legal culture it has generated. This seems an implausible description of criminal law, for it would obscure what it seeks to accomplish outside itself and why it does so. Arguably, criminal law represents that the values of the political community are important, that is, values that lie outside of its own sphere of operation and that are not important just by dint of being part of criminal law. The second reading suggests that criminal law is determined from an extra-legal domain of considerations and it pursues ends completely external to criminal law. This also seems implausible. If these extra-legal domains determine culture, then criminal law could be reduced to economic interests, ideologies or

Balbus, 'Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law' (1977) 11 *Law & Society Review* 571-588, also Csaba Varga, 'Macrosociological Theories of Law, 43-76 and 'Law as a social issue' 459-475, both in Varga, *Law and Philosophy: Selected Papers in Legal Theory* (Akaprint 1994), also Louis Althusser, *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses* (Verso 2014) Ch. 5, though not Evgeny Pashukanis, *Law and Marxism A General Theory* (Pluto Press 1978), since he regards law as a semi-autonomous field. If the force is based on an egoistic individual's natural motivation, then neo-classical law and economics can be considered here insofar as they reduce the law to a set of incentives explained in terms of individual relations of expected utility, see Richard Nobles, "Economic Analysis of Law", in James Penner et al (eds.) *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Butterworths LexisNexis 2002) 855-896, and Michael Trebilcock, 'The Lesson and Limits of Law and Economics' in Pierre Noreau (ed.) *Dans le regard de l'autre* (Les Editions Themis 2005) 113-164. It is not possible to include here institutionalist law and economics that recognise the legal domain exhibiting certain of autonomy, see Steven G. Medema et al, 'Institutional Law and Economics' *Encyclopedia of Law and Economics* (2000) 418-455.

power relations; yet, it seems that criminal law achieves at least some degree of autonomy through its operation and following its own codes in constructing meaning.

What seems fundamentally mistaken in both conceptions is that they deny the two-way feedback relation between criminal law and culture. Criminal law cannot be strictly autonomous, as the first conception suggests, nor strictly dependent, as per the second. Mezey proposes a third conception for understanding the cultural components in law. According to this view, both unidirectional approaches make a methodological mistake: both seek to reduce either culture to law or law to culture. The first overlooks the fact that law generates culture, because it is part of a broader social context in which the law achieves meaning. The second disregards the ways in which the law can generate autonomous legal meanings. By denying the dependency of law, one may overlook how relations of power, capitalist modes of production and ideologies do indeed contribute in defining the law. By denying the autonomy of the law, one may not pay attention to how the law generates particular and distinctive cultural meanings apart from what occurs in everyday life. Because both approaches illuminate different ways of constructing legal meanings, it seems necessary, according to Mezey, to adopt a view that retains both.

Mezey aims to develop a view that retains what is valuable in both unidirectional approaches through what she calls a *bidirectional approach* to law and culture, which can be seen as a more developed form of the “constitutive approaches to law”⁵². This account has several elements. First, it adopts a conception of culture as a system of symbolic meaning⁵³. More precisely, culture is “...any set of shared, signifying practices – practices by which meaning is produced, performed, contested, or transformed”⁵⁴. Mezey emphasises that culture is a process by which meaning is produced and transformed,

⁵² On this approach, see Roger Cotterrell, ‘Law as Constitutive’ *International Encyclopedia of the Social and Behavioral Sciences* (Second Edition, 2015). Previous examples of this kind of approach include the following: Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (Routledge 1993), David M. Engel, ‘Law in the domains of everyday life: the construction of community and difference’ in Austin Sarat and Thomas Kearns (eds.), *Law in Everyday Life* (University of Michigan Press 1993) 123-170; Sally Falk Moore, ‘Law and social change: The semi-autonomous social field as an appropriate object of study’ (1972) 7 *Law and Society Review* 719-746; David Engel and Frank Munger, ‘Rights, Remembrance, and the Reconciliation of Difference’ (1996) 30 *Law and Society Review* 7-54; Ruth Fletcher, ‘Legal forms and reproductive norms’ (2002) 12 *Social and Legal Studies* 217-24; Peter Fitzpatrick, ‘Law as theory, constitutive thought in formation of (legal) practice’ (2009) 5 *Socio-Legal Review* 1-20.

⁵³ Mezey, ‘Law and Culture’ (n 35) 41.

⁵⁴ *Ibid* 42.

sustained and contested⁵⁵, both consciously and non-consciously⁵⁶. As this is a social process of production and contestation of meanings, culture includes inconsistencies and contradictions and so cannot be depicted as homogeneous⁵⁷. Mezey adopts a post-modernist conception of culture, in contrast with a structuralist⁵⁸ interpretation that depicts it as a coherent, non-contested and homogeneous system of meaning. The post-modernist view of culture understands it as non-coherent, contested and heterogeneous.

Second, it unifies both unidirectional approaches. According to the unifying account, both the force of law and the force of culture are equally fundamental. The relationship between law and culture is bidirectional: law influences culture as much as culture influences law. There is a relationship of mutual reinforcement⁵⁹ because culture and law are not independent domains of human experience. All legal interpretation involves cultural interpretations⁶⁰, and so the law is a social field in which culture is sustained, contested and transformed. As such, law engages in producing and reproducing culture; it can liberate but also be coercive⁶¹. Mezey considers that the law cannot be thought of as an autonomous domain, but is embedded in a system of social practices⁶². The fact that law is not autonomous does not mean for Mezey that it is indistinguishable from other social fields, such as politics or economics. Law is distinguishable by dint of its own dynamic processes, but it is not autonomous in the sense that it is deeply connected with other social fields⁶³.

⁵⁵ Ibid 42.

⁵⁶ Ibid 42.

⁵⁷ Ibid 43. In anthropology, see Akhil Gupta and James Ferguson, 'Beyond 'Culture': Space, Identity, and the Politics of Difference' in Jonathan Javier Inda and Renato Rosaldo (eds.), *The Anthropology of Globalization: A Reader* (Blackwell 2002) 65-80.

⁵⁸ Presumably she has in mind the work of Levi-Strauss and Ferdinand Saussure, see Anthony Giddens, 'Structuralism, post-structuralism and the production of culture' in Anthony Giddens, *Social Theory and Modern Sociology* (Stanford University Press 1987) 73-108.

⁵⁹ Mezey, 'Law and Culture' (n 35) 36.

⁶⁰ Ibid 58.

⁶¹ Ibid 47.

⁶² Ibid 47.

⁶³ For a similar account, see Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Journal* 805-853.

Finally, Mezey stresses that there are three sites for understanding law in cultural terms⁶⁴. The first is the law as a site of production. The second site encompasses what inspires the law and the practices that it targets. The third is the vital site for Mezey: this involves the “encounter of law and culture”, where meaning is contested and sustained, and so is the site where the bidirectional approach works best. This approach focuses on the “slippages of law”; the inconsistencies between legal meaning and cultural practices⁶⁵. The slippages are the spaces of interaction between law and culture, and where they coordinate or clash⁶⁶. Here, legal meanings might contest and overcome a practice in the way the court or the legislator intended them to. Yet, this is not always the case; practices may offer resistance and instead change intended legal meanings. An example would be the introduction of the Indian Gambling Regulatory Act in the USA. The Act was intended to strengthen tribal sovereignty by generating economic resources by providing the monopoly over gambling. According to Mezey, in some cases this was not accomplished, for belonging to a tribe became the condition for exercising this monopoly, thereby incentivising some to seek *that* status⁶⁷. This changed the meanings of the law and also changed the meanings of the practice of seeking recognition as a tribe.

1.1.4 First Problem For The Bidirectional Approach: It Neglects Legal Institutions

Mezey’s approach has the merit of showing the pitfalls of understanding criminal law as strictly autonomous or strictly dependent. Furthermore, Mezey also underlines the usefulness of understanding criminal law bi-directionally. Her account comes closest to seeing criminal law as a two-way feedback relation. However, it seems insufficient to give a proper account of the structure and dynamics of such a relation. As a consequence, while it provides some important insights that should be retained, it fails to provide what is needed: clarifying the social and cultural aspects of criminal law. There are two main problems with Mezey’s account, which point to the conditions that must be met to develop an adequate framework. The first problem is that the bidirectional approach overlooks the role that institutions play in enabling meanings. In other words, how legal institutions

⁶⁴ Mezey, ‘Law and Culture’ (n 35) 61-62.

⁶⁵ Ibid 60.

⁶⁶ Ibid 58.

⁶⁷ Ibid 60.

frame and constrain the reproduction and transformation of meanings⁶⁸. This is how the bidirectional proceeds. By focusing on the sites of the interaction between law and culture, it aims to show how legal and cultural meanings are reproduced and changed. In other words, the focus lies on the law being put into practice, enforced and applied by public officers (police, courts, legislators, etc.). However, by focusing on the concrete interactions of law and culture, the bidirectional approach loses sight of how legal institutions structure communication, engagement and dialogue.

Mezey's account is therefore too reductive while still illuminating, for it presses on some of the sites which law culturally constructs, and which cannot be left out in understanding the phenomena. The problem resides in reducing social construction to cultural construction, and thus, to slippages. Both should be, at least, analytically separated. Mezey's reductionism might be explained because she has not yet developed how the "three sites" interact. However, by leaving this unresolved, the implication is that it portrays legal meanings as underdetermined and thus largely dependent on how individuals use them to reproduce or change cultural practices. Renato Rosaldo's influence seems evident in Mezey's emphasis on the proper site of the bidirectional approach⁶⁹, for he has made the case for the creativity and agency of individuals embedded in different institutional contexts of society. However, the portrayal is mistaken. The institutional character of law pre-settles the amount of admissible individual creativity. Legal institutions establish *how* legal meaning is to be reproduced and transformed. In a highly institutionalized practice such as law, where one can assert that legal institutions dominate the struggle over meaning, how they set the stage and limit the significance of that struggle cannot be overlooked.

⁶⁸ David Garland, 'Concepts of Culture in the Sociology of Punishment' (2006) 10 *Theoretical Criminology* 419-447.

⁶⁹ Mezey follows the anthropology of Renato Rosaldo and his critique of Clifford Geertz, and thus joins him in overlooking the constraining role of legal institutions, see Renato Rosaldo, 'While making other plans' (1994) 58 *Southern California Law Review* 19-28. The thesis follows Clifford Geertz who, along with Marshall Sahlins, agrees that culture is enabling but also constraining, see Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in Geertz, *The Interpretation of Cultures* (Basic Books 1973) 3-30, and Geertz, 'Afterword: The Politics of Meaning' in Claire Holt (ed.), *Culture and Politics in Indonesia* (Equinox 2007) 319-335; Marshall Sahlins, 'Individual Experience and Cultural Order' in Sahlins, *Culture in Practice: Selected Essays* (Zone Books 2000) 277-291, and Sahlins, 'Two or Three Things I Know About Culture' (1999) 5 *The Journal of the Royal Anthropological Institute* 399-421.

Certainly, legal institutions like courts and legislatures, but also statutes and precedents, establish and structure concrete forms of interaction that control and define in legal terms the results of legal contestation. The law places limits upon individuals' choices and thus what they can achieve. It limits the strategies available, the ends that may be pursued and provides a language of rights and duties with a specific legal and individual register. Legal institutions must be accounted for, especially in criminal law. The structure of the prosecution and its prerogatives, the position of the defence and the rights of the defendant, instances of bargaining, the structure of fact-finding and the legal procedures in lower and appellate courts are all designed to advance specific social and cultural ends. Neglecting the role of legal institutions in the construction and control of meaning mischaracterises what can be achieved through law and, therefore, what can be accommodated within criminal law.

Now it is possible to begin characterising more precisely criminal law as a socio-cultural practice. First, one must recognise the centrality of the critical function in general, and for the process of accommodation in particular. Second, one must acknowledge the "social" in criminal law, namely, its institutional nature. It follows that the communicative features of criminal law are also institutional, as is the critical function. Below, section 1.2.4 details what it means to say that criminal law is institutional. For now, it suffices to say that it involves defusing the potential re-articulation of meaning generated by criminal behaviour, by defining and treating its object in a specific way⁷⁰. Legal institutions pre-regulate the way in which social and legal interactions unfold, and so determine the amount of contingency that can be registered. They structure the struggle over legal meaning. This in no way denies that outcomes are contingent and that agents might display a characteristic creativity, but it nonetheless accords legal institutions a fundamental role in structuring that space.

1.1.5 Second Problem for the Bidirectional Approach: it is Biased Against Groups

The second problem of the bidirectional approach is that it is normatively biased to the detriment of groups. As was argued above, the basic units through which the legal system operates are individuals and their interests. It follows that the meaning the legal system

⁷⁰ Paul Bohannon, 'The Differing Realms of the Law' (1965) 67 *American Anthropologist* 33-42; Niklas Luhmann, *Law as Social System* (OUP 2004) 143.

construes takes only individuals as reference, and thus excludes groups. Groups are described as aggregations of individuals. To prevent this bias, another component is necessary: analytical objectivity between individuals and groups. This component is necessary: firstly, to prevent a descriptive explanatory deficiency, that is, to avoid describing social practices as a mere aggregation of individual actions⁷¹. This is explained below, in Section 1.2.3. Secondly, analytical objectivity makes explicit an unreflective positive evaluation of the aforementioned bias. Indeed, by allowing groups to figure in normative explanations, it becomes possible to identify how groups become excluded through a seemingly objective characterisation of culture. Certainly, it is not clear whether the post-modern conception of culture is explanatorily deficient or whether it presents an additional, normative characterisation of culture. Be that as it may, from describing culture in the absence of groups, there normally follows the normative and more contentious claim that groups *should* be excluded from any consideration.

The suggestion here is not to adopt a robust understanding of groups, but to follow a methodological principle in order to prevent collapsing the descriptive with the normative. Accordingly, groups are understood in a methodological sense equivalent to “group holism”⁷², the view that sometimes the best way to characterise social practices is in terms of the practices of a group. In securing modest space for groups, the approach remains analytically objective. This allows, on the one hand, understanding that the dilemma faced by minorities, as explained by Waldron, cannot be reduced to individual interests. On the other hand, it shows that because criminal law seeks to reproduce a liberal social world, it is naturally biased towards benefiting individuals. Mezey’s account is not objective in this regard, for the conception of culture on which the bidirectional approach stands does not make room for groups. By transforming Rapa-Nui into aggregations of individuals, the bidirectional approach excludes them as units of meaning. In turn, it obscures the way in which criminal law contributes to the practices of the group of which it is part. In other words, the account makes invisible the collective and political character of both the claims of Rapa-Nui and the state’s response through criminal law. Because groups are units of

⁷¹ This leads the post-modern account of culture to face serious problems in explaining cultural continuity, see Nikolas Kompridis, ‘Normativizing Hybridity/Neutralizing Culture’ (2005) 33 *Political Theory* 318-343.

⁷² See Deborah Perron Tollefsen, ‘Collective Intentionality and the Social Sciences’ (2002) 32 *Philosophy of the Social Sciences* 25-50; also Allan Bouvier, ‘Individualism, Collective Agency and The Micro-Macro Relation’ in Ian Jarvie and Jesus Zamora-Bonilla (eds.), *The Philosophy of Social Sciences* (Sage 2011) 199-216.

meaning, an approach that allows group-holism remains analytically objective. Let us observe more closely how the post-modernist conception of culture fails in this respect.

Mezey adopts a post-modernist conception, according to which culture is a non-coherent, contested and heterogeneous system of meaning. This is a non-essentialist conception of culture, opposed, as seen above, to structuralism. Here it is examined Uma Narayan's work, not only because it is one of the most prominent and influential accounts of the post-modernist, non-essentialist conception of culture, but also because this is the account which Mezey relies on. Narayan's conceptualisation makes explicit the normative considerations that underlie the post-modernist conception of culture. Narayan construes the notion of culture bearing in mind the idea of cultural essentialism. Cultural essentialism is equivalent to gender essentialism⁷³. Gender essentialism and cultural essentialism differ only in scope, not in kind⁷⁴, and both provide an essentialist account of culture and groups.

An essentialist account of culture is also an essentialist account of groups, illustrated by the following. First, one defines a culture as having features A, B, C, and so forth. Second, one defines membership according to members having features A, B, C, and so forth. Membership then becomes defined in terms of culture. By defining membership in this way, the essentialist can describe groups as homogeneous. Narayan argues, however, that such construction involves more than a mere description⁷⁵. In such a description, the essentialist takes only the experiences and subjectivities of the members who have features A, B, C, and so forth. Upon these, the essentialist projects not only a homogeneous image of members, but also fixes unequal relations of power⁷⁶.

Cultural essentialism homogenises the group⁷⁷ and fixes relations of power in favour of those who dominate the group, for they are the ones who decide the properties that define their culture. When Mezey claimed that the bidirectional approach rejects the idea of culture as described by traditional structuralist thought, she rejected the essentialist,

⁷³ Uma Narayan, 'Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism' (1998) 13 *Hypathia* 87.

⁷⁴ Narayan, 'Essence of Culture' (n 73) 88.

⁷⁵ *Ibid* 88.

⁷⁶ *Ibid* 88.

⁷⁷ *Ibid* 92.

normative description of culture and groups. And so when Narayan and Mezey take the view of culture and, in turn, of groups as non-coherent, contested and heterogeneous, they adopt a normative standpoint, one that allows the contestation of relations of power. Cultural non-essentialism holds that cultural differences exist⁷⁸, but denies that they correspond to distinctive cultures. All cultures are subject to dissent, all cultures are interconnected, and there is no authentic representative of a culture⁷⁹. This permits, according to them, a critical standpoint toward any essentialist description of cultures, and thus they claim these would be better described as aggregations of individual cultural interactions.

It should be noted that suddenly members of groups cannot define themselves as having a particular culture. They cannot actually define themselves as a group. Certainly, members of Rapa-Nui cannot be taken to be in consensus towards what is and what is not part of their culture. Rapa-Nui's culture is interconnected with all cultures, especially with Chilean culture, and even if that interconnection was not consented to⁸⁰, the question still arises: can they claim to be the authentic representatives of their culture? It seems that according to the post-modern conception of culture, they cannot. For that to be possible, they should (a) depict their culture as at least relatively isolated. If it were too interconnected with other cultures, there would be no way to disentangle it in order to be able to say that there is "a" Rapa-Nui culture. They should also be able to (b) agree upon the main features of what it is to be Rapa-Nui, for if there is too much dissent, there could be no agreement on what is and is not of their culture. It follows that, because the post-modern conception rejects (a) and (b), it also rejects (c); that is, Rapa-Nui's claim to be the authentic representatives of *their* culture. Indeed, necessary interconnection (a) and necessary dissensus (b) entail that anyone can claim to be an authentic representative of a culture, yet equally anyone can be prevented from claiming as much. In sum, there can be no authentic representation of Rapa-Nui culture, not even if it comes from Rapa-Nui themselves.

⁷⁸ Ibid 103.

⁷⁹ Ibid 103.

⁸⁰ Eastern Island was annexed to the Chilean State under the promise that only lands and not sovereignty was being transferred, see Jose Bengoa (comp.), *La Memoria Olvidada: Historia de los Pueblos Indígenas de Chile* (Publicaciones del Bicentenario 2004) 632.

Now, this implication of the post-modernist conception should be rejected. If someone can claim to be representative of a group, it must be that some of its members understand themselves as being part of something more than a mere aggregate. Rapa-Nui should be able to claim that much. Therefore, cultures can be understood as isolated, at least relatively so, and there can be some consensus as to what is and is not part of their culture. Thus, it turns out that rejecting this implication of the post-modernist account of culture should lead to it being modified in important respects. Therefore, the approach can thus remain analytically objective. Notice that analytical objectivity applies to understanding culture and also to the legal institutions of western, liberal social orders. The post-modernist conception of culture is not normatively neutral towards groups, because it treats social practices as practices of isolated individuals. In effect, viewing cultures as non-coherent, contested and heterogeneous appeals to individuals as the only units of meaning. It is individuals making choices about which values to endorse and which values to contest which results in a heterogeneous culture. In other words, culture is the outcome of individuals' choices. Yet this not only describes a culture, but also involves a normative consideration about how culture should be understood: as being about individual individuality. This explains why cultural and legal meanings are contingent, according to the bidirectional approach. Of course, it assigns the role of reproducing legal meanings solely to individuals. Nonetheless, whilst this is a descriptive error, it is still indicative of the normative value assigned to individuals and explains the exclusion of groups. More importantly, it highlights how this normative exclusion arises from a descriptive exclusion that characterises culture as non-coherent, contested and heterogeneous, reproduced and chosen by individuals.

In sum, it is necessary to maintain a conception of culture that remains objective towards the role that individuals and groups may play in the overall process of transformation/reproduction of meanings. Culture is neither totally coherent, uncontested and homogeneous, nor totally incoherent, contested and heterogeneous. Members of groups might share *a* culture. Some of its parts maybe incoherent, yet others maybe fairly coherent⁸¹; they might contest some areas of their collective beliefs, yet not all of them;

⁸¹ This also suggests that characterising culture as a *system* is a mistake. However, it can be valid insofar as what is meant is that there is a conglomeration of different cultural elements, which are intertwined and mutually related in different ways, even if the relations between them do not form a system. For to be a system would mean an arrangement of elements characterised by the logical properties of completeness, consistency and coherence.

and they might hold relatively homogeneous views in some areas and heterogeneous views in others. Post-modernist conceptions of culture are surely correct in stressing that to a certain extent cultures are porous, contested and heterogeneous, but they need not deny that cultural groups can exist *and* can claim access to their collective practices. Indeed, it is not necessary to claim that all social ontologies are composed only by individuals, and that cultures are always in every way incoherent, contested, and heterogeneous.

1.2. Second Step in Understanding Criminal Law as a Cultural Practice: the Reproduction and Transformation of Socio-Cultural Life

1.2.1 Culture Beyond the Bidirectional Approach

At this point, the legal literature seems insufficient in order to understand the “social” and “cultural” in criminal law. It is necessary to move beyond legal theory to social theory⁸², in order to examine more deeply these two aspects of criminal law. Let us start by focusing on the social, that is, on legal institutions understood as social structures, and their relation to culture. An examination of this topic seems to lead back to the endless debate on culture and social structure⁸³. Whilst it is not necessary to elaborate on this topic in great detail, it must nevertheless be drawn on the broader points it raises, given that legal institutions have been characterised as social structures. Moreover, it was stated that they frame and constrain the apparent contingency of cultural meanings and established that the bidirectional approach fails to consider them. Now, the thesis follows the position that considers that legal institutions are social institutions⁸⁴, and that social institutions are

⁸² The thesis draws on insights from social theory and not explicitly anthropological theory, because at a certain level of abstraction both converge on their objects, so there are many affinities between the present approach and anthropological theory. The thesis’s view of culture is not only compatible with many anthropological approaches but it relies on and is informed by them, see (n 52). More generally Robert Ulin, *Understanding Cultures: Perspectives in Anthropology and Social Theory* (Second Edition, Blackwell 2001), and Haviland et al, *Anthropology: The Human Challenge* (Wadsworth 2011) Chapter 14.

⁸³ On the multiplicity of approaches, see Munch and Smelser, ‘Relating the Micro and Macro’ in Jeffrey Alexander et al (eds.) *The Micro-Macro Link* (University of California Press 1987) 356-387; also Jeffrey C. Alexander and Steven Seidman (eds.), *Culture and Society: Contemporary Debates* (CUP 1990); George Ritzer, *Sociological Theory* (4th Edition, MacGraw Hill 2011) Chapter 14; Seumas Miller, ‘Social Institutions’ in *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition) <http://plato.stanford.edu/archives/win2014/entries/social-institutions/> accessed 20 September 2016

⁸⁴ Alan Wells, *Social Institutions* (Heinemann 1971) Chapter 3; also Jonathan H. Turner, *Human Institutions: A Theory of Societal Evolution* (Rowman and Littlefield 2003).

social structures⁸⁵. While social theorising does not focus directly on legal institutions in relation to culture, it does touch upon the relationship between social structures and culture, which is sufficient to elaborate a robust approach.

Naturally, it is not possible to examine in-depth all aspects of the debate. For that reason, it is considered in sufficient detail to make discussing legal institutions as social structures, and how they relate to culture, intelligible. Current social theorising starts with the question of whether it is possible to distinguish culture and social structure, and if so how to account for the difference. The standard position is that culture and social structure are entangled yet different, and that the difference can be observed in the effects of social structure on culture: namely, that social structure constrains culture⁸⁶. Not all agree on this. According to a second approach, associated with structuralist sociology and anthropology, social structures determine cultural meanings⁸⁷. This is more or less what the second unidirectional approach sustains⁸⁸, yet here it is expanded to the relations between culture and social structure. This alternative, however, collapses culture with social structure. If social structure determines the agency of individuals, then cultural values and beliefs have no independent existence, nor do they have any role to play, aside from the effects of social structures. In short, individuals are determined by social structure. A third approach arrives at the opposite conclusion, in considering that culture determines social structure. This approach can be either the post-modernist conception of culture or that of rational choice theory⁸⁹, according to which social structures are just individual interactions driven by power or self-interest. Yet, with this move, social structure becomes superfluous and

⁸⁵ Geoffrey M. Hodgson, 'What are Institutions?' (2006) 40 *Journal of Economic Issues* 2.

⁸⁶ Samuel Eisenstadt, 'The Order-maintaining and Order-transforming Dimensions of Culture' in Richard Münch and Neil J. Smelser (eds.), *Theory of Culture* (University of California Press 1993) 64-87; José López and John Scott, *Social Structure* (Open University Press 2001) 3; Habermas, *Theory of Communicative Action, Volume I* (n 38) 81, insofar as he follows Parsons in his view of how cultural values become institutionalised. On the centrality of the institutionalization of values in Parsons' earlier and later work, see Leon H. Mayhew, 'Introduction' in Mayhew (ed.), *Talcott Parsons: On Institution And Social Evolution. Selected Writings* (University of Chicago Press 1982).

⁸⁷ The standard position here is the work of Louis Athusser, *Lenin and Philosophy and Other Essays* (Monthly Review Press 1971), and Levi-Strauss, *Structural Anthropology* (Basic Books 1963). Both draw upon the linguistics advanced by Ferdinand de Saussure, *Course in General Linguistics* (Columbia University Press 1959).

⁸⁸ See section 1.1.2 above.

⁸⁹ See for instance Jon Elster, *Nuts and Bolts for the Social Sciences* (CUP 1989) 10, the standard position of reductive methodological individualists.

meaning unconstrained. Neither the second nor the third approach seems plausible. The most plausible account is the first approach, which asserts that social structure and culture are entangled yet different. The question becomes how to elaborate that relationship.

1.2.2 Margaret Archer and the Dynamics of Culture and Social Structure

According to the standard approach, there is a mutual dependency between social structure and cultural meanings, and culture is characterised as being *relatively autonomous* from social structure. The relative autonomy of culture is a general methodological position that holds that cultural meanings cannot be identified from social actions alone⁹⁰. That is, methodologically, it is not possible to analyse cultural meanings as equivalent to mere regularities of social behaviour. Cultural meanings are distinct from, yet dependent on, social action. Nonetheless, because this autonomy is relative, it must be acknowledged that culture is also constrained by social structure⁹¹. In this way, both are entangled and different. However, in order to understand this method better, it is still necessary to know with more precision how it is that they interact and remain different.

Among the different positions that elaborate the relative autonomy of culture⁹², the thesis follows Margaret Archer. Archer's is the best-developed account of the relationship between social structure and culture. Having engaged with the most influential sociological and anthropological literature, Archer provides a suitable way for understanding the social and the cultural in criminal law. Archer develops a method she denominates as "dualist"⁹³. Dualism seeks to understand both social structure and culture as *analytically* different, thus avoiding reducing culture to social structure and social structure to culture. Archer's dualism prevents collapsing culture and social structure either as the "downward conflationist", who reduces culture to social structure, or as the "upward conflationist", who reduces social structure to individual interaction⁹⁴. That was, more or less, what both

⁹⁰ Jeffrey C. Alexander, 'The relative autonomy of culture' in Jeffrey C. Alexander and Steven Seidman (eds.), *Culture and Society: Contemporary Debates* (CUP 1990) 25.

⁹¹ Alexander, 'The relative' (n 90) 26.

⁹² See Steve Fleetwood, 'Structure, Institution, Agency, Habit, and Reflexive Deliberation' (2008) 4 *Journal of Institutional Economics* 183-203.

⁹³ Thus, the approach is not a complete theory, as is discourse theory or systems theory, but stands as a method for understanding the social and culture.

⁹⁴ Margaret Archer, *Culture and Agency: The Place of Culture in Social Theory* (CUP 1990) Part I.

unidirectional approaches maintained. It also rejects the “central conflationist”⁹⁵, who claims that culture and social structure are mutually constituted and refuses to make any analytical distinction between them. For dualism, the focus of attention is the interface between culture and social structure, in order to explain the achievement of social and cultural reproduction or transformation⁹⁶.

Archer distinguishes social structure (SS) and cultural system (CS) as two separate levels of analytical examination. Both have similar internal dynamics. Consider first CS. In order to make sense of CS, Archer contrasts the events that take place at a socio-cultural level (S-C) and how CS conditions them⁹⁷, that is, how ideas (CS) condition socio-cultural interaction (S-C). To these two sequences of analytical differentiation, Archer adds a third, which is the result of socio-cultural interaction: cultural transformation (CT) or cultural reproduction (CR). As a consequence, the dynamics of culture are explained as three sequential levels, which can be distinguished temporally and that form what Archer designates a “morphogenetic” approach. The focus of this approach is the interface between SS and CS levels, which leads either to morphogenesis or transformation, or morphostasis or reproduction. When there is morphogenesis “...subsequent interaction will be different from earlier action precisely because it is now conditioned by the elaborated consequences of that prior action. Hence the morphogenetic perspective is not only dualistic but sequential”⁹⁸.

The above explanation suffices as a basic depiction of the morphogenetic approach to culture and social structure. The approach explains cultural dynamics by distinguishing temporal sequences of social and cultural events. The sequence has the following form: cultural conditioning (CC) → socio-cultural interaction (S-C) → cultural elaboration leading either to cultural transformation (CT) or cultural reproduction (CR). According to Archer, the causal influence exerted by cultural conditioning (CC) pre-exists S-C, which means that agents have to deal with a CS that is not of their making⁹⁹. Yet, they are responsible for the results of socio-cultural interactions in terms of cultural elaboration,

⁹⁵ Archer’s target here is Anthony Giddens.

⁹⁶ Archer, *Culture and Agency* (n 94) xxiv.

⁹⁷ *Ibid* xviii.

⁹⁸ *Ibid* xxvi.

⁹⁹ *Ibid* xxv.

that is, reproduction (CR) or transformation (CT)¹⁰⁰. After cultural elaboration, a new cycle commences with cultural conditioning (CC). Cultural elaboration then post-dates¹⁰¹ the S-C level, that is, cultural reproduction (CR) or transformation (CT) occurs after S-C, and CC precedes S-C.

According to Archer, social structures (SS) have the same dynamic as the cultural system (CS). That is, events occurring within SS follow the same sequence as the events occurring within CS. Therefore, it is possible to distinguish: structural conditioning (SC) → social interaction (SI) → structural elaboration leading either to structural reproduction (SR) or structural transformation (ST)¹⁰². According to Archer, both SS and CS cycles intersect in the middle of the sequence¹⁰³. Thus the result - social and cultural reproduction or transformation - depends on the S-C/SI interface. This interface is of particular importance, for it shows both that SC has effects on subsequent CC by virtue of SI influencing CR/CT, and that CC has effects on subsequent SC by dint of S-C influencing SR/ST. That is, culture causally influences social structure and social structure causally influences culture. Archer's account of the dynamics of culture and social structure are not only dualistic and sequential, but also cyclical, for both culture and social structure become part of cycles of cultural and social events that mutually intersect.

Archer's morphogenetic approach accounts for both the differentiation and the interrelatedness of CS and SS, and thus offers a way to understand their dynamics. That dynamic is sequential and shows how agents start their social interactions conditioned by CC and SC, then engage in socio-cultural interactions at S-C/SI interface, the result of which is either CR/SR or CT/ST. That dynamic is also cyclical, for both sequences of culture and social structure become mutually intersecting and feed each other in each cycle. Finally, Archer's scheme shows that, in broad terms, agents are both passively shaped by and yet actively shape their cultural and social environment in sequences and cycles that leads continuously from conditioning to interaction to reproduction/transformation. With Archer's approach, it is possible to elaborate further the two-way feedback relation and specify the dynamics of the "cultural" and the "social": by

¹⁰⁰ Ibid 106.

¹⁰¹ Ibid 91.

¹⁰² Margaret Archer, *Realist Social Theory: The Morphogenetic Approach* (CUP 1995) 91-92.

¹⁰³ Archer, *Culture and Agency* (n 94) 282.

analytically distinguishing CS from SS in criminal law, and understanding them in terms of a sequential and cyclical relationship. However, before applying this model to criminal law, there is one final aspect of Archer's theory that needs to be scrutinised, and which leads to an important modification¹⁰⁴.

1.2.3 From the Dynamics of Culture to Wittgensteinian Social Practices

It is Archer's understanding of cultural meanings, which figure as the content of CS, that require modification. Here, Archer's approach reveals itself to be too narrow. The reason is related to Archer's main focus: the SS/CS interface for explaining processes of *social causation*. The purpose of this thesis lies, instead, in *understanding a social practice* by elucidating the processes of reproduction/transformation of cultural meanings (and social structures). This requires a different approach. Archer's narrowness stems from how her approach characterises cultural meaning, which Archer takes from Karl Popper. For Popper, the CS of a society lies in the *logical contents*¹⁰⁵ of physical bases like books, registers, and computers¹⁰⁶. Because all of this information is treated as an object of knowledge, the cultural world can be specified in propositional forms¹⁰⁷. The cultural world would therefore be those sets of propositions that entail knowledge, thus cultural meanings are cashed out in terms of true propositions. For Archer, the CS involves *only* logical relations, and so it can be examined logically in terms of rules of coherence, consistency and completeness. However, many cultural practices and cultural artefacts cannot be explained in terms of logical relations between true propositions¹⁰⁸. Archer's reliance on formal semantics for analysing contradictions and consistencies seems unsuitable to account for the CS of a society and for understanding its practices. Thus, it is necessary to introduce a key modification to Archer's approach. Nevertheless, by appealing to formal semantics, Archer has hinted at where to look for an alternative conception of meaning.

¹⁰⁴ This is because Archer rejects what the thesis seeks to do, basically, to complement her approach with Wittgenstein's view on meaning, see Archer, *Culture and Agency* (n 94) 108.

¹⁰⁵ Karl Popper, *Objective Knowledge: An Evolutionary Approach* (Revised Edition, Clarendon Press 1979) 74.

¹⁰⁶ Archer, *Culture and Agency* (n 94) 104.

¹⁰⁷ *Ibid* 105.

¹⁰⁸ Habermas, *Theory of Communicative Action* (n 38) 81.

In order to understand the content of CS in terms of meaning, it is necessary to separate formal semantics from philosophical semantics¹⁰⁹. Archer's approach adopts the former, which focuses on computing the values of expressions¹¹⁰ on the assumption that meaning has truth-values¹¹¹. That is, Archer adopts a view in which meaning is uncovered in terms of truth. This is why she reduces cultural meanings or ideas to true propositions. This suggests that if the focus is on meaning, it is possible to turn to a philosophical approach. Indeed, philosophical semantics does not start from an a priori idea of truth in order to attain an understanding of meaning. Actually, it claims that truth cannot say much about how meaning emerges. Thus, philosophical semantics accords with the notion that cultural meaning goes beyond a formal-semantic approach. This is the view it is necessary to adopt¹¹².

The role of cultural meanings can be characterised in terms of what they accomplish, and what they accomplish is *enabling* individuals at the beginning of cycles to engage in social and cultural interaction. Participants need to master meanings in order to engage in social practices. To the extent that meaning is connected with social practices, it seems that Ludwig Wittgenstein's views¹¹³ on meaning suits the present purposes. This is because Wittgenstein's focus lies in understanding meaning as a public engagement in social practices. While it is not intended to dwell deeply on the philosophy of language, it is nonetheless necessary to connect Archer's approach with a broader idea of meaning, so that social practices may come to occupy a more prominent place within it. For that reason,

¹⁰⁹ On this distinction see Robert Brandom, 'Reply to Michael Dummett's "Should Semantics be Deflated?"' in Bernhard Weiss and Jeremy Wanderer (eds.), *Reading Brandom On Making It Explicit* (Routledge 2010) 342-346.

¹¹⁰ Robert Brandom, 'Explanatory vs. Expressive Deflationism About Truth' in Richard Schantz (ed.), *What is Truth?* (Walter de Gruyter 2002) 115-116; also Michael Dummett, 'Should Semantics be Deflated?' in Bernhard Weiss and Jeremy Wanderer (eds.), *Reading Brandom On Making It Explicit* (Routledge 2010) 213-226.

¹¹¹ Archer is not alone here; most theories advancing a representationalist account of meaning within an interpretivist account of the CS endorse the same position. For an influential essay on this way of understanding cultural meanings, see Todd Jones, 'Uncovering "Cultural Meaning": Problems and Solutions' (2004) 32 *Behavior and Philosophy* 247-268.

¹¹² A similar approach seems to follow from the approach developed by George Pavlakos, *Our Knowledge of the Law: Objectivity and Practice in Legal Theory* (Hart Publishing 2008), yet there are some differences in orientation that may play out in the understanding of meaning, for while Pavlakos espouses the semantic-exhaust ontology thesis, the thesis would put semantics above the pragmatic dimension.

¹¹³ As Foegelin has argued, properly understood, Wittgenstein does not develop a "theory of meaning", but important principles and remarks about meaning; see Robert Fogelin, 'Wittgenstein's Critique of Philosophy' Hans Sluga and David Stern (eds.), *The Cambridge Companion to Wittgenstein* (CUP 1996) 36.

a basic explanation of the way Wittgenstein connects the idea of meaning with social practices will suffice.

Wittgenstein understands meaning as appropriate rule-following, which is public or social in character. In other words, meaning for Wittgenstein is a rule-governed activity in which individuals engage as a form of social practice. Whilst meaning involves following rules, which might be susceptible to truth conditions, rules cannot be understood according to rules themselves¹¹⁴. Participants grasp meaning when they grasp rule-following, which is fundamentally a practical mastery. Thus, participants can identify what someone is doing because they have mastered the same practice of rule-following. Though it may seem obvious that people can identify what someone is doing, this obviousness obscures that complex process of mastering social rules. It was already seen that cultural meaning is not a mere regularity of public behaviour, for a mere regularity may have different and possibly contradictory meanings. Out of the plurality of different meanings a regular social behaviour can exhibit, participants can identify which of those multiple meanings is correct. How can participants do this? They can because they have mastered them as participants in a social practice, and so they can identify the cultural meaning beneath public behaviour.

Wittgenstein asks this question concerning the correct application of rules in order to emphasise the same point: if many different courses of action can be made to accord with the rule, which one is correct? Wittgenstein remarks that the answer cannot be given by the rule itself. Just as with regular social behaviour, rules are not self-interpreting. According to Wittgenstein, it is tempting to believe there is an alternative way of identifying meaning from outside of the practice. One way to avoid the participant's perspective is to believe there is a meta-rule that specifies the appropriate course of action, as an action under a rule. Thus, it removes the theorist as a participant from the practice. However, this move generates an infinite regress, which makes it impossible to settle the correct interpretation. Certainly, even if it is developed such a meta-rule, the same question arises now at this meta-level: what is the appropriate course of action according to this meta-rule? If the answer is offered in terms of a meta-meta-rule, then the alternative faces an infinite regress. Wittgenstein's answer to how we might identify appropriate rule-following is to

¹¹⁴ Ludwig Wittgenstein, *Philosophical Investigations*, (Wiley Blackwell 2009) (Revised fourth edition, Trans. by G. E. M. Anscombe, P. M. S. Hacker and Joachim Schulte) para. 201.

consider it as a social practice¹¹⁵. This shifts the question of cultural meaning from truth conditions, that is, from the activity of referring to objects in the world¹¹⁶, to the process of mastering public rules as a social practice. A key corollary is that the criterion of correctness for appropriate rule-following is given by the practice itself, not by rules or objects external to the practice. Participants cannot remove themselves from the practice in order to understand meaning.

Archer's emphasis on formal semantics¹¹⁷ - at the expense of the philosophical aspects of meaning - does not suffice to capture the complexities of cultural meanings. Broadening to social practices suggests that SS/CS cycles may contribute to an explanation of the socio-cultural transformation/reproduction of meaning. Certainly, meanings are part of both CS and SS, for both are social practices. It follows that if meanings are part of SS/CS cycles, then they are transformed and reproduced accordingly. This is the basis for explicating the social construction of reality, which the thesis develops more fully in Chapter 2. For present purposes, the conclusion is that while cultural meanings may have a semantic form, the key is to recognise that meaning can be grasped only in terms of social practices in which participants engage publicly.

1.2.4 Understanding Criminal Law as a Cultural Practice

Notwithstanding the fact that the empirical question concerning the role criminal law plays in morphogenetic cycles has yet to be investigated¹¹⁸, it is nevertheless possible to advance an interpretation of the position it holds within them. Naturally, the modified morphogenetic approach now has a different methodology, whose ends diverge from

¹¹⁵ Wittgenstein, *Philosophical* (n 114) 82, para. 202.

¹¹⁶ Which, after all, is nothing if not something individuals also learn as a social practice. In other words, individuals learn the "game" of naming objects, see Meredith Williams, *Wittgenstein, Mind and Meaning: Toward a social conception of mind* (Routledge 1999) 147-148; also John Gunnell, *Social Inquiry After Wittgenstein & Kuhn: Leaving Everything as It Is* (Columbia University Press 2014) 77.

¹¹⁷ Notice that Archer is not alone in emphasising the semantic aspect of cultural items; both Habermas and Luhmann emphasise the same. See Habermas, *Theory of Communicative Action* (n 38) 140; Luhmann, *Social Systems* (n 37) 163; also Daniel Bell, 'The Disjunction of Culture and Social Structure: Some Notes on the Meaning of Social Reality' (1965) 94 *Daedalus* 208-222.

¹¹⁸ Only recently have Margaret Archer and her associates started to examine the legal system, yet thus far little has been said on the topic or on criminal law. See the recent volume Margaret Archer (ed.) *Morphogenesis and the Crisis of Normativity* (Springer 2016). Note, however, research has not yet addressed with enough specification the distinct domains and levels of the legal system.

Archer's. The modified morphogenetic approach explicates the relationship between culture and social structure and thus provides the elements for understanding criminal law as a socio-cultural practice. The result is this: if criminal law is a social institution, then it is a social structure analytically distinct from culture. Initially, this provides a conception of criminal law based upon its "social" components, because it is a SS. Yet, following Archer's approach, it is necessary to distinguish two types of cycles, SS and CS, and so to distinguish two analytically different forms of criminal law. Let us start by understanding criminal as a SS (social structure).

Understood as a SS, criminal law appears in the first sequence as pre-structuring the way in which individuals interact socially. That is, criminal law conditions structurally (SC) the situation individuals find themselves in prior to their social interactions. Previous to individuals interacting, criminal laws are set in place to structure what has been previously defined as crime. This is why, properly speaking, criminal law is a form of structural conditioning that operates more clearly throughout the second sequence. In the second sequence, criminal law frames social interactions (SI) by establishing the institutional pathways that individuals choose. By instituting officials and courts, through legislation and precedent, by defining procedures, rules and principles, by setting competences, and through its adjudicative institutions and enforcement, criminal law *institutionalises* the choices of agents. This is the sense in which the institutions of criminal law are social structures: they structure individual choice.

The notion of "institutional" is used here in a broader way, when contrasted with how it is standardly understood in legal theory; namely, as a relationship between operative facts and normative consequences¹¹⁹. Here, instead, it is followed Robert Merton's conception of institutional structures in order to elucidate how is it that criminal law structures individual choices. According to Merton, social structures *structure* the choices of individuals¹²⁰ because they *structure the alternatives* individuals have as objects of their

¹¹⁹ See Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP 2007) 24-26.

¹²⁰ Merton makes a further claim that social structures not only constrain motivations, but also exert pressure on individuals located at different positions on the socio-economic scale to engage in conforming or non-conforming social behaviours. See Robert Merton, 'Social Structure and Anomie' in Merton R, *Social Theory and Social Structure* (The Free Press 1968) 185-214.

choices and attach to them *institutional consequences*¹²¹. Merton showed this in his study of criminal deviance, theorising about the motivations agents had towards certain desirable social goals and how their relative position in the social structure influenced their achieving them. It is possible to combine Merton's view with understanding criminal law as SS. From this point of view, as SS criminal law structures individual choices by structuring *institutional alternatives* and *institutional consequences*. The distinction allows for differentiating between two parts of the second sequence, in terms of institutional alternatives and institutional consequences.

Whilst this might seem overly abstract, the two-fold Mertonian social structure shows itself clearly in criminal law. Consider first the *institutional consequences* of the structuring of criminal law. As a consequence of committing a crime, the machinery of the state and the institutions of criminal law intervene in the scene in SI: police, prosecutors, courts and prisons. However, an understanding of this operation cannot be detached from the framing of *institutional alternatives* prior to those consequences. In effect, the operation of the applicative and operational institutions of criminal law is conditioned by institutional alternatives that define what is regarded as criminal. Once individuals follow an alternative defined as a crime, the institutions of criminal law follow as a consequence. Finally, the third sequence concerns the structural effects of criminal law: how as a social structure, criminal law reproduces or transforms. Reproduction or transformation involves the intended and unintended effects of criminal law for subsequent SS and CS. Notice that SI steers socio-cultural practices, directing them to SR in terms of institutional alternatives and consequences. In other words, it aims at ensuring that 'permitted' SS in the social world, whatever they are, remain the same. In other words, not any SS is reproduced, for criminal law may aim at transforming SS; for instance, the SS of the mafia¹²². Thus, it appears that criminal law may transform and reproduce SS at the same time.

¹²¹ Arthur Stinchcombe, 'Merton's Theory of Social Structure' in Arthur Stinchcombe, *Stratification and organization: Selected Papers* (CUP 1986) 290. On renewed interest in the structural aspects of Merton's theorising, see Sanjay Marwah and Mathieu Deflem, 'Revisiting Merton: Continuities in the Theory of Anomie-and-Opportunity- Structures' in Mathieu Deflem (ed.), *Sociological Theory and Criminological Research: Views From Europe and the United States* (Elsevier 2006) 57-63.

¹²² On understanding criminal organisations as SS, see Ross Matsueda, 'Social Structure, Culture, and Crime: Assessing Kornhauser's Challenge to Criminology' in F. T. Cullen et al (eds.), *Challenging Criminological Theory: The Legacy of Ruth Kornhauser: Advances in Criminological Theory*, Vol. 19 (Transaction Publishers 2015) 117-143.

Criminal law is also part of CS: at this level, criminal law operates as free-floating cultural meaning, like cultural beliefs and moral values, meanings with no form in terms of SS. As a free-floating cultural meaning concerned with prohibitions and permissions, criminal law enters into the first sequence, that is, it serves as a form of cultural conditioning (CC). For instance, the wrongness of rape and homicide as behaviours to be devalued enters the CC in the form of values and norms, and so there seems to be no clear separation between them as legal forms and moral values. In the second sequence, these values and norms are the object of socio-cultural interaction (S-C). At this level, CS and SS intersect and the free-floating meanings of individual actions intersect with the structuring of criminal law. At the third level, criminal law is directed towards cultural reproduction and transformation.

The approach so far is compatible with conflicts between meanings and, furthermore, it does not take the view that criminal law applies only to those practices conducive to the healthy reproduction of social life. To the extent that SS becomes not only *analytically distinct* but also *empirically distinct* from CS¹²³, it might turn out that SS can undermine those practices even if its aim is reproduction¹²⁴. Relatedly, it is not a condition of the efficacy of SS and CS that agents know all of the effects and unintended consequences of what they do¹²⁵. The same applies to understanding the world participants live in. Disclosing the meanings embedded in SS might not be achieved without self-reflection on the social world in which the participant lives. Without that reflection, participants tend to overlook that cultural values are embedded in SS, and thus, that the process of institutionalising alternatives and consequences is not value-neutral. This is a corollary of the connection between meaning and social practices, for to the extent that SS are social practices, it follows that they possess meaning. Thus, institutions embody cultural values.

¹²³ To the extent shared values become part of SS, values can constrain other free-floating cultural values, and thus become in a sense independent from them. This independence is, of course, limited. Surely, SS and thus institutions appear as shared values independent of the mental states of the community that shares them, yet they are not independent of their social practices.

¹²⁴ This is more or less what Habermas held in his thesis on the colonisation of the lifeworld. On a restatement of his thesis, emphasising its normative dimensions, see Timo Jutten, 'The Colonization Thesis: Habermas on Reification' (2011) 19 *International Journal of Philosophical Studies* 701-727.

¹²⁵ Agents need not be psychologically aware of all the implications of the social reality that they recreate together. Robert Ulin has shown in the debate between Peter Winch and Evans-Pritchard concerning the Azande, that neither of them made sense of how the British Empire affected the Azande's practices and their SS, of which, apparently, not all members of the tribe were aware. See Ulin, *Understanding Cultures* (n 82) 59-62.

Now, more schematically: criminal law as SS (social structure) is directed at ST (structural transformation) of what is defined as criminal, and to SR (structural reproduction) of what is not. Similarly, as CS (cultural system), it is also directed at CT (cultural transformation) of what is defined as criminal and CR (cultural reproduction) of what is not. Given CS and SS intersect at S-C (socio-cultural interaction)/ SI (social interaction) the intersection has subsequent effects on both CS and SS sequences. In other words, institutional alternatives and consequences direct the effects of the S-C/SI intersection at SR/ST and at CR/CT. In the example provided by Lacey at the beginning of this chapter, if criminal law seeks to challenge a pre-existing cultural standard concerning sexual consent (1) it seeks CT, that individuals change their understandings so that when X says, “No”, X is not saying, “Yes”; (2) it also seeks CR of what is regarded as appropriate consent, which is also present in social practices, to understand “No” as “No”; (3) it seeks to achieve (1) and (2) through framing S-C/SI in terms of institutional alternatives and institutional consequences, thus, conducive to SR; (4) it may seek also ST of criminal SS, for instance, if there is a sex-trafficking organisation, which in many cases involves rape, the paradigm of understanding “Yes” when the victim says, “No”.

Criminal law is always directed at both the reproduction and transformation of social structures and cultural meaning, for by *seeking to reproduce/transform socio-cultural practices it seeks to reproduce/transform meaning and social structures*. This latter aspect, the reproduction part, is most likely one of the most important contributions of the modified morphogenetic approach to understanding criminal law¹²⁶. Institutionalisation of alternatives and consequences is the way in which criminal law aims at securing that social practices remain the same or are reproduced. By structuring the choices of individuals in terms of institutional alternatives and institutional consequences, it directs socio-cultural interaction to SR/CR. Thus, it secures meanings and social structures for subsequent

¹²⁶ In understanding that cultural values embody social institutions the thesis follows Talcott Parsons selectively. It seems unnecessary to assert, as Parsons did (following, as he stated, Emile Durkheim), that the coherence of values at CS ensures consistency at SI/S-C, see Parsons Talcott, *The Structure of Social Action: Study in Social Theory with Special Reference to a Group of Recent European Writers* (The Free Press 1949) 403-404. Jeffrey Alexander also interprets Parsons views on institutionalisation as the institutionalisation of values and thus of culture. See Jeffrey Alexander, ‘Commentary: Structure, Value, Action’ (1990) 55 *American Sociological Review* 339-345; for the connection between rule-following and institutions, see David Bloor, *Wittgenstein, Rules and Institutions* (Routledge 1997) 5, 34. Now, from a broader point of view concerning the connection between culture and social structure, the thesis also agrees, partially, with Durkheim in that criminal law contributes to maintain society’s key values. See my explanation of the link with Durkheim below in notes (463) and (519).

SC/CC and SI/S-C, and thus, for subsequent sequences and cycles. This approach allows a better understanding of the critical function. Recall that the critical function seeks to reaffirm the continued validity of shared values by criticising those conducts that depart from them. It is possible to re-describe this more precisely, stating that the critical function aims at reproducing/transforming cultural meanings and social structures for subsequent cycles by seeking to reproduce non-crime and transform crime at the intersection of S-C/SI. This has an important implication: the critical function cannot be reduced to instances of questioning visible cultural standards, for it is in itself a continuous socio-cultural practice of reproducing/transforming cultural meaning.

In addition, the critical function ensures that the basic units of cultural meaning remain individual human beings. Certainly, the institutionalisation criminal law effects does not consider just any entity as a bearer of meaning, for it only registers individual choices. In this way, as a SS, criminal law defines who is to count as a legal subject by defining which interests can be protected, who can be harmed/wronged, and who can be made responsible. Once criminal law applies, it registers only what can be registered. Put otherwise, claims made by minorities about groups being entitled to interests and having the potential to be harmed and wronged become invisible in criminal law. Indeed, it only frames individual choices because it draws on the specific social practices of a group for which there *should* be only individual choices. It results, then, that the exclusive concern of criminal law with individuals is part of a structural process by which legal institutions create institutional alternatives and institutional consequences that attach only to them. Individualisation becomes institutionalised in criminal law. Finally, notice that this approach takes neither a position on “the role” of criminal law, nor concerning “the” function it plays. Thus, it remains neutral as to the diverse ends that criminal law might seek to achieve, be it prevention, retribution or rehabilitation. In fact, it is compatible with arguing that criminal law may seek multiple ends simultaneously.

Preliminarily, under this framework, the critical function involves a process of institutional individualisation¹²⁷. This, naturally, has implications for accommodation, which the following section addresses.

¹²⁷ Note, this is not the same idea sustained by Joseph Agassi, ‘Institutional Individualism’ (1975) 26 *The British Journal of Sociology* 144-155, which refers exclusively to a method for social science, yet it is quite

1.3. Excluding Accommodation from SS

Having identified that preserving the critical function is fundamental for the operation of criminal law, it becomes necessary to explore this in greater detail. Assume hypothetically that changes are made to it. That is, suppose that accommodation reaches the critical function. What would happen if the critical function were altered? According to modified morphogenetic framework, this would represent a transformation of criminal law as a SS, namely, a transformation of its institutional form. Consider first the side of institutional alternatives. Changing institutional alternatives would mean accepting other entities aside from individuals as objects of legal register. Different kinds of groups corresponding to different belief systems would widen both the moral and legal community, and accordingly, transform institutional alternatives. Groups would now be able to have interests, be harmed and wronged. Accordingly, institutional consequences would also have to change in order to make room for the new diversity of entities that can be punished. If there is ST and CT, this would lead in the next sequence to new structural (SC) and cultural conditioning (CC), and a new interface between S-C and SI would ensue: social practices and thus meaning would become different. Certainly, the transformation of meaning follows from transformations in social practices, for transformation in social practices entails transformation in meanings. Naturally, an alteration of criminal law in these terms would undermine the critical function of criminal law. Indeed, it would remove its capacity to question what offenders have done against the self-understanding of the political community as a *community of individuals*. It would be a new political community.

The transformation of meanings would change the sense of agency, as well as the sense of responsibility: individuals would be living in another socio-cultural world. Notice that whilst perhaps this revision to criminal law is unthinkable, it touches upon some of the aspects the Rapa-Nui and Shabina were looking to challenge. Shabina was looking for, among other things, recognition of her religious beliefs as part of an autonomous religious community and, thus, as belonging to a particular group also entitled to its own practices. She sought then a form of equality that the law could not recognise. Rapa-Nui, on the other hand, also sought to access their traditional practices as members of a particular group. They contested the application of criminal law not as individuals, but as a self-determined

close to what Parsons named institutionalised individualism; see Talcott Parsons, 'Law as an Intellectual Stepchild' (1977) 47(3) *Sociological Enquiry* 11-58.

group. They contested that this was more than just an application of criminal law because, more importantly, it was a socio-cultural and a political conflict between two self-determined groups that had to decide the reach of their respective rules. However, there was no political register. In the end, of course, neither Shabina nor Rapa-Nui could be heard. Their actions and responsibilities were framed in terms of institutional alternatives and institutional consequences; the law could only register individual agency. In both cases, by denying groups legal register, the law denied that the conflict was political. It was just an accommodation of claims to recognise cultural diversity.

It was argued earlier that Lacey and Waldron defend the critical function because it entails a defence of the social reality that those meanings contribute to, yet both ceded some room for accommodation. This raises a broader question concerning whether accommodation is possible at SS level. It seems that it is not possible to accommodate the basic aspects of criminal law without undermining the critical function. That is, even if institutional alternatives and consequences remain fixed on the individual, changing the definition of offences, what is to be understood by *actus reus* and *mens rea* can modify in substantial ways the capacity of the political community to evaluate departures from shared values. Of course, this in part depends on how far the community is disposed to accommodate the demands of minorities. Yet insofar as it also deems necessary the capacity to evaluate and assess departures from shared values, it seems it cannot go very far. The critical function demands lesser expectations from those to be accommodated.

Notice that there is another aspect of the critical function underlying its operation, which provides a positive justification for the application of criminal law. As Waldron and Lacey note, defences cannot undercut the role of the critical function in preserving shared values. Now, this does not suggest that a mere departure suffices to justify criminalisation, but allows emphasising another aspect of the critical function. The idea is not to trace a clear line around the conditions under which X merits criminalisation, but to put in a different light what it would mean to bring X within the structuring of criminal law. Namely, that citizens express or construct a sense that *values are shared*. Put differently, defences that prevent the political community from criticising departures from their values are not permissible because they express that values are *not shared*. In this sense, blocking defences equally to all would express that some values should remain valid for the whole population. Thus, nobody can claim that they do not share those values in order to seek

immunity from criminal law. By criminalising X, shared values remain shared, regardless of whether they *are actually shared*.

This has an important implication for accommodation in criminal law: justifications cannot be provided. Turning prohibitions into permissions widely accessible to minorities would undermine the critical function. Indeed, if justifications were available on the grounds that individuals belong to different communities, then this would reaffirm that values are not shared. Now, this suggests that defences that effectively punish allow for the argument that values are shared, even if they do not apply - strictly speaking - equally to all. Punishment would signify that even belonging to a different community does not relieve the individual from the critical function. This guarantees that values remain shared in the sense that departures from them can be criticized. Chapters 2, Chapter 3, and Chapter 4 develop further the role of the critical function concerning these 'shared values'. For now, it suffices to say that the critical function also contributes to maintain that values are shared.

The above suits Lacey and Waldron's call for a modest approach that, while maintaining the critical function, may require accommodation. This seems plausible. While it seems that altering some components of criminal law might undermine the critical function, it is implausible to suppose that any change would undermine it. Certainly, to a certain extent, "shared values" are normally in conflictual relationships with each other. Considering this more broadly, it seems it is not always possible to give priority to all shared values. Sometimes, it is necessary to give priority to one at the expense of another, which does not mean they are not shared. Observe the different weight different values carry across different stages of criminal law. Indeed, in different stages of criminal law, abstract formulation of norms by legislation or precedent, application by courts and enforcement, there is a clear, differentiated emphasis on different values. One can observe at least deontological values, utilitarian values and virtue theoretic values in each of these stages, yet they are weighted in different ways.

In traditional, non-regulatory crimes, the emphasis on the intentions of the individual and what he knows or believes are important to determine whether the act or omission can be criminalised. Deontological considerations do play important roles in some areas of criminal law, yet in other areas, other values are at play. For instance, strict liability offences are guided by utilitarian considerations. Also, consider some forms of defences,

like most excuses, and sentencing: these are all clear instances wherein the focus is first and foremost upon the character traits of the individual, thus prioritising virtue ethics. Examining the degree to which different domains of criminal law give prominence to different values and examining whether these undermine each other is not part of the present examination. The point is that recognising the variegated forms of the state's response to crime entails variegated emphasis on different values. It also appears they form something like a system, and to this extent, allow the political community to say that values remain shared. The same occurs with responsiveness to cultural diversity. It should be noted that it is not that cultural diversity forces, as it were, the responsiveness of SS from outside. On the contrary, it is the very design of criminal law that allows for such responsiveness. That is, accommodation is a form of internal responsiveness. This not only aligns with the idea that meaning is internal to social practices, but also with values being shared, for now responsiveness to diversity is a *shared value*. Here, the focus is only on those two aspects of SS from which most of the responsiveness to cultural diversity comes.

First, the retributive focus on the particular harm/wrong done by the individual and the proportionality of the state's response towards what has been done warrants some attention to cultural factors within criminal law. As Chapter 4 examines, the demand that sentencing should be individualised leads to particularised punishments, which allows for the characteristics of particular cases to become salient. This sets the stage for some receptivity towards cultural diversity. Second, the concern with individual autonomy captures another important organising principle for criminal law to recognise diversity. Specifically, the Kantian concern with individual autonomy means recognising that individual choices are to be respected in principle, along with whatever conceptions of the good individuals adopt as a way of living the good life. Thus emerges one of the key characteristics of a pluralist social order: that of treating the diversity of individuals' decisions as worthy of respect.

These two values, autonomy and retributivism, are particularly important in the design of defences and they can be expanded to allow for different conceptions of the good within certain limits. This suggests that there are spaces within criminal law that can be more or less responsive to cultural diversity, especially at the level of defences where these two considerations, autonomy and retributivism, seem to be at play. In other words, defences can be responsive to cultural diversity because the values they convey, especially

retributivism and autonomy, seem to require such responsiveness to the individual case and its own particularities. Hence, it seems that the structure of criminal defences allows for distinct cultural values to enter SS cycles. Indeed, the very construction of cultural defences out of the pre-existing materials of defences allows cultural values this influence, by expanding pre-existing defences.

The question at this point is what kind of defences can be at play. Lacey suggests that any space they might have depends on how general socio-economic considerations bear upon punishment and the varying needs of coordination and legitimacy. For Lacey, in principle cultural defences are not that different from situational defences arising out of harsh social conditions. Yet, if they really differ, then either they might give reasons *for* criminalisation or, if not, they would fall under the same rationale as situational defences, namely, the legitimacy of criminal law¹²⁸. Waldron, on the other hand, distinguishes between crimes grounded in utilitarian or deontological considerations. Arguably, it becomes possible at times to distinguish between crimes that are rights-based and utilitarian-based as Waldron suggests; yet most of the time, crimes have multiple components and thus it seems unworkable to differentiate in this way. However, even if it were workable to identify which crimes are grounded only in utilitarian considerations, this would mean that exemptions would be available to all. Waldron had in mind exemptions to the criminal prohibition of hunting. Yet, exemptions are provided not only to indigenous peoples, but also to regular hunters when certain conditions are met. For both Lacey and Waldron, exemptions would not be counterfactually dependent on an individual being a member of a minority, but on the nature of considerations applicable to all. On these conditions, the role of cultural diversity appears as marginal, if not irrelevant. Chapter 4 nonetheless advocates for an approach that aims at making it more robust, even if it ultimately falls short of the promise of recognising cultural diversity.

Conclusion

The modified morphogenetic approach has, up to this point, allowed to identify the social and cultural components for understanding criminal law as a socio-cultural practice. It allowed for an examination that suggested scepticism towards the promise that indigenous

¹²⁸ Lacey, 'Community, culture' (n 27) 304-305.

peoples can access their cultural practices. Surely, being accommodated means being part of the process of institutional individualisation that reproduces/transforms a social world of shared values, values that attach only to individual beings. The next chapter seeks to draw a connection between the social / cultural components of criminal law and its political components, yet the full connection will have to wait until Chapter 3. Chapter 2 uncovers this connection through a critical examination of the claim that the liberal social order can be neutral towards different ways of life.

CHAPTER 2

MULTICULTURALISM AND POLITICAL THEORY, CRIMINAL LAW AND THE CONSTRUCTION OF SOCIAL REALITY

Introduction

Chapter 1 developed a framework for understanding criminal law as a socio-cultural practice, which clarified its “social” and “cultural” components by analytically differentiating between cultural meanings and social structure. In starting to integrate the political components to this framework, it will be seen that criminal law is part of a process of social construction. Thus, the focus in this chapter is mainly on how socio-cultural practices contribute to criminal law, without overlooking how criminal law contributes to them. Chapter 2 seeks to build upon this by bringing into the discussion how accommodation is framed as a problem, how that frames the solution, and the implications that follow from that framing. While it was previously considered how partial defences fit the retributive and individualist structure of criminal law and how its fairness might be endangered by not accommodating the claims of minorities, it has not yet been elaborated on the reasons why accommodation is necessary in the first place. This requires identifying the frame of both the problem and the solution. If the task is to contextualise accommodation as an intelligible phenomenon, the key seems to be to recognise that there is a pre-existent context of cultural diversity. More specifically, a pre-existent context which values the cultural diversity that forms part of it. In other words, from this positive assessment of cultural diversity comes a recognition of the challenge this poses to the institutional structures of the political community in general, and thus to criminal law in particular.

The debate shifts from legal and social theory to political philosophy, because most research into accommodation has been undertaken in this field. Indeed, the very term “multiculturalism” was coined by political philosophers. Based upon the premise of valuable cultural diversity, the political philosophical literature on multiculturalism considers that there is a relationship between majorities and minorities which places the latter at a disadvantage. More precisely, minorities are in a situation of inequality in relation to the majority. Thus, accommodation is framed as a struggle for equality. A

considerable part of the literature addresses how to recognise and compensate for this inequality, and so deals with the question of what kind of rights or legal recognition should be given to minorities. It should be noted here that there is a transition from identifying a problem - of inequality - to its solution - the practices of accommodation - which are cashed out legally in terms of special rights. Special rights, because they are regarded as “rights”, are linked to the legitimacy of the political community. Special rights do not appear incidentally, as an implication of the political community’s growing self-awareness that they are or are becoming multicultural, but as a condition for its legitimacy in terms of providing equal treatment. Accordingly, specific rights and exemptions within the legal system and criminal law become necessary for maintaining its legitimacy.

In this chapter, however, the concern is not with those special rights or exemptions as they may apply within criminal law, for that will be examined in Chapter 4. Chapter 2 focuses on the principles or values within which those rights and exemptions are thought of as solutions to the minority’s situation of inequality. That is, the principle or value that both frame the problem and the solution, and thus provide the justification for special rights. Fundamentally, this is the principle of neutrality; that is, the principle that the liberal political community can be neutral between individuals holding different conceptions of the good. It might prove difficult to identify an explicit recognition of neutrality in the legal order. However, because neutrality derives from other principles, which are normally explicitly recognised, it can be identified implicitly. The derived principle may normally be observed when the legal order establishes in one way or another that all members of the political community should be treated as equals. Conditioned, as it was argued, to a context in which cultural diversity is respected and cherished neutrality can be derived from the principle of equal treatment. In these circumstances, neutrality becomes an expression of equality in a context of cultural diversity¹²⁹.

It is necessary to stress that neutrality achieves equality, and thus unity, by reconciling unity with diversity. Certainly, if the political community can be neutral between different conceptions of the good, then they can be treated equally and thus peacefully coexist together. Unity is achieved. Neutrality reconciles unity with diversity through special

¹²⁹ Jonathan Seglow, ‘Neutrality and Equal Respect: On Charles Larmore’s Theory of Political Liberalism’ (2003) 37 *The Journal of Value Inquiry* 86-87.

rights, which have a specific aim: to foster autonomous choice¹³⁰. Legal practices of accommodation are supposed to be sensitive to breaches of neutrality. Special rights are activated when neutrality is breached, and they seek to re-establish the conditions for choosing options the individual regards as being of worth. For the majority, neutrality contributes to strengthening the social order in a context of cultural diversity, by treating all equally and with fairness. For minorities, neutrality affords them the opportunity to pursue those projects they find worthwhile. Thus, neutrality preserves diversity and unity by entitling society to designate itself as neutral between different conceptions of the good. It follows from this that there is a challenge for the critical function. Indeed, if minorities are being criminalised for being minorities, then accommodation is failing and equality is breached. Certainly, under these conditions, can the state really claim to be neutral? If criminal law is not neutral, then do minorities require special rights? This chapter seeks to address these questions and the implications of the political community's responses.

This chapter is organised as follows. Section 1 starts by examining the principle of neutrality, looking at the most influential approach for accommodating the claims of minorities within the liberal state, Will Kymlicka's multiculturalism. Section 2 highlights the unresolved tensions in Kymlicka's proposal to realise equality in terms of enhancing individual choice. Section 3 explores the failure of neutrality in criminal law and the implications of efforts that aim to correct it. Section 4 proposes strengthening the idea of neutrality by adopting the notion of responsiveness in order to assess the situation of indigenous peoples within criminal law.

2.1. Will Kymlicka's Theory of Multiculturalism

2.1.1 Autonomy and Equality

Will Kymlicka's multiculturalist theory has been so influential that most of this new field in political philosophy can be seen as an extension or further development of his ideas. This justifies the focus on his work. In *Liberalism, Community and Culture*¹³¹, Kymlicka

¹³⁰ Underlying this is, as Waldron has put it, a connection between personal autonomy or autonomous choice and moral autonomy, see Jeremy Waldron, 'Moral Autonomy and Personal Autonomy', John Christman and Joel Anderson (eds.), *Autonomy and the Challenges to Liberalism: New Essays* (CUP 2005) 307-329.

¹³¹ Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press 1989).

establishes the central points of his theory of liberal multiculturalism. Specifically, he sets out a theoretical foundation for minority rights by combining the values of autonomy and equal treatment. His basic aim is to develop a theory for securing minorities' access to their cultural practices, compatible with what he holds are the fundamental elements of liberalism. The first central element of liberalism is individual autonomy. More specifically, according to Kymlicka, the fundamental value that liberalism seeks to guarantee consists in the individual's interest in living a good life¹³². That is, one's interest in following a conception of the good which is worthy of pursuit. In contrast to John Rawls, Kymlicka holds that what matters most is not having deliberative capacities for choosing a conception of the good, but having worthy projects to pursue. The value of having deliberative capacities, namely, the value of being able to revise beliefs¹³³, is derivative; it derives from individuals caring about their projects¹³⁴.

Kymlicka seeks to connect the value of having worthwhile projects to pursue with access to cultural contexts or practices. He rejects the view that individuals are in some sense pre-social, a view he attributes to Rawls. On the contrary, Kymlicka claims that individuals need access to cultural contexts to make meaningful choices, and thus, to have worthy projects to pursue. This links the basic liberal concern that individuals should live good lives and have the capacity to revise their ends, with the communitarian concern that cultural contexts are necessary for meaningful choices¹³⁵. Kymlicka reformulates Rawls's theory of justice, considering that cultural contexts are primary goods, goods that any rational agent would consider in the original position¹³⁶. That is, under the veil of ignorance, individuals would know that they need cultural contexts for their choices to be meaningful, and so those contexts cannot be regarded as dispensable. This is another way of saying that agents are not pre-social; choices under the veil of ignorance always rely upon cultural contexts to be meaningful. According to Kymlicka, this in no way contradicts liberalism's fundamental values. Indeed, whilst cultural contexts provide the range of valuable options, the authority to select them lies in the individual himself¹³⁷.

¹³² Kymlicka, *Liberalism* (n 131) 10-12.

¹³³ *ibid* 13.

¹³⁴ *ibid* 12.

¹³⁵ *ibid* 165.

¹³⁶ *ibid* 166.

¹³⁷ *ibid* 165.

What gives these contexts authority is the individual's decision concerning which context to choose and live according to.

The second central element of liberalism is individual equality. According to Kymlicka, liberalism requires that individuals should be treated equally when they choose a conception of the good. Once it is recognised that cultural contexts are necessary for autonomous choice, liberalism requires that those situations of inequality or disadvantage in which individuals find themselves when accessing their cultural contexts be rectified. Kymlicka holds that an individual is treated unequally when access to their cultural contexts is more costly than for others. Thus, it follows that compensation is due in order for them to receive equal treatment. Kymlicka draws on Ronald Dworkin's¹³⁸ resources view of equality, according to which, in deciding how to distribute goods, the basic criteria is that individuals should take responsibility for their choices. Individuals are responsible for what they choose. Thus, according to the resources view, if an individual's choices are expensive and therefore require the allocation of more resources, then they themselves must bear the costs, as such a re-distribution would not be permitted. Asking X to contribute to Y's expensive life plans would require an unacceptable redistribution of X's resources, as this would mean that X is asked to take responsibility for Y's choices.

According to Kymlicka, things are different if individuals are not responsible for their choices being expensive. That is, when a choice is expensive due to "circumstance", and not individual responsibility. When this occurs, individuals should be compensated¹³⁹, and this is the case when an individual follows an expensive conception of the good that is not under his control¹⁴⁰. This has implications concerning equal treatment. Indeed, access to a cultural context the expense of which the individual is not responsible for means that he has to bear a cost which he would not otherwise have to pay, had the individual chosen a non-expensive conception of the good. To treat individuals unequally because they have different conceptions of the good constitutes an inequality that needs to be corrected

¹³⁸ Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10 *Philosophy and Public Affairs* 283-345.

¹³⁹ Kymlicka, *Liberalism* (n 131) 37-38.

¹⁴⁰ This idea has been advanced by several authors, Thomas Scanlon, 'The Significance of Choice', in Sterling M. McMurrin (ed.) *The Tanner Lectures on Human Values*, Volume VIII (Utah University Press 1988) 149-216; G. A. Cohen, 'On the Currency of Egalitarian Justice (1989) 99 *Ethics* 906-944; Richard Arneson, 'Primary Goods Reconsidered' (1990) 24 *Nous* 429-454.

through some form of compensation¹⁴¹. Distributing resources to those whose circumstances make their choices expensive reinstates equal treatment.

This is important for this entails not only a principle of restraint, but also a principle of positive action to meet the demands of equality. Thus, the alternatives for redressing inequalities in access to cultural contexts become expanded. According to Kymlicka, there are many groups whose access to cultural contexts is expensive, amongst which figures the particularly clear case of Canadian indigenous peoples. When compared with non-indigenous Canadians, it appears that whilst they access their culture for free¹⁴², indigenous peoples have to pay to enjoy the same kind of access. This means indigenous peoples' conceptions of the good are not treated equally. Thus, granting special rights to access their cultural contexts is justified in realising equal treatment. Special rights, then, fulfil two objectives. On the one hand, they realise equality, for these rights are owed¹⁴³ as a matter of justice. On the other hand, they realise autonomy, for rights aim to improve minorities' access to their cultural contexts by maximising¹⁴⁴ individual choice.

2.1.2 Societal Cultures and Special Rights

In his first book, Kymlicka provided a philosophical justification for special rights, yet left underdeveloped some important aspects, particularly the kind of rights minorities should be endowed with and the meaning of "cultural contexts". In his subsequent book, *Multicultural Citizenship*, Kymlicka developed these¹⁴⁵, explicitly taking into consideration current political and legal arrangements. According to Kymlicka, there are three types of rights minorities can be awarded with: self-government rights, which allow the group to integrate according to their own way of life¹⁴⁶; polyethnic rights, which allow the group to

¹⁴¹ Kymlicka, *Liberalism* (n 131) 38-39.

¹⁴² *ibid* 187.

¹⁴³ *ibid* 190.

¹⁴⁴ *ibid* 148.

¹⁴⁵ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995) 26-33.

¹⁴⁶ Weak forms of self-government rights are held by some tribes in Canada. For an overview, see Jennifer E. Dalton, 'Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?' (2006) 22 *Windsor Review of Legal and Social Issues* 29-78.

integrate better into the larger society, be exempted¹⁴⁷ from general duties and provide special funding opportunities¹⁴⁸; and finally, special representation rights. These rights come with a proviso. According to Kymlicka, liberalism justifies these rights insofar as they consist of “external protections”. Minority rights are external protections when they protect minorities from the wider political community to which they belong¹⁴⁹. Self-determination or self-government rights are obviously in this category. However, minority rights are not justified when they consist in “internal restrictions”; that is, when they aim to control internal dissent within the minority community itself¹⁵⁰. The reason is that internal restrictions put liberal freedoms at risk and so they cannot be justified by liberal politics, whereas external restrictions, insofar as they advance liberal freedoms, are not only compatible¹⁵¹, but they may also be required.

Kymlicka also introduces a conception of culture that was missing from his earlier work, albeit this is a complex notion with three meanings that are not easily identified and commonly misinterpreted, as it will be seen. The first meaning of culture has already been introduced and we will come back to it shortly. The second meaning of culture¹⁵² aims at differentiating both between multicultural and non-multicultural countries, and between immigrants and national minorities. Concerning the former differentiation, Kymlicka holds that whilst a society might be pluralistic, it is not necessarily multicultural. Multicultural societies require the co-existence of at least two different cultures, whereas being pluralistic only requires the acceptance of at least two different conceptions of the good. A single culture might embody different conceptions of the good, whilst the converse is not true. Concerning the second differentiation, Kymlicka holds that both immigrants and

¹⁴⁷ In the UK, in *Mandla vs Dowell-Lee* [1983] UKHL 7, [1983] 2 AC 548, the school’s decision to expel a Sikh school boy who refused to take off his turban to comply with the dressing regulations was held to be unlawful. In the US, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), it was held in favour of the Amish community that they could be exempted from compulsory education from the 8th grade.

¹⁴⁸ See, for instance, in the UK the special funds that local government have to improve the conditions of sites to which Gypsies and Travellers have access. See Sandra Fredman, *Discrimination Law* (OUP 2011), at 69-72. In Canada, for instance, there are tax exemptions for the Nisga tribe, which were settled through an agreement with the provincial authorities in British Columbia. See Patricia Dickason and David T. McNab, *Canada's First Nations: A History of Founding Peoples From Earliest Times* (4th Edition, OUP 2009) 416.

¹⁴⁹ Kymlicka, *Multicultural* (n 145) 36, 43.

¹⁵⁰ For instance, in the form of controls for free speech, *ibid* 36.

¹⁵¹ *ibid* 75.

¹⁵² *ibid* 10-19.

national minorities are sources of cultures that make a country multicultural. However, he only considers national minorities as holders of special rights, and while in principle, he denies immigrants access to them, he nevertheless considers that they may be provided with some polyethnic rights.

With the third meaning of culture, that is access to a “cultural context”, Kymlicka specifies what national minorities are entitled to by special rights. In order to explain this, Kymlicka introduces the notion of “societal cultures”. Societal cultures involve a set of institutions, political, religious, or social, by which individuals organise their social world and which provide them with different ways of life¹⁵³. It is this third meaning of culture that has been commonly misinterpreted¹⁵⁴, because scholars have not related it to Kymlicka’s first meaning of culture, which concerns the position of culture within a theory of justice. Recall that for Kymlicka, culture has a place within a theory of justice as a context for meaningful choice. It appears then that these cultural contexts for meaningful choice, once contextualized, are societal cultures. That is, when Kymlicka speaks of culture in the third sense he has in mind institutionalised cultural contexts for meaningful choice¹⁵⁵, contexts which involve political, religious and social institutions that allow individuals to live different ways of life¹⁵⁶. Then it becomes clear that the aim of special rights is to enable and enhance national minorities’ institutions, political or otherwise, such that they would amount to societal cultures if special rights were granted. Granting such rights would tend to correct the problems of inequality indigenous peoples currently experience.

In the following, when speaking of culture, the reference is to societal cultures. With this notion, Kymlicka reunites the basic elements of his conception of liberalism: respect for

¹⁵³ *ibid* 76.

¹⁵⁴ Joseph Carens has argued, wrongly in my view, that for Kymlicka, indigenous peoples cultures emerged in modernity, given that societal cultures did not exist before. See Joseph H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (OUP 2000) Chapter 3. Similarly, Bhikhu Parekh claims that Kymlicka uses culture and societal culture interchangeably. However, this is incorrect because Kymlicka’s idea of societal cultures points out the institutional conditions under which cultural contexts are meaningful in modern times, whilst culture refers to the contexts for meaningful choice. See Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (MacMillan Press 2000) 101.

¹⁵⁵ Kymlicka, *Multicultural* (n 145) 83-84.

¹⁵⁶ Though Kymlicka does not say so, he seems to refer to what is known in the sociological literature as ‘institutional completeness’. See Raymond Breton, ‘Institutional completeness of ethnic communities and the personal relations of immigrants’ (1964) 70 *American Journal of Sociology* 193-205.

autonomous choice, for equality, and the culturally embedded nature of meaningful choice. Certainly, if societal cultures are necessary for meaningful choice, then individuals should be given wide access to them in order for their choices to be meaningful. The authority to make decisions about how to live a good life still concerns the individual alone, but these decisions require a societal culture. Access to them is a primary good, a good any rational agent would choose to have access to under the veil of ignorance, and so it should be equally distributed. This is the role played by societal cultures: a benchmark of what equality demands. If national minorities suffer inequalities in such access, then special rights should be granted. The requirements of equality are met¹⁵⁷ once those rights are granted, for having those rights amounts to cultures being capable of emerging as societal cultures. On this view, minority cultures are left to the autonomous decisions of their members, so that if they do not develop into societal cultures and seem disadvantaged, this could owe to their members having decided that the culture in question is not worth pursuing. Thus, minorities cannot be depicted as disadvantaged even if they have failed to become societal cultures.

2.2. The Problem of Liberal Neutrality

2.2.1 Neutrality as Individual Autonomy and Individual Equality

The above suffices as a description of the main elements of Kymlicka's theory, capturing the philosophical and moral character of special rights afforded to minorities. Before assessing it with the present approach, it is necessary to make clearer the connections between equality and neutrality, and therefore between neutrality and autonomy. In the present context, neutrality applies to state actions¹⁵⁸ and it requires treating individuals, according to Ronald Dworkin's terminology¹⁵⁹, as equals. That is, the state treats individuals equally when it abstains from promoting one particular conception of the good over another. There is a close connection between equal treatment and not promoting a particular conception of the good. Indeed, if the state were to promote such a conception, it

¹⁵⁷ Kymlicka, *Multicultural* (n 145) 77-80.

¹⁵⁸ The concern then is state neutrality, see Peter Jones, 'The Ideal of the Neutral State', in Robert Goodin and Andrew Reeve (eds.), *Liberal Neutrality* (Routledge 1989) 9-38.

¹⁵⁹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 272.

would not treat individuals equally. This is because it would disqualify¹⁶⁰ those whose conceptions of the good are not worthy for the state¹⁶¹, at the expense of promoting those it deems worthy. In other words, if the state promotes a particular conception of the good, it does not treat those who hold different conceptions of the good equally. Certainly, state policies would distinguish between those who pursue worthy life plans and those who do not, benefiting the former and burdening the latter. It appears then that to treat individuals equally, the state needs to be neutral between different conceptions of the good.

According to Steven Wall, the above is one of the central meanings of liberal neutrality, which acknowledging the existence of a reasonable disagreement concerning the good life, considers that the state should not promote the good¹⁶². This is the role of neutrality: it permits the identification of inequalities and the way to correct them. According to Kymlicka, under conditions of pluralism and competing conceptions of the good, the state should remain neutral between them. However, he recognises that state policies cannot avoid being non-neutral in their consequences. Kymlicka then distinguishes between “neutrality of consequences” and “neutrality of justification”¹⁶³, and following Rawls, he adopts the latter. Kymlicka argues that the state can be neutral in the justification of its public policies, but that its consequences can be non-neutral. Here enters the idea of individual autonomy. For Kymlicka, consequences are non-neutral yet unproblematic because they stem from individuals’ autonomous decisions when they choose what they consider to be valuable or preferable. Thus, if individuals are responsible for the choices they make, no compensation is necessary. Within this framework, non-neutrality is neither intentionally nor directly pursued, and the commitment to neutrality is preserved at the

¹⁶⁰ Will Kymlicka, ‘Liberal Individualism and Liberal Neutrality’, (1989) 99 *Ethics* 900.

¹⁶¹ This follows given the assumption that the State ranks different ways of life differently. See Dworkin, *Taking Rights Seriously* (n 142) 273. Thus, the perfectionist, which is Dworkin’s and Kymlicka’s central enemy here, might allow themselves to be neutral if they endorse moral pluralism, for then ranking and enforcing the ranking would be not necessary. See Steven Wall, ‘Perfectionism in Moral and Political Philosophy’, *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition) <<http://plato.stanford.edu/archives/win2012/entries/perfectionism-moral/>> accessed 20 September 2016.

¹⁶² Wall, ‘Perfectionism’ (n 161).

¹⁶³ On this distinction, see Peter De Marneffe, ‘Liberalism, Liberty, and Neutrality’ (1990) 19 *Philosophy and Public Affairs* 253-274.

level of justifications. It follows that which conceptions of the good flourish and which end up vanishing is left to the “market place of ideas”¹⁶⁴.

Now it is necessary to examine Kymlicka’s views critically. At the core of neutrality of justification lies a traditional liberal value: individual autonomy. It should be noted that individual autonomy is not only compatible with neutrality of justification, but it is also the means through which it can be achieved. What explains neutrality of justification is the fact that there are individuals making choices concerning which conceptions of the good to endorse. Yet invoking the centrality of individual autonomy as the way of understanding neutrality seems to confuse two separate things. Indeed, to claim both that individual autonomy is central and that the liberal social order can be neutral seems to confuse the state not promoting some particular conception of the good with the state not promoting any conception of the good. Indeed, the state may be able to abstain from promoting some particular conception of the good, but it cannot avoid promoting a conception of the good, for otherwise how to endorse a conception of the good would be up for grabs. Definitely, for Kymlicka, this is not up for grabs; autonomous individual choice is how the good should be chosen, and is what makes the state neutral. In other words, the liberal state endorses a conception of the good in conditioning its attainment to the exercise of individual autonomy.

It appears that by endorsing the value of individual autonomy, neutrality of justification is not neutral¹⁶⁵; this is the first conclusion of this section. Whilst those who support¹⁶⁶ and reject¹⁶⁷ neutrality recognise that it cannot be neutral, it seems that they have not fully worked out the implications for the equal treatment of minorities. That is, the several implications that follow from considering that individual autonomous choice is not worthy

¹⁶⁴ Kymlicka, ‘Liberal individualism’ (n 160) 895.

¹⁶⁵ Steven Wall, ‘Neutrality and Responsibility’ (2001) 98 *The Journal of Philosophy* 389-410. Others, like George Sher, restrict neutrality only to controversial conceptions of the good, meaning it does not cover individuals’ interests in being prosperous and free, George Sher, *Beyond Neutrality: Perfectionism and Politics* (CUP 1997) 37-38.

¹⁶⁶ See Jeremy Waldron, ‘Legislation and moral neutrality’, in Waldron, *Liberal Rights: Collected Papers 1981-1991* (CUP 1993) 159; Gerald Gaus, ‘The Moral Foundations of Liberal Neutrality’ in Thomas Christiano and John Christman (eds.), *Contemporary Debates in Political Philosophy* (Blackwell 2009) 83.

¹⁶⁷ See Thomas Nagel, ‘Rawls on Justice’ in N. Daniels (ed.), *Reading Rawls* (Basic Books 1975) 1-16; Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) chapter 5; also Sher, *Beyond Neutrality* (n 165) 66-67.

of respect per se. It has been seen that neutrality identifies a problem of individual inequality and solves it by appealing to the non-neutral principle that attaining the good is achieved through autonomous individual choice. However, this argument is far from complete. A full endorsement of the value of autonomous choice would consider a broad range of choices as worthy, insofar as value is given by autonomous choice. Indeed, if the concern is having a worthy project to pursue, then little importance should be given to the beliefs of the minority in providing such rights, if they are pursued autonomously. Yet, Kymlicka stressed that projects should be “worthy”, as seen above. Accordingly, Kymlicka holds that these rights should not be provided when they promote fundamentalist politics, for then “... far from appealing to the primary good of cultural membership, [this] conflicts with it, since it undermines the very reason we had for being concerned with cultural membership –that it allows for meaningful individual choice”¹⁶⁸.

Kymlicka asserts that it is because fundamentalist politics undermine meaningful choice that special rights should not be granted, but this is misleading. Indeed, the choices of fundamentalists can be meaningful for them, thus if the reason is allowing meaningful choices, then there should follow some form of entitlement to access special rights. Kymlicka’s rejection of this conclusion is not related to the meaningfulness of choices. It is instead explained by the fact that for his theory, those choices are not worthy of being promoted and protected by liberal politics. The reason why fundamentalist politics should not be respected is because they are not valuable in the first place; they are non-valuable options. Thus, it is not only that there is a bias towards choices being valuable if they are taken autonomously, but also that only a subset of them is actually worthy of respect: precisely, those options compatible with liberal values. But then the move is deliberately inconsistent with the claim to state neutrality, for now it appears that autonomy, whilst valuable, is only instrumental to achieving not just any good, but the liberal good.

Now it is possible to see that Kymlicka’s argument in its complete form denies neutrality¹⁶⁹. Indeed, it entails a ranking of some ways of life above others. Therefore, it does not treat all individuals with equal concern, insofar as they may hold non-valuable

¹⁶⁸ Kymlicka, *Liberalism* (n 131) 172.

¹⁶⁹ As Hurka has argued, this means Kymlicka endorses a view Hurka names philosophical perfectionism, for it holds that some values are intrinsically superior to others and make individuals’ lives better. See Thomas Hurka, ‘Indirect Perfectionism: Kymlicka on Liberal Neutrality’ (1995) 3 *The Journal of Political Philosophy* 36-57.

conceptions of the good. In other words, it justifies treating unequally those conceptions of the good incompatible with liberal values, which is why he denies special rights as internal restrictions. This kind of unequal treatment becomes fundamental, for otherwise those who seek to advance fundamentalist politics that undermine liberal freedoms might claim protection, paradoxically, from the liberal state in the form of special rights. This bears on his theory of special rights for indigenous peoples. Certainly, it appears that self-government rights are limited to social practices that are compatible with liberal freedoms, that is, those which replicate fundamental liberal values. Whilst Kymlicka might not dispute this conclusion, it has important implications for the accommodation of the claims of indigenous peoples, as examined in the next section. Equally important, it has implications for understanding the majority's access to their societal cultures. Basically, it makes explicit that the majority needs to access their societal cultures and that this access cannot be for free.

It is now possible to appreciate the depth of the non-neutrality of the liberal state between different conceptions of the good, which hangs on the proposal to understand criminal law as a socio-cultural practice. In broad terms, it has been claimed that criminal law contributes to socio-cultural practices by reproducing/transforming meaning and social structures. Central among those meanings is individual autonomy. Put differently, the value of individual autonomy seeking the good is legally enshrined in the very institutional structure of society. Accordingly, it appears that Kymlicka's multiculturalism not only adopts a conception of the good, but that it requires one as one of the guiding ends of societal cultures. Certainly, Kymlicka might claim that societal cultures do not fulfil that role for a conception of the good, but then they would be superfluous. If they are superfluous for achieving justice and equality, then they should not figure in society's basic structure. However, this would contradict Kymlicka's theory of justice, which has as its object just institutions because they contribute to the good life. It follows that Kymlicka needs to accept that those institutions are fundamental in this sense. In other words, he requires societal cultures because autonomous choice has meaning within them, and reproducing/transforming those practices cannot be for free.

It is attained the second conclusion of this section: Kymlicka is mistaken in arguing that the majority have access to their societal cultures for free. In effect, maintaining the operation of multiple legal, social, and cultural institutions suitably synchronised to give

effect to the meaning of autonomy is not for free. The social world needs to be organised in a particular way if it is to serve as a context for meaningful autonomous choice. This is why the majority require societal cultures to be non-neutral. For individuals to experience the free marketplace of ideas requires a pre-existent context in which that market makes sense and is thus not monopolised by conceptions of the good for which individual autonomy is irrelevant or non-valuable. For that reason, the liberal order requires reproducing/transforming social practices upon which the idea of autonomous individuals choosing the good has meaning. If this is correct, then access to this societal culture is certainly not for free: it must be continuously recreated in order to ensure that the marketplace of ideas is run by individual choice seeking the good.

Now it is necessary to examine how claims for self-determination fit under this description of the non-neutrality of the principle of neutrality, and the implications of this within criminal law. Firstly, it is examined indigenous peoples' claims to self-determination, and below the implications for criminal law.

2.2.2 Collective Political Equality

Upon the non-neutrality of the principle of neutrality, it seems possible to re-articulate expensive tastes as impossible tastes: indigenous peoples face disadvantage because the language of modern institutions is tailored to meet individual interests, and this makes many of the choices they value, which are collective, not only more expensive but impossible. This claim will be substantiated later in Section 2.4.3. For now, it is important to note that whilst the institutions of the liberal state are well-fitted to address the claims and demands of individuals and their interests, this does not hold for the interests or the value of groups directly. The process of accommodation cannot be detached from being informed by a particular conception of the good. Thus, no matter how much compensation is given, it will always remain short of what indigenous peoples claim if what they seek does not accord with the centrality of autonomous individual choice seeking the liberal good. It should be emphasised that this centrality is not arbitrary. The majority need to be non-neutral, because they seek a particular context of social practices within which their actions have meaning, and so they need to control the ways those contexts are reproduced

and transformed. In a word, the majority claim justified control over their own CS/SS cycles¹⁷⁰.

Understood in this way, accommodation entails the denial of what most indigenous minorities seek: equality between groups. Indigenous peoples do not seek any form of equality, but collective political equality: self-determination¹⁷¹. Collective political equality between groups, however, leads to questioning the motive for accommodation; namely, reconciling unity with diversity, thus achieving unity. Collective political equality would leave criminal law open to be modified in the ways it was described in the last section of Chapter 1. Certainly, making a relation between groups politically equal entails empowering minorities with the capacity to shape their own practices, including criminal law, and this would undermine such reconciliation. Political equality between groups amounts to introducing a break in the normative unity of the state because it recognises that other groups are also entitled to set which norms to abide by. It begins to appear with more clarity that what indigenous peoples demand is not only access to their cultural practices, but also to their political practices. In other words, indigenous peoples also seek justified control over their own SS/CS cycles.

Let us suspend for the moment the enquiry into whether indigenous peoples' claim to be self-determining is justified, for this would lead to an examination of the many ways in which a group can be self-determined¹⁷² and so to the many ways of recognising self-determination¹⁷³. It is started from the assumption that indigenous peoples claim to be self-

¹⁷⁰ While in different words, see Margaret Moore, 'Defending Community: Nationalism, Patriotism, and Culture' in Duncan Bell (ed.), *Ethics and World Politics* (OUP 2010) 130-146.

¹⁷¹ The argument covers not only indigenous peoples, but also national minorities previously entitled to self-determination. See Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy?' in Stephen Allen and Alexandra Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 183-208.

¹⁷² Note that the claim here is a normative claim concerning self-determination, and not whether indigenous peoples meet the requirements that, according to international law, should be sufficient to claim it. The reason lies both in the narrowness of international law concerning the subjects of self-determination, for it excludes clear cases of indigenous peoples, and the blurriness of international law concerning the differentiation between minorities (including immigrants) and indigenous peoples. On the former, see Will Kymlicka, 'Theorizing Indigenous Rights' in Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (OUP 2001) 120-132; on the latter, see Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) 54.

¹⁷³ See Marc Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff 2008).

determined¹⁷⁴ and that this claim, which may range from the claim to secede to a claim to some form of sub-state autonomy, provides the criteria for the kind of accommodation they seek. That is, it specifies the criteria that the State would need to satisfy in order to fulfil the demands of equality: empowering indigenous peoples with self-determination. Overlooking this political claim to self-determination, and the fact that it entails control over SS/CS cycles, prevents theorists from distinguishing between the different forms of equal treatment that the process of accommodation should provide when addressing the demands of different minority groups. It is explored these different forms of equal treatment in Chapter 4 and Chapter 5. At this point, it is necessary to determine the implications of non-neutrality for criminal law.

2.3 Neutrality and Criminal Law

2.3.1 Neutralists and Perfectionists on the Neutrality of the Harm Principle

The foregoing analysis has prepared the terrain to explore what implications - if any - the principle of neutrality has in the context of criminal law. A preliminary approximation considers that neutrality matters for criminal law, for if it did not, then there would be no need to identify breaches of equality. If neutrality does not matter for criminal law, then this would mean that it treats all persons equally. Surely, it is possible to consider neutrality as excluded from criminal law, so that even if criminal law were not neutral, it would not follow the requirement to award minorities special rights. It is examined this possibility in the next chapter¹⁷⁵. Now, if neutrality matters for criminal law, then the question turns upon whether it is necessary to empower minorities with special rights. One should recall that awarding minorities special rights is necessary in order to treat individuals equally from the perspective of respecting a plurality of conceptions of the good. As has been seen, the principle of neutrality demands, to the extent that access to societal cultures is unequal, awarding those rights. Now, the question is whether they are applicable in criminal law.

¹⁷⁴ This recognition has reached the level of international law. See James Anaya, *Indigenous Peoples and International Law* (OUP 2000).

¹⁷⁵ This is examined in the sense that criminal law can be impartially justified, namely, as based on normative reasons that all could agree upon.

In other words, given that criminal law might not be neutral, the question is whether polyethnic rights may be required for grounding exemptions in the form of defences provided for minorities. This is different from what has been seen in Chapter 1, for the issue here is not whether there is pre-existing responsiveness of defences, but whether there can be a right to such defences. However, what needs to be established before addressing the possibility of special rights is whether or not criminal law is neutral. Certainly, if it is, then it appears inquiring into special rights is inconsequential. Whilst it is not possible at present undertake the broader task of determining whether criminal law as a whole can be neutral, it can be pursued the narrower task of whether the critical function can be neutral. This is equally fundamental, for if the critical function is not neutral, then neither is criminal law. It has been said that the critical function aims to reproduce/transform social practices for subsequent cycles and that it contributes to values being shared. The focus on shared values and the evaluative function it implies seem to indicate that the critical function cannot be neutral towards the social practices it seeks to reproduce/transform, for if it were, it would be neutral between the values that are to be shared.

It is appropriate to explore this apparent necessity of the non-neutrality of the critical function in relation to a fundamental principle of criminal law. Consider that an important part of the critical function appeals to the harm principle, both as a principle of restraint, indicating the considerations why criminal law should be limited, yet also as a positive principle for permissible criminalisation¹⁷⁶. That is, the harm principle illuminates in at least some relevant parts of the criminal law the values that should be protected from criminal law, as well as the values that it seeks to protect by preventing crime. The focus on deterrence is not meant to underplay retributivist considerations. On the contrary, it has already been accepted that retributivist considerations are part of criminal law. Yet from the present perspective, retributivist considerations seem to prove far more directly that the state is not neutral between different conceptions of the good, for in defining what

¹⁷⁶ For the multiplicity of meanings of the harm principle, see James Edwards, 'Harm principles' (2014) 20 *Legal Theory* 253-285. For a critique of this multiplicity, see Bernard Harcourt, 'The collapse of the harm principle' (1999) 90 *Journal of Criminal Law and Criminology* 109-194.

constitutes wrongful conduct, it appeals to moral considerations which are in principle forbidden by the principle of neutrality¹⁷⁷.

If it is possible to determine the sense in which the critical function is not neutral by ascertaining that the harm principle is not neutral, then we may also arrive at better reasons to believe that neither is criminal law, and thus whether some kind of special rights might be necessary. Given that there are retributive considerations already at play, it seems there is an inclination for the state not to be neutral, a proposition which can be further confirmed. The harm principle is a liberal principle that aims to restrict criminal law to the prevention of harm-causing conducts. Defenders of the harm principle are also neutralists for they believe that the only aim of criminal law should be to prevent harm, which leads them to embrace deterrence as the exclusive function of punishment. It follows that the harm principle realises important liberal virtues, yet the question remains: must it be considered neutral between different conceptions of the good? Wojciech Sadurski, a liberal neutralist, argues that whilst the state should be neutral between individuals' conceptions of the good, it does not need to be neutral between harmful and non-harmful conducts¹⁷⁸. Joel Feinberg, also a neutralist, explains that the harm principle is a moral principle that sets permissible criteria for the criminalisation of punishment¹⁷⁹, endorsing individual autonomy as a fundamental value for organising criminal law. It seems then that after all, the harm principle as one organising principle of criminal law does enforce a conception of the good, and thus cannot be regarded as neutral. As was evidenced above, almost all political philosophers agree on this.

It is interesting to note here the congruency between the perspectives of those who defend the principle of neutrality and those liberal perfectionists who reject the principle. Following the perfectionists, one may conceive that the state should pursue a particular conception of the good. Not, of course, a single conception of the good, according to which there is but one single value worthy of respect, but a plurality of values. This strategy aligns with the views of Joseph Raz and George Sher, for it holds that there are multiple

¹⁷⁷ This is at least true of moral forms of retributivism, see Jean Hampton, 'Retribution and the Liberal State' (1994) 5 *Journal of Contemporary Legal Issues* 128-129. Political forms of retributivism will be examined in Chapter 5.

¹⁷⁸ Wojciech Sadurski, 'Theory of Punishment, Social Justice, and Liberal Neutrality' (1989) 7 *Law and Philosophy* 372.

¹⁷⁹ Joel Feinberg, *Harmless Wrongdoing* (OUP 1988) 13.

sets of objective values that obtain independently of the agent's subjective states. Accordingly, instead of saying that there are valuable and non-valuable choices, the perfectionist says there is a plurality of valuable and non-valuable options. In this regard, the role of the state should be to promote valuable options and at least discourage non-valuable ones. This matters for criminal law, for it leads one to consider that there are positive reasons that make criminalisation permissible: not because it might prevent harm, but because it might discourage non-valuable options¹⁸⁰. Granted, perfectionists concede that there are additional considerations that must be weighted in deciding whether to discourage non-valuable options through criminal law¹⁸¹. For instance, that identifying breaches requires infringing other fundamental rights, or that punishment can prevent the individual from attaining the good. However, they nonetheless agree that criminalising a subset of non-valuable options would be desirable and justified, notwithstanding that doing so would make criminal law non-neutral. Accordingly, no special polyethnic rights would be needed, for no unjustified inequality would ensue.

According to the perfectionist, the harm principle is justifiably not neutral between different conceptions of the good. Can the neutralist argue differently? From the point of view of the neutralist, the harm principle as a restraint is justifiable only in its capacity to prevent harm. It might seem that the neutralist could understand harm as neutral between different conceptions of the good. Indeed, if it were possible to remove from criminal law all cultural meanings that draw on the majority's culture¹⁸², then none would feature in the process of criminalisation. However, this would undermine the very rationale of the harm principle. Consider the following. It is often said that criminal law is special in one or more of the following three ways: in the values it seeks to protect; in the kinds of attacks from which it seeks to protect; and in the values it sets back when applied. In other words, it is agreed that criminal law protects only the most important values of the political community; that it seeks to protect individual autonomy from harm; and that because it

¹⁸⁰ Moral wrongdoing is one such a consideration, see Michael Moore, *Placing Blame: A Theory of the Criminal Law* (OUP 1997); also Sher, *Beyond Neutrality* (n 165) 70-71 and Raz, *The Morality* (n 167) 420, and Koen Raes, 'Legal Moralism or Paternalism? Tolerance or Indifference? Egalitarian Justice and the Ethics of Equal Concern' in Peter Alldridge and Chrisje Brants (eds.), *Personal Autonomy, the Private Sphere and the Criminal Law: A Comparative Study* (Hart Publishing 2001) 43-45.

¹⁸¹ More generally, the perfectionist might claim that the good requires abstaining from state interference, see Steven Wall, *Liberalism, Perfectionism and Restraint* (CUP 1998) 3.

¹⁸² This is proposed by Claes Lernestedt, 'Criminal Law and "Culture"' in Will Kymlicka, Claes Lernestedt and Matt Matravers (eds.), *Criminal Law and Cultural Diversity* (OUP 2014) 45.

represents a serious interference with individual autonomy, it is justifiable only under exceptional circumstances. Now, if criminal law were not based on a particular conception of the good, then there would be nothing special about it: neither in terms of the interest it protects, nor the harms it seeks to prevent, nor the harms it causes through punishment¹⁸³. More concretely, if sexual autonomy is just a subjective preference like any other, then why punish rape as a serious offense? If liberty and bodily integrity are just subjective preferences like any other, then why all the fuss about punishing the innocent or doing so disproportionately¹⁸⁴? In other words, the rationale of the harm principle would be undermined and the critical function would become meaningless.

It has been demonstrated that the liberal state requires endorsing a conception of the good; something similar occurs in criminal law. Surely, preventing harm requires relying on a substantive account of the good, for only then does it become important to limit state power and the exercise of coercion. However, this suggests that in the two readings, neutralist and perfectionist, the harm principle should not be neutral after all. The importance of considering these two views about the harm principle lies in the extent to which they inform considerable parts of criminal law. That is, both neutralist and perfectionist present different liberal conceptions of the good that are present in the configuration of criminal law. It follows that there is something special about the critical function neither the perfectionist nor the neutralist can abandon. Actually, it would be too revisionist to argue that there is nothing special about the critical function in the three dimensions it has been considered. Accordingly, the same applies to criminal law, of which the critical function is a part. That is, criminal law not only is not neutral between different conceptions of the good, but insofar as it aims to be special, it requires being non-neutral.

2.3.2 Neutrality and the Critical Function

Based upon the previous section, one comes fairly directly to the conclusion that if the harm principle is not neutral, then neither are the critical function nor criminal law. It follows that by treating individuals who hold these conceptions unequally, the critical

¹⁸³ See Jeffrie Murphy, 'Legal moralism and retribution revisited' (2007) 1 *Criminal Law and Philosophy* 10.

¹⁸⁴ See Hampton, 'Retribution' (n 177) 129-130.

function breaches the principle of neutrality. In principle, in the context of accommodating minorities, if state action leads to breaches of neutrality, then this is supposed to be compensated by polyethnic rights. However, it has also been seen that the liberal social order can provide these kinds of compensations only when they are compatible with liberal freedoms, and that the harm principle is presumably informed by such a conception. Thus, whilst it appears that criminal law might be non-neutral, it remains unclear whether it is necessary to award minorities special rights.

This lack of clarity needs to be examined. As was seen above, the critical function is not neutral between different conceptions of the good because it requires being non-neutral. As in the case of the harm principle and the neutrality principle, if the critical function were not based on a conception of the good, then it would be meaningless. Indeed, there would be nothing fundamental about the values of the political community it seeks to defend and nothing special about the rights it interferes with and threatens. It follows that it would be superfluous in terms of the social practices it secures for subsequent cycles, and superfluous in terms of the shared community of values that it helps to construe. The critical function needs to be non-neutral if it aims to make an important and meaningful contribution to the practices on which it depends. This is precisely what its function is: to defend the values of the political community by transforming behaviours that convey values which depart from them, and to reproduce cultural meanings and social structures that are taken as important for subsequent cycles. It seems that both the harm and the neutrality principles require guidance, and thus it is reached the key point: this guidance is provided by the underlying conceptions of the good embedded in the social practices that give criminal law its meaning.

It appears, then, that the conceptions of the good underlying the critical function justify its non-neutrality. The point now is whether from the recognition that the critical function treats minorities unequally, there follow a requirement to give polyethnic rights to minorities. The answer was already suggested in Chapter 1: it is not possible to endow minorities with polyethnic rights that undermine the critical function. Polyethnic rights, in the form of exemptions from criminal law, would undermine the meaningfulness of the critical function in the terms it has been in the previous chapter. Without the operation of the critical function, it would not be possible to state that the political community shares the values that it shares, thus rendering it impotent to respond when crimes that depart

from these values occur. Indeed, if the political community defines itself as not sharing a single fundamental value, there could be no agreement on how to engage in social interaction, no social structures or institutions, and thus social practices and the contexts they create for meaningful action would be at risk of being transformed into something else. Therefore, what settles the guidance here are the conceptions of the good underlying the critical function.

Defending a guided critical function requires the application of criminal law, which implies that polyethnic rights cannot be justifications. Surely, if they were justifications, then minorities could impose their own conceptions of the good. What about partial defences? Here, perhaps, there is a contrast between the neutralist and the perfectionist. Indeed, it seems that whilst the neutralists reluctantly agree that the critical function is not neutral, the perfectionist celebrates it, for he argues that the principle treats all equally in the sense that it respects all valuable options. Recall that for the perfectionist, there is no inequality in the first place, and this supports whether there is a reason for ameliorating punishment. Though in principle, the perfectionist could not find a reason for a partial defence at all, it could not only upon the ground of unequal treatment. Thus, there might be a case for a partial defence if the values the minority upholds coincide with the perfectionist understanding of valuable options. More specifically, the issue is one of moral responsibility and thus the lack of conditions for individuals to choose among valuable options. If, for instance, the individual has not fully developed their capacity for choosing the good, this might be an obstacle for accepting that full punishment should proceed, and thus there is some space for partial defences.

On the other hand, whilst the neutralist seems to be in the dilemma of justifying the inequalities created by the critical function, in truth there is simply no dilemma because like the perfectionist, the neutralist does in fact endorse a conception of the good. Indeed, it has been seen that Kymlicka's framework is committed to a comprehensive view of the good. As such, the framework entails a ranking of ways of life, some above others, and therefore it accepts treating individuals unequally insofar as they hold non-valuable conceptions of the good. In other words, it justifies treating unequally those conceptions of the good incompatible with liberal values. This has a direct bearing on criminalisation, for it suggests - for the same reason offered by perfectionists - that criminalising actions which undermine liberal values can be justified. Thus, no breach of liberal neutrality occurs when

Rapa-Nui are criminalised, and no polyethnic rights can be awarded. Again, the neutralist agrees with the perfectionist that in some instances there could be a partial defence, but that would be so insofar as the minority in question holds values which elicit a response from the values embedded in criminal law. Again, the fact the individual is a member of a minority does not feature in this reasoning.

Hence, it is attained a similar conclusion to that which was reached in Chapter 1, yet it shows that the responsiveness of the legal system is narrower than initially suggested. Certainly, only those cultural values that represent valuable options can obtain some kind of responsiveness from criminal law. Lacey and Waldron, then, join Matt Matravers, who holds that if lesser punishment is justified, then this is not because the defendant acted from a specific cultural reason, but because criminal law itself is sensitive to claims that fit its own definition of the conditions of criminal responsibility¹⁸⁵. If, according to criminal law, the individual can receive full punishment only when he meets the conditions for being fully responsible, being less responsible can merit a lesser punishment. One should note that criminal law is responsive not only if there is compatibility of values in substantive criminal law, for the critical function also extends to criminal procedure. That is, criminal law may or may not be responsive to cultural values during the criminal procedure. The case *R v D (R)*¹⁸⁶ is illustrative. In this case, the Crown Court had to decide whether it was possible for a defendant to wear a niqaab, a garment used by Muslim women that covers their body, including half of the face, during the criminal proceeding. According to the Court, the right to manifest a religious belief could not impinge on the way in which evidence is given during a trial. That is, the structural principle of adversarial justice cannot be trumped by a religious belief. In other words, when it comes to what is taken to be the essential parts of the form of the criminal trial, how it communicates, how it criticises, these cannot be accommodated. Surely, the critical function needs to be protected.

In sum, it can be observed that the strategy of framing both the problem and the solution in terms of breaches of neutrality constructs criminal cases as cases of individual inequality.

¹⁸⁵ Matt Matravers, 'Responsibility, Morality and Culture' in Will Kymlicka et al (eds.), *Criminal Law and Cultural Diversity* (OUP 2014) 89-103.

¹⁸⁶ *R v D (R)*, Transcript of Ruling by HHJ Peter Murphy at Blackfriars Crown Court, 16 September 2013 (Judgement of HHJ Peter Murphy in Relation to Wearing of Niqaab by Defendant During Proceedings in Crown Court.).

The solution that criminal law offers is directed towards what it considers a problem in its encounter with diversity. Because there is no particular problem in defending the critical function, minorities can be awarded a defence on the condition that there is an agent choosing valuable options. If the individual is not choosing valuable options, there is no reason to reduce the response of criminal law, unless there is a lack of what for criminal law are the conditions for ascribing criminal responsibility. However, then indigenous peoples disappear, for not only are they prevented from claiming collective self-determination in their search for individual equality, but moreover, they are treated as just another agent of the liberal group. Indigenous peoples' cultures are left to the marketplace of ideas.

2.4 Meaning and the Social Construction of Social Reality

2.4.1 Separating the Individual From Social Practices

It is now time to start explicating the process of the social construction of reality in which both accommodation and criminal law take part. In this section, it is rejected the notion that the good obtains independently of social practices and argued that, on the contrary, it is enabled by them. In the next section, it is offered a theory of the social construction of reality. It has been seen that the recognition of diversity and efforts to accommodate minorities are processes that occur in political communities that designate themselves as valuing and respecting cultural diversity. This is where the principle of neutrality appears and where it becomes important. Neutrality identifies a problem of individual inequality and, accordingly, it aims at solving a problem of individual inequality. In other words, it construes both the problem and the solution exclusively in terms of treating individuals in certain ways. The fundamental implication of framing both the challenge of and the solution to cultural diversity in terms of individual inequality is that it separates the context of social practices from the meaning on which individual autonomy depends. That is, it severs individual choice from the context of choice. Examining the principle of neutrality has led to two important implications that help to disclose this separation. Firstly, that neutrality is in fact not neutral, for it seeks to realise a specific conception of the good at the expense of others, one in which autonomous individuals seek valuable options. Secondly, that accordingly the majority requires non-neutrality for access to societal cultures that are not for free, given its need to be reproduced/transformed. Drawn together

and in general terms, it appears that the political community requires that underlying its social practices is a particular conception of the good and that these social practices, characteristic of the community, need to be reproduced/transformed in order for individuals to attain the good. That is, social practices invest the good with meaning.

Neutrality, however, rejects these implications, and by so doing it severs the individual from the social practices on which he depends and which depend on him. In other words, it neglects social holism. Social holism provides a view in which the meaning of individual actions depends on social practices, simultaneously claiming that social practices depend on those individual actions. In other words, by providing a method for examining meanings and social practices, it also provides a view of how reality is socially constructed. To see this, it becomes appropriate to distinguish between autonomous choices being meaningful and having meaning, which are not interchangeable. Autonomy being meaningful is conditional upon the set of valuable options autonomous individuals have in choosing what kind of life to live. Autonomy having meaning, in contrast, does not refer to the availability of a narrow range of options, but to a broader context of social practices where autonomy and other values can have meaning. That means that only within the context of certain social practices it is possible to understand what it means to be an autonomous individual. Whilst being meaningful points to the existence of valuable options, having meaning points to the social practices which confer meaning.

Kymlicka, as seen above, rejects having meaning and endorses being meaningful. Kymlicka is solely interested in contexts that present the individual with valuable options; that is, social practices that are compatible with liberal freedoms. However, by making recourse to such a defence, Kymlicka becomes a perfectionist, thus dividing having meaning and being meaningful. Let us see how this separation arises. It has been seen how, according to the neutralist, policies can be justified neutrally but can have non-neutral effects. Nevertheless, these effects are admissible because they are the product of individual choice, so long as they choose the good. It has also been seen that, according to the perfectionist, policies can be non-neutral if they aim at improving the likelihood of the individual attaining valuable conceptions of the good. Though it seems there is a stark contrast between the former and the latter, for the former emphasises autonomous choice whilst the latter does not, the contrast is misleading. Both claim the good is objective: the former considers that the good requires the exercise of autonomous choice, whereas the

latter does not consider that exercise indispensable in every case. For both, the objectivity of the good means that obtaining the moral good is independent of social practices. From this point of view, social practices become external to the good; something that either hinders or facilitates attaining the good.

With these arguments in place, it can be developed a challenge by elaborating the argument of “social construction”: valuable options either depend on social practices or they do not. If they do not, as seen above, it seems that it makes no sense to claim that having access to societal cultures is a matter of basic justice. Surely, if being meaningful can obtain regardless of social practices, then they can obtain regardless of those contexts. Kymlicka, the neutralist, and the perfectionist appear aligned in holding that the good is external to social practices. Accordingly, if the good does not depend on social practices, then the good is not socially constructed, and thus valuable options are invariant across contexts of social practices. However, as it has been seen, this would undermine the project of accommodation from the start, for there would appear to be no reason why access to societal cultures is relevant at all. Additionally, it would make societal cultures natural or costless, neglecting their history as historical achievements. Finally, it would make criminal law irrelevant in the three senses discussed above. Yet, this seems overly implausible. These implications should be rejected, which leads us to endorse the opposite view. If valuable options depend on social practices, then it makes sense to claim that societal cultures are a matter of basic justice, for without them, participants can have no meaning. If the aim is to provide an account on which societal cultures matter by the role they play for meaning, it must be accepted that valuable options depend on social practices. That is, that being meaningful depends on having meaning, while the converse is not true¹⁸⁷.

Consistent with adopting the argument of social construction is an understanding that social practices are more than artefacts that hinder or facilitate: social practices enable the good. Accepting the argument of social construction leads to an understanding that meaningful options depend on having meaning. This has two important implications for the present enquiry. The first is that if there are many social practices, it seems that there are many meanings to what are valuable options. This is the context within which the

¹⁸⁷ Certainly, only a radical ethnocentrism would warrant the claim that it is possible to understand only what is valuable, and would reject that is not possible also to understand what is not.

claims of indigenous peoples come to be heard: a context in which the state recognises and values cultural diversity. The dependence of having meaning on access to societal cultures shows how fundamental that access is for minorities, but equally important, how fundamental it is for the majority to access theirs. The second implication makes the neutralist and perfectionist insistence on liberal freedoms primarily a political argument, and only derivatively a moral argument. Certainly, if the good is socially constructed, then there is a justified reason to believe that the good depends on how individuals organise their collective life, that is, their social practices. Since any argument concerning how to organise social life to enable what their members regard as valuable options is a political argument, it seems the argument of social construction helps to disclose, in general terms, the political character of the question of justified control over SS/CS cycles.

One should note that accepting the argument of social construction paves the way for the perfectionist and the neutralist to show they can justify their selection of valuable options. Yet, this is not in terms of the true morality of the good, but rather collective self-determination. That is, on deciding collectively on which social practices to engage in. This is what the argument of social construction reconnects: the fact that social practices generate meaning with the kind of meaning individuals aim to collectively generate. In other words, social practices are required for obtaining valuable options. This points more concretely to the socio-cultural conditions under which being meaningful has meaning. The neutralist, for instance, can argue that one should care about autonomous choices. However, having accepted the argument of social construction, he can no longer accept this on the grounds that autonomy is the only morally valuable option. The nature of the claim has changed; now it is a socio-cultural and political claim. The same goes for the perfectionist. Thus, whether there are other communities, also entitled to collective self-determination and which could call in their favour the requirement of a non-neutral account of the good, resurfaces as a politically salient issue¹⁸⁸.

In sum, the connection between social practices and the good appears to the extent that the individual search for meaning is understood upon particular social practices. Recognising this connection involves understanding that the good is socially constructed. In other words, that there is an internal connection between social practices and attaining the good.

¹⁸⁸ Yet see Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative' (1992) 25 *University of Michigan Journal of Law Reform* 783.

It follows that there is a plurality of different meanings as to what the good is. Reconnecting the good with social practices also allows for an acknowledgement of the relevance of accessing societal cultures, for both minorities and the majority. Additionally, this facilitates understanding that access to social practices has a political character, because it implicates the collective organisation of social life towards valuable options. This is what control over SS/CS cycles specifies, the kinds of cultural and social processes over which political control is exercised in light of reproducing or transforming social practices, and thus, societal cultures.

2.4.2 Reconnecting the Individual to Social Practices

It has been developed a particular argument holding that the good is socially constructed, but this hangs on a broader conception of the social construction of social reality. Here again, there arises a tension in the morphogenetic approach, given Archer's account of meaning. As shown above, Archer's insistence that cultural meanings are true propositions is tailored to the claim that CS only "conditions" agents; that is, CS conditions their selection of cultural meanings. Agents choose within a cultural world that is not of their making, yet it falls to them to decide among the options they have within their reach. With the idea of "conditioning", Archer rejects social determinism, considering that agents are reflexive enough to mobilise and decide which meanings to choose. Yet this image commits Archer to an impoverished understanding of the dilemma facing minorities, particularly in criminal law. Indeed, Archer sees agents choosing cultural meanings as objects describable in term of true propositions. If true, decisions as to which meaning to choose would be a matter of selecting among those that are true and knowable.

If this view is correct, then it is hard to understand why, as Waldron suggests, individuals are torn between whether to abandon a practice or become criminalised. If it is a decision concerning the truth of some set of propositions: why should the Rapa-Nui be torn apart by abandoning their practices? Similarly, if one takes the good to be independent from social practices, then it is not clear why minorities should be seen as facing an unfair moral dilemma. Raz argues, for instance, that the moral values central to liberalism are context-independent¹⁸⁹ and immutable¹⁹⁰, freedom among them¹⁹¹. It seems that for Raz and

¹⁸⁹ See Jay Wallace, 'Introduction', in Jay Wallace (ed.), *The Practice of Value* (OUP 2003) 3.

Archer, deciding simply involves exercising the natural capacity for theoretical reasoning. This conforms better with understanding indigenous peoples as systematically deceived by their practices, such that they can be relieved from false consciousness through appropriate moral reasoning to apprehend those moral facts which make for a fulfilling life¹⁹². Raz and Archer understand values and meaning as objective and external to social practices, and thus frame the relationship between them and the social world in terms of how the latter either facilitates or hinders attaining the good. However, it has already been rejected the idea that meaning and moral values can be understood outside of social practices.

The thesis has adopted the social construction argument showing the inadequacies of Archer's understanding of cultural meanings, which also applies to Raz's view on moral values. Starting from social holism, it has been tried to show that there is a mutual relationship between engaging in social practices and meaning. This accords, as has been seen, with rejecting determinism¹⁹³, and whilst it considers social practices may condition, that is, facilitate or hinder social actions, it does not reduce them to mere conditioning. Clarifying the conception of social construction aids understanding this non-reductive position. Put in more positive terms, when groups and individuals engage in social practices they enable social actions to have meaning. More generally: social practices enable having meaning. In terms of the modified morphogenetic approach, CS/SS cycles

¹⁹⁰ Joseph Raz, 'Multiculturalism: A Liberal Perspective' in Raz, *Ethics In The Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995) 196.

¹⁹¹ For Raz, 'freedom' does not depend on social practices, see Joseph Raz, 'The Practice of Value' in Jay Wallace (ed.), *The Practice of Value* (OUP 2003) 34. This view is adopted by many authors, some natural law theorists and other legal positivists, see Mark Murphy, *Natural Law in Jurisprudence and Politics* (CUP 2006), Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (CUP 2008), Michael Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (OUP 2000).

¹⁹² Raz, 'The Practice' (n 191) 26. True, Raz seems to be enquiring into the metaphysical relation between practices and values, but the relation between them is not (only perhaps) metaphysical, but fundamentally practical. In the case of Archer, because she develops her theory from the work of Roy Bashkar, she inherits his moral realism, see Dave Elder-Vass, 'Realist Critique Without Ethical and Moral Realism' (2010) 9 *Journal of Critical Realism* 33-58.

¹⁹³ It rejects determinism in the sense that rejects that SS determines S-C/SI, allowing strategic moves. More broadly, the conjunction of CS and SS does not commit to either social or cultural determinism, for this would return to denying the autonomy of culture thesis, which it has already been defended. Enablement is not compromised by determinism for two more reasons. First, given its institutional structure, it may fail to reach the totality of social interactions, and second, even if it reaches them, it may fail to integrate as participants all those it applies to. Certainly, state and social institutions more generally need not cover all socio-cultural interactions, allowing (sometimes forcing) dispersed communities to remain disperse. More importantly, the autonomy of culture shows that participants can remain bi-cultural, for participants can master more than one group's practices and meanings.

do not only condition social actions¹⁹⁴, because they are implicated in the process of reproducing/transforming the continuity of social practices in order to achieve the continuity of meaning. It is necessary to stress this, for it points to the fundamental basis for the present approach: meaning is socially enabled.

In order to elaborate what it means to say that meaning is socially enabled, it is employed the work of John Searle on the nature of social reality. Basically, the claim is that to say that social practices are enabling is to say that some of them are institutional facts. It is not necessary to dwell on his theory; it will suffice to emphasise its social constructivist side in order to characterise the social world. The fundamental insight of Searle's theory is his view on the institutional character of the social world. There is a proviso in using Searle here. It is better to understand Searle not as having provided a comprehensive account of the social world, but as having identified and characterised fundamental features of social practices. Thus, it is particularly illuminating in expanding the understanding of SS. Within the morphogenetic approach, individuals experience SS as part of an external environment, this is why it merely conditions agents. Yet this appearance is a mistake. Individuals and groups engage as participants in the transformation/reproduction of their social and cultural lives: they enable each other through their social practices to have meaning. This is what I consider most valuable from his contribution. For this reason, the interpretations from his work emphasise his social constructivist side, which is nonetheless not in accord with Searle's explicit intentions.

Searle uses the term "institutional" in a different sense to how it has been used here. Searle characterises institutions philosophically, guided by the methodological principle that it is agents themselves who construe the institutions they inhabit¹⁹⁵. Underlying this approach is the Wittgensteinian view that human social practice confers meaning on what humans do¹⁹⁶. So, with minor modifications, Searle's insights are broadly compatible with the

¹⁹⁴ The traditional understanding of enablement means mere conditioning, a position held by Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) 173-175; also Margaret Archer, *Structure, Agency and the Internal Conversation* (CUP 2003) 4-5.

¹⁹⁵ John Searle, 'Social Ontology: Some Basic Principles (with a new Addendum by the Author)' in John Searle, *Philosophy in a New Century: Selected Essays* (CUP 2008) 22. This is in contrast to other rational-choice theories that construe agents externally by idealizing them as maximizing individuals, see Frank Hindriks and Francesco Guala, 'Institutions, rules, and equilibria: a unified theory' (2015) 11 *Journal of Institutional Economics* 463.

¹⁹⁶ Hans Johann Glock, *A Wittgenstein Dictionary* (Blackwell 1996) 328-329.

modified morphogenetic approach. Searle views social reality in terms of a theory of institutional facts, through which individuals articulate and organise their social world. It has three main components: the first is “collective intentionality”¹⁹⁷. Intentionality does not mean, according to Searle, to act with the intention to do A, but rather it characterises the mind as directed at the world. Searle considers this form of directedness operative at a collective level, namely, at the level of collective action. Intentional collective action is a form of directedness at the world that takes place when the contents of individuals’ mental states are collective. This condition is met when what agents are doing together can be described as something “we are doing”¹⁹⁸. This form of individual mental content is, according to Searle, irreducibly collective. Individuals take part in collective action insofar as the content of their mental states is collective. This first component shows that institutions emerge collectively and intentionally.

The second component is “function assignment”¹⁹⁹. Humans assign functions to objects, and they do so with collective intentionality. The result is the creation of “institutional facts”. Viewed from the perspective of these two elements, one can assert that these facts are socially constructed. One should note further that the evaluative dimension that comes with institutions is also socially constructed. With the creation of institutional facts, a normative dimension is introduced²⁰⁰. For instance, assigning the social function of a credit card to a piece of plastic involves assigning one or several social functions. The normative and evaluative vocabulary that accompanies institutional facts enables descriptions of credit cards as achieving or failing their purpose. In other words, institutional facts also create evaluative practices internal to institutions, as achieving or failing to achieve certain ends. The second component shows that participants ascribe ends to institutions. That is, institutions serve evaluative, socially-constructed ends²⁰¹, the ends of those who form the collective intentionality and engage in the practice of function assignment.

¹⁹⁷ John Searle, *The Construction of Social Reality* (Free Press 1995) 23-26.

¹⁹⁸ Searle, *The Construction* (n 197) 26.

¹⁹⁹ *ibid* 13-23.

²⁰⁰ John Searle, *Making the Social World: The Structure of Human Civilization* (OUP 2010) 59.

²⁰¹ On the idea of ends as the defining part of institutions, see Seumas Miller, *Social Action: A Teleological Account* (CUP 2001) and Seumas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (CUP 2010).

The third component of Searle's theory of institutional facts is "status functions"²⁰², which is the state of affairs of an object having a status function. According to Searle, objects perform certain functions beyond what their physical properties allow them to perform. They accomplish this by virtue of a collective ascription of a status function. Once the status function operates, that is, once there is collective acceptance of the function assignment, the object performs a function by virtue of the collective intentionality of the community in which it performs that function. With the third component in place, the basic structure of institutional facts emerges: "X counts as Y in C". In the case of the credit card: there is a piece of plastic (X) that counts as a credit card (Y) when certain circumstances obtain (C). This third component shows formally that there is an intentional collective assignment of a function to an object X, such that it can fulfil function Y in certain circumstances C. In sum, through collective intentionality a group assigns a function to an object X. Once there is collective acceptance of function assignment, X fulfils the role as Y when certain conditions obtain. This third element shows that the practice of participants gives rise to a new institutional fact.

The basic insight Searle's theory provides for present purposes is its explanation of how social practices become socially enabled by participants' collective, intentional, practical attitudes. In short, some social practices become institutional facts, which permits understanding them beyond merely hindering or facilitating social actions. Social practices are a collective intentional process that involves function assignment and collective acceptance. Once these conditions are met, institutional facts enable new social practices and thus new meanings. Moreover, it also shows that the institutional social world serves specific ends that a group seeks through their respective institutions.

The problem, however, is that the way Searle presents his theory is not compatible with the present constructionist interpretation of institutional facts as enabling social practices and meaning. On the one hand, Searle's theory is too individualistic and centres on individuals' mental states. Indeed, institutional facts are reducible to individuals' mental contents taking part in collective actions. On the other hand, the theory is too naturalistic, for it claims that every institutional fact can be reduced to a physical base on which it

²⁰² Searle, *The Construction* (n 197) 33-34.

supervenies. A reinterpretation is necessary to preserve the constructivist interpretation. Surprisingly, no substantial modification is needed, as showed below.

The key reinterpretation concerns the individualistic understanding of collective intentionality. For Searle, it is an individual whose psychological mental state represents what he does in collective terms as 'We' ("assign credit cards function Y in C"). Yet, collective intentionality does not depend strictly speaking on individuals having psychological mental states regarding what they do together in order to collectively assign a function. Functions are assigned collectively not because individuals have mental contents that are collective, but because they engage collectively in public social practices. Function assignment only makes sense in a context of social practices, for such assignment is not a matter of mental contents²⁰³, but of understanding and mastering a practice. Thus, collective intentionality is better understood as a collective practice ranging over both function assignment - the practice of ascribing X as Y in context C - and status function, which it is renamed collective acceptance - X's achievement of function Y in context C. With these three elements in place institutional facts appear²⁰⁴.

Using Searle's theory provides a clearer sense of what it means to say that social reality is constructed or, in other words, that social practices and meaning are socially enabled. Enablement means that some social practices are institutional facts. One should note that claiming social reality is enabled is a strong claim. It is to claim that through participants engaging in social practices, new facts come into existence, which did not exist before. Social practices enable or create institutional facts, which is how participants construct their social reality. Institutional facts involve the existence of new social practices that depend on participants' intentional, collective, practical attitudes. Social reality, the world individuals inhabit, depends on collective practices of function assignment and its recognition through collective acceptance. There is no linear dependence on brute facts, in the sense that brute facts do not particularly determine the emergence of institutions. Institutional facts are internally related to participants, for it is they who engage in a collective practice of function assignment and collective acceptance. Thus, by conceiving

²⁰³ Searle recognises this much in his more recent work, but still sustains that this is a matter of individual mental contents, although he now demands the existence of mutual belief, see Searle, *Making* (n 200) 58.

²⁰⁴ A similar view is proposed by James Coleman, 'Commentary: Social Institutions and Social Theory' (1990) 55 *American Sociological Review* 333-339.

some social practices as institutional facts, it can be observed that CS and SS contribute to enable new social practices, and thus, they enable new meanings²⁰⁵. In other words, new meanings are enabled that could not be understood before.

2.4.3 From Non-Neutrality to the Responsive Nature of Social Reality

The constructivist reading of Searle's theory allows observing institutional facts in both SS and CS, for it seems that many, if not all, social practices follow the structure of institutional facts. Therefore, the presence of institutional facts in the social world is pervasive. SS/CS should, then, be characterised as cycles of social construction, for if social practices have an institutional-fact structure, then cycles of socio-cultural reproduction/transformation are implicated in enabling new meanings that could not be understood before. This aligns with the methodological requirement that in order to understand the social world, one should adopt the participant's point of view. If social practices have an institutional-fact structure, they are to be understood from the inside, as a participant. It appears then that in the sense used here, both Searle and Archer's views on the social world are complementary. In effect, they can be reinterpreted as seeking to answer different questions. Searle's theory is genetic, for it aims to elucidate the conditions that allow the social world to enable contexts for social action in terms of institutional facts. Archer's theory, on the other hand, aims to outline the social and cultural dynamics by which that world is reproduced/transformed, thus ensuring continuity within social practices through time. With these resources, it is now possible to understand the impossibility of admitting indigenous peoples' tastes.

If the political community is institutionally enabled, it cannot be neutral in terms of the enablement of social practices and meaning. As outlined above, the process of accommodation only makes available options compatible with the liberal good; now, this can be comprehended more generally in terms of the impossibility of enabling different social practices. Because groups need to socially construct their practices, they cannot,

²⁰⁵ This is not as controversial as it appears, for what is indeed controversial is the opposite: that speech acts are not socially constructed. For a defence of the view that meaning is socially constructed, see Frederick Stoutland 'On Not Being a Realist' (1989) 89 *Proceedings of the Aristotelian Society* 95-111; Torbjorn Tannsjo, 'Moral Relativism' (2007) 135 *Philosophical Studies* 123-143; Dave Elder-Vass, *The Reality of Social Construction* (CUP 2012) Chapter 6; David Velleman, *Foundations for Moral Relativism*, (Second Expanded Edition, Open Book Publishers 2015) 60-73.

through their institutional facts, provide the practical space indigenous peoples need in order to ensure the continuity of their meanings. Certainly, through them groups only enable their meanings. The impossibility of indigenous peoples tastes depends on two conditions obtaining. First, that they are defined as not being collectively self-determined. Second, that they engage in their social practices within the institutional-fact structure of the larger group of which they are part, and which denied their self-determination. Because the first condition obtains, it is necessary to show why the larger group cannot enable different meanings, which can be demonstrated by the responsiveness of institutional facts. It is important to note that by now the issue is not neutrality, but the need for the larger political community to enable particular social practices. In other words, the issue is not one of hindering or facilitating.

Because the first condition obtains, indigenous peoples as participants must confront meanings that are not only external and imposed, but which also impinge on their capacity to enable their own meanings. This is further explored in the next chapter, but first it is necessary to uncover the problem that institutional facts represent. The first key point is to understand accommodation as located at the level of enablement of meaning, for then it enters into direct conflict with what the group understands itself as entitled to. If the conflict is about who should enable meaning, then it appears that accommodation challenges those for whom institutional facts are institutional facts of a collective practice; that is, of a 'collective subject'. The second key point to note is that if social practices enable meaning, then not any meaning is being enabled, but only a meaning. The institutional reality individuals inhabit enables a social world that could have been otherwise, that could have created different meanings. However, it has not; instead, it has excluded potential meanings from being enabled by virtue of enabling others. Accommodation challenges where the line should be drawn and which meanings should be enabled: it challenges a 'collective subject' as the enabler of meaning. To this extent, accommodation also challenges participants, for their 'collective subject' instituted institutional facts that enable their meanings. The problem, then, lies in that institutional facts are responsive to the social practices and meanings of participants. Inasmuch as institutional facts are responsive by being enabled by the social practices of participants, they respond by requiring the use of particular meanings and advancing their ends.

To say that institutional facts are responsive to participants' social practices and meanings means two different things. First, they are responsive in terms of meaning: meaning-responsiveness. As a matter of practical mastery, the rules that govern the institution can be grasped through the social practices of the collective subject of which the institution is part²⁰⁶. Second, they are responsive in terms of interests or values: axiological-responsiveness. As shown by Searle, the ends served and advanced by institutions are those that the collective subject has set as valuable for their social and cultural world. Institutional facts, then, not only become intelligible to those who were the original participants²⁰⁷, because later participants can also master the meaning-responsiveness and axiological-responsiveness of the institutions they inhabit. As a consequence, institutions speak to and are the voice of those who continuously construct them through their social practices. They speak the voice of a 'collective subject'.

It has been arrived at characterising institutional facts as doubly responsive. To say that institutions are non-neutral fails to specify the ways in which institutional facts are responsive to participants' social practices. This allows for a better understanding of how practices of accommodation operate in criminal law: insofar as they are institutional facts, they are also meaning-responsive and axiological-responsive to particular social practices and to a collective subject. Double responsiveness follows from the impossibility of the non-neutrality of criminal law, for if it were really neutral then there would be no underlying conception of the good. Thus, criminal law would say nothing about the values and the interests it protects, neither of the harms it seeks to prevent, nor of the harms that it

²⁰⁶ On how to understand the learning process in terms of social practice, see Meredith Williams, *Blind Obedience: Paradox and Learning in Later Wittgenstein* (Routledge 2010) Chapter 3.

²⁰⁷ Of course, SS may favour different ends, and because they remain empirically different from CS, they develop with certain independence of groups. Surely, in capitalism, the owners of the means of production could be defined in terms of ethnic belonging, but this is not necessary. Therefore, social organisation can end up favouring a minority within an indigenous group. Indeed, it is widely recognized that this is what has happened in Fiji since the mid 20th century, where Indo-Fijians, who were a minority, came to dominate the economy of the country, and thus, state politics, when they turned into the majority of the population. Yet successive military coups have aimed to favour ethnic Fijians without success, it seems, see Wadan Narsey, 'Review of Fiji's Economic History, 1874-1939: Studies of Capitalist Colonial Development', by Bruce Knapman' (1990) *The Contemporary Pacific* 208-213; William Sutherland, 'Nationalism, Racism and the State: Class Rule and the Paradox of Race Relations in Fiji' (1990) 31 *Pacific Viewpoint* 60-72; Stephanie Lawson, 'Constitutional Change in Fiji: the Apparatus of Justification' (1992) 15 *Ethnic and Racial Studies* 61-84; Terrence Carroll, 'Owners, Immigrants and Ethnic Conflict in Fiji and Mauritius' (1994) 17 *Ethnic and Racial Studies* 301-324; Yash Ghai and Jill Cottrell, 'A Tale of Three Constitutions: Ethnicity and politics in Fiji' (2007) 5 *ICON* 639-669.

causes through punishment. However, the critical function requires being non-neutral; in other words, it requires exhibiting double responsiveness because it is guided by the underlying conceptions of the good endorsed by the collective subject.

Now, it appears that criminal law, as an institutional fact, is doubly responsive to a collective subject; to the Chilean political community. Double responsiveness can be identified in criminal law's institutional alternatives and consequences. The definition of crime and the responses to its occurrence, which conducts to forbid, which conducts to exempt and which to aggravate, how to conduct the investigation and which items are necessary to prove the charges, the way to address the offender, who is to count as an agent and who is not, what can and cannot be resolved during the criminal process, what are the ends of punishment and the institutional design for that end, etc., are all matters responsive to Chileans' meanings. As a result, by enabling, they exclude other forms of defining, investigating, processing and punishing. This is a responsive institutional world, as every institutional world is.

Now it becomes possible to better illustrate the dilemma faced by Rapa-Nui. Rapa-Nui's social practices and meaning register in criminal law through Chilean institutional facts, and they are the object of socio-cultural practices of reproduction/transformation. In other words, they are part of a socio-cultural practice by which meaning is enabled for another collective subject. Rapa-Nui's choices towards engaging in their cultural practices in the cave have been criminalised. It should be noted, first, that their choices have been institutionally structured, for what they have done is regulated by criminal law in terms of individual choices. Second, their choices have been institutionally described as individual actions and have been ascribed institutional consequences, in this case, concerning criminal law. Police and prosecutors, public defenders and courts speak to and from the Chilean dominant meanings. Third, it appears those institutions are biased in what concerns the register of different forms of collective agency: Rapa-Nui exist in criminal law only as an aggregation of individuals. Accordingly, there are no group interests in the case at hand, and of course, no group has been harmed. Thus, not only do the Rapa-Nui disappear, but so does the collective subject for which criminal law is playing a role: the Chilean political community. Fourth, as a condition for engaging meaningfully in criminal law, Rapa-Nui need to master successfully the legal techniques of the Chilean criminal procedure. The Rapa-Nui are asked to defend themselves by engaging in the institutional

framework set to register their demands in institutional terms. Fifth, as a consequence, what the Rapa-Nui might aim to contest is circumscribed by what the institutional framework allows to be discussed and resolved, for that institutional framework is responsive only to certain ends. That is, by using criminal law to conduct the process of accommodation, the Rapa-Nui become instrumental to further the institution of criminal law and the ends it serves. Thus, it will only be responsive if Rapa-Nui appear as reasonable Chileans. Finally, by engaging in criminal law, they are regarded as part of that larger group of participants who share the same values; they are regarded as Chileans.

Conclusion

In sum, and again provisionally, it has been strengthened the case for understanding accommodation as a failure. Indigenous peoples' tastes seem impossible, at least within the institutional facts that are doubly responsive to the collective subject of which they are part. However, this is a consequence of that subject's social world being institutional. It could not have been different, for otherwise their institutional world would have been compromised. The social world of the collective subject is socially enabled, as are their social practices and meaning. It is socially constructed. This casts the situation of minorities as a dilemma for accommodation, because accommodation is an institutional fact not only doubly responsive to the collective subject's social practices, but also furthers that Rapa-Nui are not Rapa-Nui. Divested of self-determination, they can only be regarded as Chileans, and thus, can only ask that criminal law treats them with leniency by relying on what would make a response lenient for a Chilean. Rapa-Nui's practices and their continuity as a group are left to the marketplace of ideas. More needs to be said about this 'collective subject', for now it appears too diffuse. The next chapter addresses this by arguing that it is a constitutional order possessing a constitutional identity.

CHAPTER 3

CRIMINAL LAW, CONSTITUTIONAL IDENTITY AND CONSTITUTIONAL DIALOGUE

Introduction

Chapter 2 ended arguing that the social construction of reality is political because it concerns the organisation of collective life, and that a conflict appears in terms of who should enable meaning. This chapter, explores the question of this “collective subject”, and argues that it refers to a constitutional order. As a part of the constitutional order, criminal law limits accommodation politically. It is argued that criminal law is political because it makes a key contribution to the constitutional order. More specifically, what makes criminal law political is that it forms part of the identity of the constitutional order, as a constitutional order. In other words, a constitutional order claims to control criminal law in a way that excludes any potential interference, because it is a mark of its own identity. What still requires elaboration is, first, that the constitutional order organises collective life politically. Basically, the claim is that the constitutional order seeks to enable particular meaning-responsive and axiological-responsive institutional facts, a process that can be conceptualized as generating a constitutional identity. Constitutional identity draws attention to how the constitutional order places boundaries that enable its own identity. Second, understood as part of the constitutional order, it is argued that criminal law is part of its identity and thus, shapes how it marks the boundaries which make that order what it is. From this perspective, criminal law becomes political by virtue of contributing to set those boundaries. It follows that limiting the accommodation of cultural diversity is also political, because in doing so, criminal law contributes to draw the boundaries of the constitutional order.

This chapter is divided into three sections. Section 1 elaborates the notion of constitutional practice, shifting the focus from the constitutional text to the constitutional order. Section 2 develops a theory of constitutional identity with which it is examined the current debate concerning constitutional identity in EU law, in order to illustrate what it means to claim that criminal law is part of it. In the first part of Section 3, it is challenged the view that sees in constitutional dialogue a way for minorities to be recognised within the

constitutional order, and thus within criminal law. Finally, in the second part of Section 3, it is proposed a principled distinction for treating indigenous peoples equally in contrast to other minorities that do not seek to fragment the constitutional order, but rather to integrate with it.

3.1. Constitutional Order

3.1.1 Constitutional Order and Social Practices

It seems appropriate to start by employing social holism to understand the constitution, in order to make sense of the social practices on which it depends, and how they in turn depend on the constitution. The idea of a two-way feedback relation reappears in the sense that the constitution has meaning by virtue of being part of broader social practices, while simultaneously contributing to those practices having meaning²⁰⁸. The focus in the following is mainly on how the constitution contributes to socio-cultural practices, without overlooking how socio-cultural practices contribute to the constitution. Starting from social holism, it appears that the constitution is identified primarily with particular socio-cultural practices and not with a text. Thus, this approach proposes a shift from understanding the constitution exclusively in reference to a text, to a socio-cultural practice of constitution-making. In other words, it is possible to understand the constitution as a constitutional order²⁰⁹. By understanding the constitution in this way, it is highlighted that its foundations are pre-constitutional²¹⁰, for it draws on the social practices and meanings of its participants. This is the key to understanding the constitutional order.

One virtue of the constitutional order understood as a socio-cultural practice of constitution-making is that it complies with Wittgenstein's dictum that rules cannot be

²⁰⁸ For similar accounts, see Matthew Palmer, 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54 *The American Journal of Comparative Law* 587; Ernest Young, 'The Constitution Outside of Constitution' (2007) 117 *Yale Law Journal* 408.

²⁰⁹ This traces more or less the distinction between the constitution and constitutional law. See W. J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (CUP 2007) 28-29; Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (CUP 2009) Chapter 3; David Strauss, *The Living Constitution* (OUP 2010) 35.

²¹⁰ See Frank Michelman, 'Constitutional Authorship' in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations* (CUP 1998); also Frederick Schauer and Larry Alexander, 'Defending Judicial Supremacy; a Reply' (2000) 17 *Constitutional Commentary* 460-462.

self-interpreted²¹¹. This has implications for constitutional interpretation, for the meaning of a constitutional provision cannot be determined solely by its semantic content. It becomes fundamental to appeal to the context in which a provision is applied and understood: the context of its pragmatic use. Another virtue is that given its focus on social practices, unwritten constitutions become unproblematic. If the practice of constitution-making is fundamental, it is not necessary to rely on the existence of a written document in order to characterise it as having a constitution. Instead, it would be necessary to look at the constitutional practice. In this examination, it would suffice to identify whether the practice has the properties with which it is possible to characterise a constitutional order. Thus, the approach also allows that oral traditions can have a constitutional order, as much as written traditions can. There are many virtues to this approach, yet the key, is that the constitutional order allows drawing attention to the political practices that organise political power²¹², for they underpin the constitution. This is the focus of attention.

The most important virtue of the constitutional order as a concept is that it highlights that constitution-making practices are essentially a political phenomenon. The constitutional order is a socio-cultural and political practice of constitution-making. In other words, it is a way of organizing political power, which understands it as constrained or non-absolute in regard to the collective life that it organises, which is in turn what gives meaning to that political organisation. Crucial in this respect is the following: because it gives form to a political power that organises social life and that depends on it, it is not merely a constraint. In other words, it is overlooked what is most fundamental about the constitutional order if it is admitted the liberal contention that all it does is fulfilling the negative function of constraining power. This view pays no attention to social holism. By structuring and giving form to the exercise of political power, the constitutional order also shapes the form of social practices on which it depends. From this perspective, while the constraining function appears as one important dimension of the constitutional order, it does not exhaust it.

The above has implications for what is most characteristic of the constitutional order. As a socio-cultural and legal practice formally similar to criminal law, the constitutional order

²¹¹ This idea was developed earlier in Chapter 1, Section 1.2.3. For a good compilation of essays on the influence of Wittgenstein in jurisprudence, see Dennis Patterson (ed.), *Wittgenstein and Law* (Ashgate 2004).

²¹² Mark Tushnet, *The New Constitutional Order* (Princeton University Press 2004) 1-2.

also appears to play a role in the social construction of reality on which it depends: it is an institutional fact. Now, if understood as an institutional political phenomenon, then the constitutional order is enabling. It is arrived at the most important function of the constitutional order: it enables political power. This form of political power is institutional in the philosophical sense. It was enabled in the sense that historically social practices made it possible, and thus as a new institutional fact, once it emerged it contributed to social practices and meanings that were not possible before. The constitutional order enables political power by organizing it within the order it sets for itself. In modern states, one can identify this role in how the constitutional order channels the will of the people and gives it a particular constitutional form. Certainly, by organizing the sources and form of political power²¹³, the basic fuel of political and legal reproduction/transformation, and by enacting individual rights²¹⁴ and organising its form through agencies, competences, and procedures, it organizes itself politically.

In sum, the claim is that by enabling political power, the constitutional order plays a fundamental role in the socio-cultural reproduction/transformation of social life. The main contribution of the constitutional order lies in enabling political power. Now, it is necessary to defend this view against an important counterargument. One may object that this approach is just a theoretical view of constitutional states, so that any purchase it may have must be in terms of how a constitution motivates individuals to act in conformity with its prescriptions. Let us explain. The challenge is directed toward the claim that constitutions play a role at least at a cultural level. If this is true, then it would be necessary to show that individual actions are motivated by the constitution, at least on some relevant occasions. The challenge is then that unless it can be demonstrated that constitutions actually do motivate individuals with respect to what they prescribe, the enabling aspect of the constitutional order cannot be vindicated. That individuals are indeed thus motivated may be confirmed if they have integrated the values and principles of the constitution, and what they do, at least in the legal context, can be explained by reference to the

²¹³ Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (CUP 2011) 372.

²¹⁴ In the same way, Thornhill notes that rights contributed to expand the power of states and strengthen their economies. See Chris Thornhill, *A Sociology* (n 213) 219; on the role of constitutional arrangements securing property rights and facilitating the stabilization of the economy, see Douglass C. North and Barry R. Weingast, 'Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England' (1989) 49 *The Journal of Economic History* 803.

constitution's prescriptions. Because the challenge claims that constitutions need not motivate individuals in this way, the notion of constitutional order is undermined.

Jeffrey Goldsworthy has raised this challenge by asserting that in some states, constitutions play no role at all, or at least not in the way the present approach suggests. In Australia, for instance, Goldsworthy expounds, the constitution plays largely no role in contemporary social movements²¹⁵. Australian social movements rarely rely on the constitution when they pursue, for instance, legal recognition for some moral right. Moreover, even from a narrower point of view, the constitution remains hidden from the legal practice itself, as for the most part lawyers and courts rarely rely explicitly on the constitution²¹⁶. It can be accepted that what Goldsworthy describes is not an isolated phenomenon. It can be accepted that in many states, the constitution may not exhibit an explicit integrative effect, in the sense of being a source for individual psychological motivations. For instance, in Canada, outside of Charter cases, which have a particular procedure under the competence of specific courts, Charter's rights are rarely mentioned in case-law. The same could be said of the UK, where there is no written constitution on which to ground psychological motivations.

The claim about the constitution can be vindicated, notwithstanding the above. Individual psychological motivations may be absent, yet it does not follow from this that the constitution is not enabling. True, the constitutional order might be investigated empirically in terms of psychological mental states, but the point of the constitutional order is to draw attention to its institutional character. In other words, the focus is on how the constitutional order enables social practices²¹⁷, and thus contributes to the reproduction/transformation of the broader social practices on which it depends. This is not to say that psychological states are not important. On the contrary, they are, yet they

²¹⁵ Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' (2012) *University of Illinois Law Review* 685.

²¹⁶ Goldsworthy, 'Constitutional Cultures' (n 215) 685-686, recounts that Free Speech is said to have only been recognized by the Constitution since 1992.

²¹⁷ On the integrative role of constitutions, see Rudolf Smend, 'Constitution and Constitutional law', in Arthur Jacobson and Bernhard Schlink (eds.), *Weimar: A Jurisprudence in Crisis* (University of California Press 2000) 218. On the integrative role of law, see Roger Cotterrell, *The Sociology of Law* (Butterworths 1992) 72-73; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1996) 66-81; Dieter Grimm, 'Integration by Constitution' (2005) 3 *ICON* 193; for an empirical view, see Keith Whittington, 'More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics' (2000) 25 *Law and Social Enquiry* 601.

supervene on the social practices that give them meaning. Singling out one's motivation for doing something only represents a partial, incomplete explanation. Think of neurons firing. Certainly, every time individuals are motivated to do something, their neurons are firing, yet knowing this does not allow one to draw nearer to the meaning of social practices than one might by examining psychological mental states. Just as it is individuated a neuron firing within a context of social practices that enable meaning, it is singled out motivations to do something. Indeed, only grounded within a context of social practices can the neuroscientist relate the neurons firing with what individuals are doing²¹⁸.

From the fact that it is not observed a psychological motivation grounded in the constitution in an individual bringing his case before courts, it does not follow that the constitution is not enabling. If such an individual brings his case before the courts, it may well be the case that he has no psychological motivation grounded in the constitution. However, the constitutional order figures in what the individual is doing because that context has been politically organised, and what the individual does has meaning in part by virtue of that contribution. If value A (e.g. freedom from harmful interferences) does not figure explicitly in the psychological states of individual X, say because X neither knows nor believes that the constitutional order establishes value A, it does not follow that, in asking courts and police for protection from individual Y, who has threatened to kill X, that the constitutional order is not enabling A. On the contrary, what X is doing and believing has meaning because there is a constitutional order that supports institutions to which he might appeal in protecting A. Perhaps because in the long run, as it is well accepted²¹⁹, the constitutional order creates path-dependence²²⁰, which pushes institutional facts beneath the surface, this may appear as just another brute fact; but appearances are deceiving.

In sum, the lack of psychological motivations does not prove that the constitutional order is not enabling and, therefore, that it does not contribute to the reproduction/ transformation

²¹⁸ For a similar argument, see Michael Pardo and Dennis Patterson, *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (OUP 2013) 21.

²¹⁹ See Keith Whittington, 'Constitutional Constraints in Politics' in Steven Kautz et al (eds.), *The Supreme Court and the Idea of Constitutionalism* (University of Pennsylvania Press 2009); also Jack Balkin, *Living Originalism* (Harvard University Press 2011), chapter 14.

²²⁰ For empirical evidence of path dependence in general, see James Mahoney, *The Legacies of Liberalism: Path Dependence and Political Regimes in Central America* (The John Hopkins University Press 2001).

of socio-cultural practices. Even Goldsworthy recognizes, implicitly, the underlying role of the constitutional order. Indeed, he claims that the Australian constitution just plays a structural and power-conferring role. But if this is true, then the Australian constitution does play a fundamental role in the particular configuration of the political system (by establishing that elections should be conducted with certain regularity), in the legal system (by establishing the existence of a Supreme Court), in the economic system (by determining the position of the state vis-a-vis that of markets), and so on. In other words, his challenge does not disprove that the constitutional order is enabling.

3.1.2 Nationalism and Constitutional Order

Thus far the claim has been that constitutions enable political power, and that they are better understood as constitutional orders. Drawing on the previous chapter, it appears that if the constitutional order is an institutional fact, then it is also meaning-responsive and axiological-responsive. The social reality the constitutional order contributes to requires that participants master its meanings to advance their particular ends. In other words, the constitutional order is a complex network of institutional facts by which participants enable their political organisation, which in turn reflects back in the form of double responsiveness. Now, whilst this understanding is conceptual, it can be supplemented by the history of modern states becoming constitutional orders. Surely, the constitutional order was informed by particular social practices and meanings, and as a consequence constitutionalised a particular form of political and socio-cultural life.

In seeking to historically vindicate double responsiveness, it is taken the uncontroversial interpretation that locates the origins of western modernity in the rise of European states²²¹. It also seems uncontroversial to join the assertion that the modern state-form conveys a new form of political organisation centred around the ideas of individual rights and popular sovereignty, explicitly distanced from the monarchical and absolutist forms of early modern Europe²²². What seems to have facilitated the rise of states was the idea of the nation, yet because this process is understood as enabling, this history is approached from a different perspective. Specifically, the relation that is the focus is the process of

²²¹ Gerard Delanty, *Formations of European Modernity: A Historical and Political Sociology of Europe* (Palgrave Macmillan 2013) Chapter 9.

²²² Thornhill, *A Sociology* (n 213) 218-219.

collective identity formation and its impact on the modern constitutional order, which I examine in terms of the history of transformation/reproduction of particular constitution-making practices.

In the extensive literature on nationalism, two dominant strands compete in explaining nationalist movements, and thus how they contribute to the emergence of modernity. According to Anthony Smith, instrumentalists²²³ assume that national identity, understood as ethnic identification, was largely a process of instrumentalisation used by political elites to achieve territorial control over a particular land. Instrumentalists thus situate nationalism at the very the origins of modernity. Primordialists²²⁴, on the other hand, consider national identity grounded in the idea of ethnicity as immemorial, and thus situate nationalism at the origins of human civilisation. According to Smith, it is necessary to find a middle way between these two approaches in order to recover what is valuable in both and to reject what is not. This means recognising both the role played by nationalisms in the emergence of modernity and the role of pre-existing ethnic identifications. The aim here is more modest, and consists simply in underlining what Smith and historians of nationalism²²⁵ insist should not be disregarded in the study of nationalism and, thus, the formation of nation-states: that every nationalist movement relied on their own pre-existing social practices²²⁶. This is important for it places emphasis on some commonalities between what are traditionally considered two distinct possible origins in the formation of modern states: national and non-national movements²²⁷. Whilst there are certainly differences between

²²³ Anthony Smith, 'Culture, Community and Territory: The Politics of Ethnicity and Nationalism' (1989) 72 *International Affairs* 446. According to Krishan Kumar, both the work of E. J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (CUP 1992) and Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (Revised edition, Verso 1991) are instrumentalists, to which it is possible to add the work of Paul Brass, *Ethnicity and Nationalism* (Sage 1991), for all locate nationalisms at the emergence of modernity and understand it as an instrument of elite domination. On the considerable divide between historians and sociologists on the origins of nationalism, see Krishan Kumar, 'Nationalism and the Historians' in Gerard Delanty and Krishan Kumar (eds.), *The Sage Handbook of Nations and Nationalism* (Sage 2006).

²²⁴ Smith, 'Culture' (n 206) 446.

²²⁵ Key works here are Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (2nd edition, Clarendon Press 1997) and Anthony Smith, *The Nation in History: Historiographical Debates about Ethnicity and Nationalism* (New England University Press 2000).

²²⁶ See also the recent work of Azar Gat and Alexander Yakobson, *Nations: The Long History and Deep Roots of Political Ethnicity and Nationalism* (CUP 2013).

²²⁷ The standard view considers that England was formed by fundamentally non-ethnic and thus non-national attachments, as compared, for instance, with Scotland and Ireland, see Philip Gorski, 'Pre-modern Nationalism: An Oxymoron? The Evidence from England' in Gerard Delanty and Krishan Kumar (eds.), *The*

them, there are also commonalities, for both state-forms emerged by relying on their pre-existing social practices.

The present interpretation claims that regardless of whether there was a common, ethnic, national identity, states emerge drawing on their pre-existing social practices²²⁸, and thus the new practices that emerged from them became later institutionalized²²⁹. In other words, if states emerged drawing on pre-existing social practices, then the new institutions that emerged with them were meaning-responsive and axiological-responsive. It is important to underline the implications of this idea for the formation of the constitutional order, for this was part of the new institutions that emerged during the rise of the modern state-form. Certainly, this casts a different light on the standard distinction between ideologically-unified nation states and non-ideologically-unified states. It is often said that constitutional orders emerged within nation-states, but this then leaves unexplained constitutional orders which emerged from states that were not ideologically unified. The recourse to common social practices offers an explication: namely, that constitutional orders emerge from common social practices. However, nation-states illustrate perhaps more clearly what it is necessary to show now: how, by centralising political power²³⁰, the state constructed a unity of social practices. It is thus valuable to examine them for the clarity they provide regarding how minorities become excluded from the state-form.

Let us examine the nation-state building narrative. The narrative holds that there was a unified collective, a unitary homogeneous group²³¹, that decided to give itself a higher law²³². To be sure, the group that could as a matter of fact manage to enact the constitution had to imagine itself as a unitary sovereign demos²³³. More importantly, because it was a

Sage Handbook of Nations and Nationalism (Sage 2006) 146, although, as Gorski states, this view has been contested.

²²⁸ Thornhill locates the incipient rising of European states in 12th and 13th century, as a decoupling of the political sphere from the economic sphere, Thornhill, *A Sociology* (n 213) 22-25.

²²⁹ Giddens thus distinguishes between nationalism and nation-state, see Anthony Giddens, 'Nation-state and violence' in Anthony Giddens, *Social Theory and Modern Sociology* (Stanford University Press 1987).

²³⁰ Thornhill, *A Sociology* (n 213) 19.

²³¹ Heather Rae, *State Identities and Homogenisation of Peoples* (CUP 2002) 5.

²³² Thornhill, *A Sociology* (n 213) 189-191.

²³³ Maria Koundoura, 'Multiculturalism or multinationalism?' in David Bennett (ed.), *Multicultural States: Rethinking difference and identity* (Routledge 1998); Stephen Tierney, "'We the Peoples": Constituent Power

group that instituted its own practices, and that defined itself as homogeneous²³⁴, by achieving its unity it excluded those who did not share its practices. Accordingly, only the meanings of a group were represented by the nation-state²³⁵ that constructed itself as a collective unity²³⁶. Here emerges the nation-state erected as a sovereign state, justifying itself in terms of the political power that it has enabled.

Within this justificatory narrative, that is, in the claim that there was a homogeneous group prior to the constitution which decided to give itself a higher law, appears a fundamental problem for minorities. The problem, as has been seen, concerns more than the narrative itself; it reaches the institutional order whose emergence the narrative facilitated. In historical terms, what made possible such a narrative was the development of the state as a centralised form of political power. One should note that the same occurs without the narrative - as in England - or with a narrative that at times verges upon describing two peoples sharing sovereignty, as in Canada. With or without a unified ideological discourse, the new constitutional order emerges along with the centralised institutional form of the state. The state's institutions emerged as meaning-responsive and axiological-responsive to those whom constructed the state by centralising political power. In other words, through the formation of states emerges a context of centralised, therefore unified, institutional facts.

Naturally, the state excluded from itself, given its institutional character, alternative social practices and sources of meaning²³⁷. Two consequences follow from the state's

and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constituent Form* (OUP 2007) 231.

²³⁴ It has been already learned the implications of this move thanks to post-modern theorists of culture.

²³⁵ Stephen Tierney, *Constitutional Law and National Pluralism* (OUP 2005) 9; Michelman, 'Constitutional Authorship' (n 210) 79-80; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995). As an example, in the eyes of the French revolutionaries, people were not really "equal". Suffrage was premised on the possession of certain minimal economic status, and thus excluded most of those whom would be considered entitled to vote today, see Nicholas Capaldi, 'The Meaning of Equality' in Tibor Machan (ed.), *Liberty and Equality* (Hoover Institution Press 2002).

²³⁶ Michael Walzer, 'On the Role of Symbolism in Political Thought' (1967) 82 *Political Science Quarterly* 191; Homi Bhabha, 'Introduction: narrating the nation' in Homi Bhabha (ed.), *The Nation and Narration* (Routledge 1990) 1.

²³⁷ See generally Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4-68.

centralisation. First, the new institutionalised context places boundaries upon the state²³⁸: what emerges is taken as a new collective with a new identity ranging over a territory, regardless of their co-existence with others who do not consider themselves included in the group²³⁹. These are acts of inclusion. Second, the others who co-exist within the boundaries of the space the group claims for itself are excluded, given the double responsiveness of the new institutional facts. Therefore, the nascent collective, by constructing a unity of social practices underlying the centralised state, with boundaries specifying what this unity is and is not, excludes and includes minorities from the beginning²⁴⁰.

In the next section, it is elaborated on what is meant by “identity”. For now, it seems necessary discarding a social-psychological concept of identity sometimes used to characterise the constitutional order. The reason lies in that it gives a superficial description of social practices and their capacity to integrate, very much like what was seen in Goldsworthy’s challenge. Accordingly, it makes invisible how social practices integrate into a pre-existing unity of social practices. This tends to be the upshot of social-psychological concepts of identity, which seek to examine human practices through the individualising methods of cognitive science²⁴¹. This is clear in the now dominant identity

²³⁸ On seeing the nation as a unity, see Michael Walzer, ‘The national question revisited’, in *Nation and Universe: The Tanner Lectures on Human Values* (University of Utah Press, 1990) 538-539; Rae, *State Identities* (n 214) 3. However, there are variations in the idea of unity, depending on the different institutional contexts. In reference to indigenous peoples, unity might lead to more or less asymmetrical forms of inclusion. Thus, for instance, in Australia there was an almost absolute asymmetry in the political inclusion of Australian indigenous peoples (“they should be completely assimilated”), whereas in Canada it was less asymmetrical in relation to Canadian indigenous peoples (“they should be assimilated but retain some practices”). In turn, less asymmetrical was the inclusion of the French in Quebec, and less asymmetrical still was the position of Scotland in relation to England. See, in general, Jon Stratton and Ien Ang, ‘Multicultural Imagined Communities: Cultural Difference and National Identity in the USA and Australia’ in David Bennett (ed.) *Multicultural States. Rethinking difference and identity* (Routledge 1998). In relation to Scotland and Quebec, see Ailsa Henderson, *Hierarchies of Belonging. National Identity and Political Culture in Scotland and Quebec* (McGill-Queen's University Press 2001) 28. For Australia, see John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (CUP 1997). In Canada, see Dickason and McNab, *Canada's First* (n 148) 226.

²³⁹ As Brubaker details, placing boundaries in terms of national belonging is essential in the construction of nation-states. See Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992) 28.

²⁴⁰ In section 3.3.2, it is considered whether the modern form of democratic states can respect and include minorities.

²⁴¹ Here, it is followed Greenwood’s critique of mainstream social-psychological research, see John Greenwood, *The Disappearance of the Social in American Social Psychology* (CUP 2004) 6-8; also Dominic

theory²⁴². In analysing the possibility of a constitution for the EU, Armin von Bogdandy adopts identity theory, criticising the need for collective identities for EU integration²⁴³. In his opinion, it suffices for a successful common constitutional project the existence of a plurality of “weak” collective identities²⁴⁴, without relying on individuals identifying themselves with it. Bogdandy holds that a “weaker” kind of association would be sufficient for European integration, one that is less demanding, “...one would follow more of a liberal, contract-oriented model of European Constitutional law.”²⁴⁵.

Bogdandy claims that a collective identity exists insofar as the motivations and self-ascriptions of individuals are adequately identified. Thus, he psychologises the institutional dimension of pre-existing social practices and how these achieve integration. Specifically, Bogdandy seems to overlook how the practices he relies on are no less demanding. Observe market practices: it is uncontroversial to hold that as markets expand, so do the social practices they rely on, so that achieving a common market between different groups means not only increased market integration²⁴⁶, but also greater political and cultural

Abrams and Michael Hogg, ‘Collective Identity: Group Membership and Self-Conception’ in Michael Hogg and Scott Tindale (eds.), *Blackwell Handbook of Social Psychology: Group Processes* (Blackwell 2001).

²⁴² The seminal work of Henri Tajfel still dominates the field, Henri Tajfel, *Human Groups and Social Categories* (CUP 1981). For references concerning the dominance of this paradigm in contemporary social psychology, see Russell Spears, ‘Group Identities: The Social Identity Perspective’ in Seth Schwartz et al (eds.), *Handbook of Identity Theory and Research, Volume 1 Structures and Processes* (Springer 2011).

²⁴³ Armin von Bogdandy, ‘European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe’ (2005) 3 *ICON* 295; also Anna Sledzinska-Simon, ‘Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and its Application in Poland’ (2005) 13 *ICON* 124; also the essays compiled in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013).

²⁴⁴ On the undesirability of strong collective identity, see Jiri Priban, ‘Symbolism of the Spirit of the Laws: A Genealogical Excursus to Legal and Political Semiotics’ (2009) 22 *International Journal of Semiotic Law* 179.

²⁴⁵ Bogdandy, ‘European Constitution’ (n 243) 315.

²⁴⁶ Indeed, it is well accepted in the sociological literature that cultural and social integration follows from economic integration, see Francesco Duina and Nathan Breznau, ‘Constructing Common Cultures: The Ontological and Normative Dimensions of Law in the European Union and Mercosur’ (2002) 8 *European Law Journal* 575; on the relation between market expansion and legal integration, see Loïc Azoulaï, ‘The Complex Weave of Harmonization’, in Anthony Arnall and Damian Chalmers (eds.), *The Oxford Handbook of European Union Law* (OUP 2015); on the effects of market expansion on social identities, see Leora Auslander, ‘Bavarian Crucifixes and French Headscarves. Religious Signs and the Postmodern European State’ (2000) 12 *Cultural Dynamics* 283; for a historical view of this relation, see Michael Mann, *The Sources of Social Power: Volume 2, The Rise of Classes and Nation-states, 1760-1914* (New Edition, CUP 2012), Chapters 2-4, and assuming such connection, see Thornhill, *A Sociology* (n 213) 23-34; in general, on understanding markets as cultural constructions and embedded in cultural meaning, see Lyn Spillman, ‘Enriching Exchange: Cultural Dimensions of Markets’ (1999) 58 *The American Journal of Economics and*

integration of the kind that provides for the harmonization of social practices which markets require. This seems particularly true in the case of the EU which, although it arose specifically centred on the idea of common markets, stands today as a supra-national political institution. It appears, then, that market integration cannot be considered less demanding for two reasons.

First, the very language that Bogdandy employs - the language of liberal autonomous individuals entering constitutional contracts - already relies on thick assumptions about the historical practices that emerged during European state formation²⁴⁷. In other words, Bogdandy apparently overlooks how even a weaker idea of integration, under which the EU is just a form of economic integration, still relies on thick assumptions about particular social practices and meanings. Certainly, it relies, among other things, on: describing individuals as autonomous beings capable of entering freely into contractual relations; describing markets as free and driven by the logic of private appropriation; and describing private property as embedded in an institutional system of law enforcement and protection. In short, it relies on describing the social conditions which historically, over the long run, made possible western capitalist liberal democracy.

Second, and as it will be seen shortly, EU integration led to the creation of a new autonomous political entity that pursues an identity of its own. In creating its own identity, serious tensions have emerged around the putative depth of European integration, yet these cannot be plausibly understood if economic integration is as weak as Bogdandy assumes. Finally, it should be highlighted that no part of the foregoing entails a positive evaluation of the capacity of market and capitalist integration, nor of the EU as an economic and political project for that matter. Even as its voraciousness constantly threatens its own unity with crisis, collapse and injustice, it should not be denied what these practices do: achieving the integration of common socio-cultural practices.

Sociology 1047; also Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Harvard University Press 2011); and more generally, Bruce Carruthers and Sarah Babb, *Economy/Society. Markets, Meaning, and Social Structure* (Sage 2013); also stressing market dependence on meaning and social practices, Nancy Fraser, 'Behind Marx's Hidden Abode For an Expanded Conception of Capitalism' (2014) 86 *New Left Review* 55.

²⁴⁷ See Peter Gay, *The Enlightenment: An Interpretation. Volume II: The Science of Freedom* (Alfred Knopf 1969). Concerning the earlier period, see Henry Kamen, *Early Modern European Society* (Routledge 2001).

3.2 Constitutional Identity

3.2.1 Hans Lindahl's Theory of Constitutional Identity

It now becomes necessary to develop a more refined conception of constitutional identity and link it to the constitutional order. For this purpose, this section draws on the work of Hans Lindahl, particularly his ideas about what a constitution is and the identity of the legal order. In order for a theory of the constitutional order to understand, acknowledge, assess and possibly correct the exclusion that minorities have experienced, it must go further than showing that institutional facts are responsive. This is an important step, but it is also necessary to account for the process of boundary setting, that is, of minorities' exclusion from, and inclusion within, the constitutional order. In other words, a theory of constitutional order needs a theory of constitutional identity. It should be noted that while in previous sections, it was described how the rise of the state form enabled a new institutional world that excluded and included minorities, it was not elaborated on how those boundaries were actually maintained²⁴⁸. This is where Lindahl's theory enters²⁴⁹. Whilst Lindahl says little about what it means for a constitution to have an identity, he develops a substantive theory of the identity of the legal order. He also considers how a constitution should be understood, and so provides what is necessary to develop a theory of constitutional identity.

A word of caution is necessary before commencing. The present use of Lindahl's theory is selective. This is due not only to the immense richness of his theory, but also to the extent that he draws on a phenomenological tradition, it is not the aim to strain his insights to fit

²⁴⁸ Also noted by Honig, see Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democratic Theory' (2008) 2 *Netherlands Journal of Legal Philosophy* 119.

²⁴⁹ It is necessary to emphasise here that drawing on Lindahl's theory already assumes a prior history of an expanding sphere of participants in the constitutional order. That is, of understanding that the sphere of those entitled to actively shape their social life has been increased with the transition of the constitutional order from feudal Europe to modern Europe. On the progression towards a more expansive sphere of participants, see Ellen Meiksins Wood, *Liberty And Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso 2012) 37, suggesting that property rights asserted against the lords gave rise to an incipient constitutional order. Centuries later, there was an exponential growth brought by bourgeois revolutions and later worker social movements in 20th century, see Bryan S. Turner, 'Outline of a Theory of Citizenship' (1990) 25 *Sociology* 211; also Thornhill, *A Sociology* (n 213). To be sure, this process has not been yet fully accomplished, see Elizabeth Anderson, *The Imperative of Integration* (Princeton University Press 2010). Inclusion in this sphere is what is typically understood as the ideal of civic inclusion, see Frank Michelman, 'Law's Republic' (1988) 97 *The Yale Law Review* 1493-1537.

the present framework. Within the present framework, the process of boundary setting is understood as specifying how the constitutional order takes part in a process of the social construction of reality. While this involves modifying his views, this will be in minor respects, because this section draws on his insights as they apply to the legal domain, and from this draws more general implications according to the present approach. Insofar as the present approach is broad in its orientation, Lindahl's approach facilitates unpacking it. Let us start. According to Lindahl, the legal order is a first person plural concept, that is, an authoritative collective action²⁵⁰ that regulates human behaviour, requiring specific addressees (subjectivity) to do something (content), in some place (space) and at some point in time²⁵¹ (time), in order to achieve a normative point²⁵² (the values that justify legal ordering).

It deserves attention that how Lindahl characterises the end of the legal order is quite similar to axiological-responsiveness, for legal institutions seek a normative point. While it goes further in indicating what aspects of human action become relevant for the law, it falls somewhat short in terms of considering the role of institutional ends with regards to the broader social practices on which they depend. Lindahl says little on meaning-responsiveness, but it is safe to assume he would agree with the notion as a condition for engaging meaningfully in the legal domain. Now comes the important point: by regulating these four dimensions of human action, the legal order establishes legal boundaries. In other words, it includes practical possibilities of action, while excluding others in light of achieving a normative point. Legal boundaries include how they define human actions as legal, that is, characterising them in four-dimensional ways. Boundaries also exclude, internally²⁵³, by defining some practical possibilities as illegal, in light of what been defined as legal. Together, the legal plus the illegal also define what the law might be said to exclude externally: non-law in the words of Lindahl²⁵⁴. Non-law resides outside of legal boundaries, and thus, lies beyond the normative point the collective seeks to realise.

²⁵⁰ Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (OUP 2013) 8.

²⁵¹ Lindahl, *Fault Lines* (n 250) 14.

²⁵² *ibid* 30.

²⁵³ This obviously brings Lindahl quite close to systems theory.

²⁵⁴ *ibid* 14.

Importantly for the purposes of uncovering the ‘collective subject’ it was left underdeveloped in Chapter 2, Lindahl characterises legal boundaries as a form of collective agent engaging in collective action. Legal boundaries cannot be conceived of as reducible to individual interests or expectations because the legal order is not merely an aggregation of individuals. On the contrary, as well as regulating collective actions under laws, the legal order is also a collective agent in its own right. Very succinctly, drawing on the work of Margaret Gilbert, Lindahl distinguishes between two different instances of collective action, we-each and we-together. For Lindahl, the legal order is an instance of the latter because participants see themselves as a collective or group²⁵⁵. Whilst necessary, this is nonetheless insufficient to account for the legal order. Following Philip Pettit, he draws the distinction between joint action and group action, arguing that the legal order is a group action that structures itself by monitoring itself. Yet, Lindahl adds further, the monitoring specific to the legal order is structured authoritatively²⁵⁶. Authorities, in the name of the collective, monitor the actions of participants, ensuring they engage in tasks aimed at fulfilling the collective goal and take active measures to secure that joint action is consistent over time²⁵⁷.

With this, it is reached an understanding of boundary setting as the exercise of a collective legal order that seeks a normative point. Next, Lindahl claims that legal orders acquire a particular identity that endures over time because they draw boundaries. Following Paul Ricoeur’s distinction between ipse-identity and idem-identity²⁵⁸, Lindahl distinguishes two types of collective identities in the legal order. Collective idem-identity means sameness: the legal order has a collective character that endures over time. By establishing boundaries through normative expectations, the legal collective marks its opening and closure²⁵⁹. Yet this also signals its peculiar character, for it makes manifest the specific way in which the legal order regulates human action²⁶⁰. Collective ipse-identity, on the other hand, refers to the collective’s sense of self, its collective selfhood. From the point of view of participants in the legal order, ipse-identity refers to how they understand

²⁵⁵ *ibid* 5.

²⁵⁶ *ibid* 87.

²⁵⁷ *ibid* 87.

²⁵⁸ Paul Ricoeur, *Oneself as Another* (University of Chicago Press 1992).

²⁵⁹ Lindahl, *Fault Lines* (n 250) 85.

²⁶⁰ *ibid* 85.

themselves as part of a WE²⁶¹ (shorthand for “we the group”). From the point of view of the collective, ipse-identity means collective self-reference: it involves a WE that refers reflexively to itself as a collective capable of forming intentions, holding beliefs²⁶², and taking decisions.

Let us observe the interplay of these elements in an example from criminal law. Lindahl explains that when a theft occurs, there is an interruption of idem-identity in terms of the continuing expectations that participants uphold. A theft makes visible what was before invisible: participants’ normative expectations and thus legal boundaries. A theft also makes visible the selfhood of the collective. Participants do not engage collectively as an aggregation of individuals, but as a WE and as a WE, they do not consider this disappointment of expectations legal²⁶³. The collective character and the collective self are two different aspects made visible by the theft. As stated, the theft also makes visible boundaries, or the domain of legality and illegality. The theft may also make visible boundaries as limits, if the theft is an a-legal behaviour, for the a-legal challenges how boundaries should be drawn. Now, if the theft is just simple illegality, by punishing it the WE achieves consistency, thus securing the normative point. A-legality will become important in the last part of this chapter, where it is elaborated on Lindahl’s third category, aside from boundaries and limits; fault lines. Now it is necessary to revisit the idea of constitution.

While Lindahl’s concern is not to provide a specific analysis of constitutions, he nonetheless singles out their main characteristics. One of them is that they empower²⁶⁴. They open up new sets of practical possibilities under law from the perspective of a constitutional WE, which seems entailed by understanding the constitutional order as enabling, as it was seen. In this regard, Lindahl considers the constitution as a first person plural concept, characterised as the master rule²⁶⁵. As a master rule, it governs the establishment of boundaries, that is, of what is enabled. Put another way, these new possibilities arise as the WE sets boundaries, for boundaries both exclude and include new

²⁶¹ *ibid* 91.

²⁶² *ibid* 83.

²⁶³ *ibid* 89.

²⁶⁴ *ibid* 99.

²⁶⁵ *ibid* 100.

forms of practical possibilities. Here it is attained the basics for understanding constitutional identity: it is a collective phenomenon by which a WE organizing political power enables new social practices that emerge by a process of setting boundaries, thereby establishing its own idem-identity and ipse-identity.

In sum, this theory generates two important and interrelated implications. First, acts of exclusion and inclusion are the outcome of setting boundaries or the emergence of constitutional identity, and second, they single out a collective practice and a collective subject whose identity depends on them. Broadly understood, constitutional identity connects a WE's drawing of boundaries with the process of enabling its idem-identity and ipse-identity, which involves acts of inclusion and exclusion. The constitutional order denies minorities the ability to shape what is legal/illegal, yet includes them by assuming they are participants²⁶⁶. This means minorities are included and excluded in terms of both the idem-identity and ipse-identity of the constitutional order. In the next section, the focus is on one aspect of the identity of the constitutional order, its criminal law. The aim is to understand criminal law as part of a political process geared towards reproducing/transforming the identity of the constitutional order.

3.2.2 Criminal Law and Constitutional Identity

In this section, I examine the recent debate in EU law concerning constitutional identity and the place criminal law has within it. There is a reason for examining the debate in the EU, for though it may seem shocking, there are insightful parallels in the relation between member states and the EU, and indigenous peoples and the state of which they are part. If self-determination is something that matters for these groups and if it is vanishing by becoming part of a larger group, then this is something both have in common. Furthermore, because the decline of self-determination is an issue that concerns the debate of constitutional identity, the parallels are stronger still. True, indigenous peoples self-determination has not been formally recognised and member states' sovereignty is less

²⁶⁶ On the effects of land appropriation and recolonisation of indigenous peoples lands, see the case-studies examined by Colon Samson, 'Rights as the reward for simulated cultural sameness: the Innu in the Canadian colonial context' in Cowan et al (eds.) *Culture and Rights: Anthropological Perspectives* (CUP 2001) 226-248; Norman Forer, 'The Imposed Wardship of American Indian Tribes: A Case Study of the Prairie Band of Potawatomi' in Sandra Burman and Barbara Hurrell-Bond (eds.), *The Imposition of Law: The Social Consequences of Imposed Law* (Academic Press 1979) 89-114.

than fully self-determined, and shrinking as the EU expands. Yet in both cases, this has not diminished so much as strengthened their claims for self-determination. Therefore, both cases fit well with the idea of a conflictual constitutional pluralism²⁶⁷. Of most interest for this section, both cases exhibit an interaction between two WE who seek to maintain their own idem-identity and ipse-identity by claiming exclusive jurisdiction over criminal law.

The notion of constitutional identity has emerged progressively in EU law since the inclusion of the “national identity” clause in the Maastricht Treaty²⁶⁸ and its reformulation in the Lisbon Treaty²⁶⁹. This is the progression of the so-called identity provision. However, the idea is older, tracing its origins to German constitutional history²⁷⁰ and presumably in Sieyes’s distinction between constituted and constituent power²⁷¹. In current debates, constitutional identity takes the form of a constitutional doctrine, as the identity provision in Lisbon progresses into the judicial arena. In other words, constitutional identity has become a doctrinal concept, once the identity clause becomes justiciable in courts²⁷². A gap then seems to appear between the more philosophically-oriented concept of identity taken from Lindahl and its less theoretical cousin, the doctrinal concept. Certainly, whereas for the latter, an issue or conflict implicates constitutional identity conditional on a provision being justiciable, for the former there might be an unrelated

²⁶⁷ See Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *The Modern Law Review* 317-359.

²⁶⁸ The Maastricht Treaty established that “...the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy”, Consolidated Version of the Treaty on European Union art. 6 (2), May 9, 2008, 2008 O.J. (C115) 13.

²⁶⁹ The Treaty of Lisbon establishes that the EU “...shall respect the equality of the Member States as well as their national identities before the Treaties inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 3a, Dec. 13, 2007, 2007 O.J. (C 306) I.

²⁷⁰ Monika Polzin explains its origins as a doctrine developed by Carl Schmitt during the Weimar Constitution, aimed at limiting the possibility of amending it. See Monika Polzin, ‘Constitutional Identity, Unconstitutional Amendment and the Idea of Constituent Power: the Development of Doctrine of Constitutional Identity in German Constitutional Law’ (2016) 14 *ICON* 411.

²⁷¹ It is notable that in France, while this distinction was widely acknowledged, the development of the notion of “constitutional identity” is a recent phenomenon. See Pierre Bon, ‘National or Constitutional Identity, a New Juridical Notion’ (2014) 100 *Revista Española de Derecho Constitucional* 167.

²⁷² The identity clause in Lisbon is specifically justiciable, whereas in Maastricht it was a matter of ultra vires; see Monica Claes and Jan-Herman Reestman, ‘The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case’ (2015) 16 *German Law Review* 922.

provision or no provision at all (a purely political phenomenon unregistered in the legal domain), implicating constitutional identity. It is urged adopting the philosophical view because the doctrinal concept approaches the issue so narrowly as to overlook what matters most: that the identity clause levels out the interaction of several WE.

The reason for the narrowness of the doctrinal concept lies in its method, one that privileges the constitution over the constitutional order. Indeed, most approaches to the doctrinal understanding of constitutional identity focus on judgements of courts, statutes or treaties²⁷³, and as a consequence only on the constitution²⁷⁴. Here it is examined the doctrinal concept of constitutional identity as an aspect of the identity of the constitutional order. Because the focus is the latter, it is followed Pietro Faraguna's analysis of constitutional identity, for he considers it through the lens of the constitutional order. Indeed, by considering not only court rulings, relevant treaties and enhanced cooperation agreements, but also cases in which the unanimity rule still applies, national Parliaments' reasoned opinions and opt-outs from common frameworks²⁷⁵, Faraguna incorporates into the analysis issues of wider relevance to the political organisation of power, thus providing a more comprehensive assessment of the identity provision. Fundamentally, it vindicates the more philosophically-oriented notion of constitutional identity.

As a doctrinal concept, authors have been struggling to provide an interpretation of the identity provision and judicial practice. Some suggest that it is possible to interpret

²⁷³ Bogdandy is the paradigmatic case, but practically all the available bibliography at the time of writing focuses exclusively on this.

²⁷⁴ The emphasis should not fall on the idea of national identity as non-institutionalised discourse, but rather on the kinds of practices that institutionalise that discourse. For this reason, it seems mistaken to consider that constitutional identity just is the essential values of the *constitution*, without considering that what is essential refers to the *constitutional order*. Nonetheless, most scholars consider identity as exclusively institutionalised through the constitution; see Wojciech Sadurski, 'European Constitutional Identity' (2006) *Legal Studies Research Paper No. 6/37* < <https://ssrn.com/abstract=939674> > accessed 18 September 2016; also Marti, 'Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013) 17-29; Barbara Guastafarro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 31 *Yearbook of European Law* 263; Mary Dobbs, 'Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?' (2014) 33 *Yearbook of European Law* 298.

²⁷⁵ Pietro Faraguna, 'Taking Constitutional Identities Away From the Courts' (2016) 41 *Brooklyn Journal of International Law* 572.

constitutional identity as national identity²⁷⁶. Yet, as Bogdandy argues, the Lisbon Treaty rephrased the provision in such a way that it seems clear that constitutional identity cannot be taken to mean just national identity²⁷⁷. Outside of the EU debate, it has been suggested that constitutional identity is a dialogical concept²⁷⁸. Specifically, with eyes towards the USA²⁷⁹, these scholars do not regard the concept as a dialogue between different WE, but a form of self-dialogue within a single constitutional order. An important contrast appears then between theorizing in reference to the USA and EU. Differentiating both is important, for the type of case it is being considered involves the existence of at least two collectives claiming to be at least relatively self-determined. Accordingly, the key difference that makes the EU the focus lies in the kind of independence states have within it. Certainly, in the case of the EU, all states predated the EU and are still regarded as independent; this singles out precisely the characteristic under consideration in the parallel with indigenous peoples, for like member states they were independent well before European colonisation.

Returning to Faraguna, he interprets the identity provision as facilitating differentiated integration. That is, in the face of the political, cultural, and socio-economic diversity of member states, a model for the accommodation of differences is the best fit as a model of integration²⁸⁰ in which member states enter the EU in different and complex ways. There is no unique model of integration that suits every member state equally well. According to Faraguna, the identity provision in Maastricht was part of an overall strategy aimed at striking a balance between the jurisdiction of the EU and that of member states²⁸¹. Maastricht, for instance, established specific opt-outs from regulations and declarations for

²⁷⁶ See Leonard Besselink, 'National and Constitutional Identity Before and After Lisbon' (2010) 6 *Utrecht Law Review* 43-44; Roberto Toniatti, 'Sovereignty Lost, Constitutional Identity Regained' in Alejandro Saiz Arnaiz and Carina Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013) 63; Jose Luis Marti, 'Two Different Ideas' (n 274); Elke Cloots, *National Identity in EU Law* (OUP 2015) 168-170.

²⁷⁷ Armin von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1427; also Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010) 11-12.

²⁷⁸ Robert Post, 'The Supreme Court, 2002 Term—Forward: Fashioning the Legal Constitution: Culture, Courts, and Law' (2003) 117 *Harvard Law Review* 8; Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 7.

²⁷⁹ Jacobsohn considers not only the USA, but also Ireland and India. However, these cases are structurally the same insofar for him constitutional identity is a form of self-dialogue.

²⁸⁰ Faraguna, 'Taking constitutional identities' (n 275) 534.

²⁸¹ *ibid* 536.

accommodating differences without denying the integrity of the EU. Lisbon²⁸² follows the same strategy. For Faraguna, the United Kingdom opting out of the Euro is one example that shows the success of the mechanisms of differentiated integration. This is the place of the identity provision. Constitutional identity does not represent a barrier to the EU. On the contrary, it facilitates inclusion into the EU²⁸³. The identity provision allows member states to claim to be self-determined on what supposedly matters most to them. In this light, the EU's expansion is acceptable insofar as it respects constitutional identity.

Faraguna concludes that constitutional identity comprehends, at this point of the practice, matters relative to essential state functions; specifically, matters regarding the regulation of the family; internal and external security; and criminal law, among others²⁸⁴. Understanding criminal law as part of a constitutional identity means that it is a matter over which the member state can check the other's overreaching jurisdiction²⁸⁵. Let us examine how this plays out. There are two main ways in which member states and the EU have been interacting through criminal law: through "mutual recognition", the recognition of judicial decisions between countries; and through "harmonization", the modification of criminal law in member states by instituting minimal common rules between them. According to Valsamis Mitsilegas, previously Lisbon member states resorted to mutual recognition over harmonization, in the belief this would impinge less on their power over criminal law. However, Mitsilegas shows this was misleading, for the emphasis on effective cooperation and implementation of EU policy has altered the criminal laws of member states, with particular emphasis on the rights of the defendant²⁸⁶. That is, it has harmonized through mutual recognition. In Pupino²⁸⁷, for instance, the European Court of

²⁸² Guastaferrero argues the same in her examination of national parliaments' reasoned opinions. See Barbara Guastaferrero, 'Coupling national identity with subsidiarity concerns in national parliament's reasoned opinions' (2014) 21 *Maastricht Journal of European and Comparative Law* 326.

²⁸³ Faraguna, 'Taking constitutional identities' (n 275) 557. On the capacity of the clause to solve many constitutional conflicts between member states and the EU, see Francois-Xavier Millet, 'Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in Loic Azoulai (ed.), *The Question of Competence in the European Union* (OUP 2014) 262.

²⁸⁴ Faraguna, 'Taking constitutional identities' (n 275) 573.

²⁸⁵ Notice that, whilst related, this is not a case of conflict of laws because its object is the authority to regulate a domain of cases, and not which rule is supposed to regulate an actual case. For an overview of the idea of conflict of laws in EU law, see Christian Joerges et al, 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation' (2011) 2 *Transnational Legal Theory* 153-165.

²⁸⁶ Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing 2009) 25.

²⁸⁷ Case C-105/03, *Maria Pupino*, ECR [2005] I-5285.

Justice (CJEU) modified the Italian Code of Criminal Procedure at the expense of the rights of the defendant²⁸⁸, by extending to cases of non-sexual abuse the possibility of testifying under a special procedure previously contemplated only for sexual offences. In doing so, the CJEU developed criminal law principles with general application and, as Mitsilegas rightly points out, mutual recognition led to an informal harmonization through judge-made law²⁸⁹.

For the present purposes, depicting the expansion of the EU, both formally and informally, provides support for the role of criminal law as it emerges in constitutional cases under the mantle of constitutional identity. Indeed, as the jurisdiction of the EU grows, constitutional identity reaffirms itself and criminal law as some of its fundamental ingredients. Criminal law appears as that part of the constitutional order that cannot be deferred without altering the idem-identity of the constitutional order. The same holds for ipse-identity, for criminal law shows the commitment of the political community to maintaining certain practices together. It is noteworthy, however, that the doctrinal understanding of the identity clause seems unable to identify a related process concerning the EU, which aids an appreciation of its narrowness. Indeed, criminal law also plays a role for the identity of the EU, which as a constitutional order aims to be capable of having a constitutional identity. In other words, being capable of having its own criminal law.

What is remarkable here is the similarity between the unity the EU seeks and the unity achieved by emerging states, and the role played by criminal law in that process. Indeed, the monopolisation of the use of force - and thus the monopoly over criminal law - is considered a key component in the process of state consolidation²⁹⁰. Thus, the two-way feedback relation reappears again in a historical fashion: the emergence of modern criminal law depended on the rise of self-determined states, yet self-determined states

²⁸⁸ See Emily Smith, 'Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security' (2013) 4 *New Journal of European Criminal Law* 82.

²⁸⁹ Mitsilegas, *EU Criminal Law* (n 286) 322. For the ECJ treatment of the principle *ne bis in idem*, see Mitsilegas, *EU Criminal Law* (n 286) 148-153. More generally, the catalogue of mutually recognised offences is already quite substantial, covering 32 types of offences. For a brief examination, see Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer 2016) 501-562.

²⁹⁰ Giddens, 'Nation-state and violence' (n 229) 173-174; the claim might be weaker in the sense of achieving centralisation through law, see Thornhill, *A Sociology* (n 213) 168.

depended on monopolising criminal law²⁹¹. Constitutional identity articulates this two-way feedback relation in modern times. What matters is not territorial unity, but the institutional unity criminal law contributes to; that is, to the unity of social practices, and thus, of meaning. It would seem then, that criminal law is equally fundamental for both member states and the EU order for the same reasons, owing to how the WE seeks to enable its idem-identity²⁹² and ipse-identity by relying on the operation of criminal law. Hence it is unsurprising that the WE, both of member states and the EU, aims to control it internally. The EU has indeed become equivalent to the state's emergence in that respect, and while its monopoly over all criminal law might not be observed, in the post-Lisbon scenario there is a clear, exclusive jurisdiction on some matters in substantive and procedural criminal law²⁹³. Now, the EU has the power to harmonise criminal law in the areas of article 83(1), what the treaty names "serious crime", with a cross-border dimension enumerating among them terrorism, drug trafficking, and organized crime striving to achieve the effectiveness of EU policy²⁹⁴.

The point here has not been to provide a thorough examination of EU criminal law, but to illustrate how the philosophy of constitutional identity allows for understanding the new EU criminal law. From this point of view, it appears that the new powers given by Lisbon form part of the process of the EU constitutionalising its own order and as such consolidating its own constitutional identity. Consolidating its own identity means, at least, to have autonomous power over criminal law, in order to contribute to enabling its identity. Mutual recognition and harmonisation are instances of this broader phenomenon. While it

²⁹¹ On the connection between the rise of sovereign nation-states and criminal law, see Giddens, 'Nation-state and violence' (n 229) 173-174; Mireille Hildebrandt, 'Radbruch on the Origins of the Criminal Law: Punitive Interventions before Sovereignty' in Markus Dubber (ed.), *Foundational Texts in Modern Criminal Law* (OUP 2014); James Whitman, 'The Transition to Modernity' in Markus Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* (OUP 2014); Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and the Civil Order* (OUP 2016) 45-46.

²⁹² On understanding criminal law as defining rights, see Peter Ramsay, 'The Responsible Subject As Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69 *Modern Law Review* 41, and for an application of this idea, see Christina Eckes, 'How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of Segi' (2006) 17 *Kings Law Journal* 144. More generally, on the connection between fundamental rights and constitutional identity, see Bogdandy and Schill, 'Overcoming Absolute Primacy' (n 277) 1436.

²⁹³ See Valsamis Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing 2016) Chapter 3.

²⁹⁴ On the problematic nature of the principle of effectiveness see, Ester Herlin-Karnell, *The Constitutional Dimension of European Criminal Law Europe* (Hart Publishing 2012) Chapter 3-4.

might be argued that the effects of mutual recognition on the legal systems of member states is an anomaly, given that the jurisdiction of the CJEU is limited by Lisbon to cases that have a cross-border character like the aforementioned, this neglects the progressive influence which the EU exerts over criminal law. In addition to the examination of Mitsilegas, Maria Chaves has suggested²⁹⁵ that the broadness of the definition of organized crime in Lisbon provides an “umbrella concept” for the EU to legislate in many different areas of substantive criminal law, far beyond what Lisbon actually provides for. Thus, it is interesting to note that while constitutional courts make emphatic declarations about the need to protect constitutional identity, and that while judicial and political powers recognise that criminal law is part of that identity, there is considerable leeway for the EU to legislate and promote both formally and informally its own system of criminal law. Indeed, the EU also has jurisdiction in criminal law.

Thus the narrowness of the doctrinal concept comes into focus once more. An over-emphasis on constitutional identity as a doctrine overlooks the framework in which it takes part and its role within it. Indeed, from the perspective of two WE engaged in an institutional relationship, it does not seem accurate to state that even this provision is subject to a proportionality judgement from the CJEU, for this would systematically grant the CJEU the last word on the matter²⁹⁶. The identity provision provides a more flexible approach, allowing member states also to have the last word without collapsing into the radical view that sees the identity provision as endangering the very existence of the EU. On the contrary, as has been shown, the identity provision is part of a political mechanism, developed to strike a balance of power between the EU and member states²⁹⁷ by facilitating differentiated integration. The EU is granted jurisdiction over criminal law to counter the power of member states over criminal law. In other words, respect for each other’s identity is achieved through the identity clause.

²⁹⁵ Maria Chaves, ‘The Evolution of European Union Criminal Law (1957-2012)’ (DPhil thesis, The London School of Economics and Political Science 2013) 69; also and more generally Alexandra Orlova and James Moore, ‘Umbrellas” or “Building Blocks”?: Defining International Terrorism and Transnational Organized Crime in International Law’ (2005) 27 *Houston Journal of International Law* 267.

²⁹⁶ Bogdandy considers that the identity provision protects only against a disproportionate interference, see Bogdandy and Schill, ‘Overcoming Absolute Primacy’ (n 277) 1430.

²⁹⁷ One way in which this can be achieved is proposed by Cloots arguing that the ECJ should protect national identities categorically, thus recommending abandoning the proportionality principle, see Cloots, *National Identity* (n 276) 210.

In sum, the identity provision is a result of the institutional interaction between two WE, whose degree of development of constitutional identity is considerably different. Certainly, even prior to the EU, member states were constitutional orders whose identity was reproduced/transformed by their criminal law. In contrast, the EU is still struggling to consolidate its own constitutional identity²⁹⁸. The theory of constitutional identity thus elucidates the relationship between what appear to be independent parts of unrelated concepts: jurisdiction over two forms of criminal law and the identity provision. Criminal law appears as part of the identity of the constitutional order that cannot be deferred. If it were, the WE would abdicate the power to shape its own identity. Furthermore, the same can be said regarding the identity of the EU, for if member states were to have complete power over criminal law, then the EU would not be able to shape its own.

Applied to relationships between the state and indigenous peoples, this suggests a deepening scepticism regarding their accommodation by criminal law. Surely, to accommodate them in the ways examined above would necessitate the WE abandoning the contribution criminal law makes to its constitutional identity, whilst not accommodating them means being integrated into an imposed constitutional order. However, not all scholars agree on this last point, for an influential line of argumentation holds that indigenous peoples can seek real inclusion in the constitutional order of which they are part, even if that order was imposed on them. That is, that the new democratic order can be inclusive of minorities. The next section addresses this counterargument.

3.3. Minorities and Constitutional Identity

3.3.2 James Tully and Constitutional Diversity

It might be possible to argue that minorities can come to accept the constitutional order. If they can engage with its institutions and advance its ends, then they might accept the authority of criminal law when it criminalises their practices, which is to say that once included, they might. This requires assuming the position of a participant. Surely, if

²⁹⁸ This might explain, for instance, why it remains unclear when a member state has overstepped the jurisdiction of EU criminal law. Regarding the uncertain protection of fundamental rights in these matters, see Tony Marguery, 'European Union Fundamental Rights and Member States Action in EU Criminal Law' (2013) 20 *Maastricht Journal of European and Comparative Law* 282.

criminalization is grounded in reasons all participants can share, then even those who disagree can still accept that criminalization is legitimate, if justified in the interest of all. This Habermasian theory of constitutional inclusion of minorities, while it may accept the responsiveness of institutional facts, can claim to be impartially justified, and thus, binding upon all²⁹⁹. However, whilst this may be applicable to the case of immigrants, it is not to indigenous peoples. As Lindahl argues³⁰⁰, when Habermas intends for them to take the constitutional language as their own and thus be included, that is, as participants, it realises the WE's unsuccessful colonial dream during the 19th and 20th century³⁰¹: to assimilate indigenous peoples into western political culture.

Lindahl has provided a convincing critique of the implications of Habermas' thought in this regard, so it is not necessary to examine his position further. Instead, it is taken issue with a less controversial view of constitutional inclusion. An alternative to Habermas could place emphasis not on reasons individuals could all share, but on the capacity of the constitutional order to make room for cultural diversity. Rather than emphasising sharing norms all individuals have reasons to share, the stress is put on finding common ground for dialogue about the ways in which individuals can live together. One influential line of argumentation suggests understanding the constitutional order as a mode of dialogue, and thus the accommodation of difference as a form of constitutional dialogue. The alternative would therefore be a dialogue between different groups who rely on a horizon of common meanings given by the constitutional order, but who engage through their own languages

²⁹⁹ See Duncan Ivison, *Postcolonial Liberalism* (CUP 2002) 118.

³⁰⁰ Lindahl, *Fault Lines* (n 250) 232. For a further development of Habermas' argument concerning cultural recognition, see Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002). For a critique of Benhabib on the same lines, see Richard Mohr, 'Some Conditions for Culturally Diverse Deliberation' (2005) 20 *Canadian Journal of Law and Society* 87; also Kompridis, 'Normativizing' (n 71) 318.

³⁰¹ The history of the encounter with indigenous peoples from Australia and New Zealand, to North, Central and South America, has gone from colonisation, conquest and genocide to forced assimilation and has entered only during the last decades, and only in some places, into a process of acknowledging the harms and wrongs done, underlining the recognition of special rights. For an overview, see Franke Wilmer, *The Indigenous Voice in World Politics* (Sage 1993) Chapters 3-4. It should be noted here that genocide was not merely a side-effect of disease and hunger, but also an intended goal pursued against men, women, and children. For the history of genocidal warfare against indigenous peoples in the USA, see David Stannard, *American Holocaust: The Conquest of the New World* (OUP 1992). For a brief overview of other colonising genocidal warfare, including the Spanish in Mexico, Australians in Australia, Germans in South West Africa, and Russians in the Caucasus, see Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (CUP 2005) Chapter 4. It bears noting that this is a broad depiction of a timeline, and does not mean to suggest that conquest, murder or assimilation have ended.

and modes of reasoning. The constitution is posited as a flexible tool, which allows dialogue between diverse worldviews.

James Tully has elaborated the most comprehensive defence of such a view. Tully argues that the constitutional order can do justice to the demands of those whom have been unjustly excluded. Tully claims that constitutions can accommodate cultural diversity, insofar as they allow their citizens to negotiate the conditions of their association in accordance with an interpretative framework of constitutional practice guided by “...three conventions of mutual recognition, consent and cultural continuity”³⁰². Tully’s view is quite ambitious because he aims to replace the historical constitutional conventions on which modern constitutionalism has been erected. Three of these conventions are particularly important. First, the convention that assumes the existence of a homogeneous constitutional WE³⁰³, which implies reducing and even suppressing recognition of cultural diversity. Second, the convention that considers modern constitutions the mark of modernity and progress³⁰⁴, which implies viewing old constitutions as hindering development. Third, the convention that calls for political uniformity and seeks to treat all citizens identically³⁰⁵, which implies that claims to differential treatment are unacceptable. By recommending the rejection of these conventions, Tully seeks to undermine the belief that there is a homogeneous WE, that we ought to cherish only the principle of identical treatment, and that ancient constitutions impede social progress.

Tully describes his position not just as an interpretive framework for what could be the appropriate interpretation of the constitution, but as providing the components for making constitutional dialogue “political”. According to Tully, one can understand constitutional dialogue politically insofar as one places emphasis on the procedures by which individuals dialogue with others and agree on the bases for social life³⁰⁶. Emphasis lies on the procedural aspects of the constitution and not its contents. The divide might be difficult to discern, yet it seems true that if dialogue is substantively premised on the conventions of

³⁰² Tully, *Strange Multiplicity* (n 235) 30.

³⁰³ *ibid* 63-64.

³⁰⁴ *ibid* 64-65.

³⁰⁵ *ibid* 65-66.

³⁰⁶ David Owen and James Tully, ‘Redistribution and Recognition: Two Approaches’, in Anthony Laden and David Owen (eds.), *Multiculturalism and Political Theory* (CUP 2007) 281.

mutual recognition, consent, and cultural continuity, and procedurally premised on the principles of constitutionalism³⁰⁷ and democracy³⁰⁸, cultural diversity might be better recognized. Both substantive and procedural premises underpin constitutional dialogue, and such a dialogue offers a sensible way by which to be more open to recognising cultural diversity. Indeed, the values that fuel dialogue would be mutual respect towards each other's cultural backgrounds and avoiding coercion by appealing for consent to the norms that should guide future interactions.

Tully's theory is clearly sensitive to the plurality of groups that coexist in a single state, especially those excluded by the convention of cultural homogeneity, so he is aware of processes of exclusion. Moreover, his emphasis on dialogue provides a thinner procedure by which to resolve political differences, when compared to Habermas. Tully provides one of the best frameworks for interpreting the constitution in order to recognise cultural diversity, but it is nonetheless problematic. The claim is that there is a fundamental problem in how he conceives of constitutional dialogue, for it obscures how the constitutional order seeks to include. The basic problem is that the language of the constitutional order underpinning dialogue is in fact the very problem indigenous peoples seek to address. It should be stressed that the present claim is not that there is an overburdening that results from expecting too much of the constitution³⁰⁹. It is pointed to a different problem altogether in relying on the constitution as a basis for dialogue³¹⁰; it is a process of inclusion.

The point can be substantiated by examining Tully's approval of Richard White's "The Middle Ground"³¹¹. Tully understands White's work as an example of a dialogue underpinned by the three conventions that he relies on³¹². Actually, more than an example,

³⁰⁷ Owen and Tully, 'Redistribution and Recognition' (n 306) 281.

³⁰⁸ The idea is to ensure that rules are self-imposed. See Owen and Tully, 'Redistribution and Recognition' (n 306) 282.

³⁰⁹ For this critique, see Emiliios Christodoulidis, 'Constitutional Irresolution, Law and the Framing of Civil Society' (2003) 9 *European Law Review* 408.

³¹⁰ A similar point is made by Hans Lindahl, 'Recognition as Domination: Constitutionalism, Reciprocity the Problem of Singularity' in Neil Walker et al (eds.) *Europe's Constitutional Mosaic* (Hart Publishing 2011) 210.

³¹¹ Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650 - 1815* (2th edition, CUP 2011).

³¹² Tully, *Strange Multiplicity* (n 235) 129.

it seems to constitute a central building block of his argument, by showing that dialogue can be accomplished. White's description of relations between the French and indigenous peoples around the Great Lakes in Canada shows that accomplishing accommodation of diversity took place in a not-that-distant past. After examining detailed historical records on the matter, White provides the key insight of his research: that the encounter between the French and indigenous peoples in Canada created a "middle ground", a space that was the product of each side's attempt to understand the other. As a consequence of repeated interaction, there emerged a new set of conventions³¹³, which neither side could set aside and subject by force the other to their own understandings. Both had to reason and take from the other what was necessary to succeed within their own aims³¹⁴. Now, the idea of a middle ground out of which common and hybrid practices emerge does not straightforwardly support what Tully believes, although it seems compatible with two WE engaging in interactions under the conventions he recommends. Yet, this under-determination is precisely the problem, for the middle ground is also compatible with other forms of social interaction. More pointedly, the middle ground can be a relation of domination.

It is worth asking why the middle ground can be a relation of domination. It seems that, first of all, White is right to claim that, in some cases, indigenous peoples actively shaped the social space they shared with Europeans in North America. Certainly, there might have been instances of coordination and cooperation between indigenous peoples and Europeans, and even well-intended efforts to understand each other³¹⁵. History demonstrates, however, that these interactions were episodic. To be sure, what White describes was a strategic kind of interaction where Europeans and indigenous peoples understood each other in terms of need and thus were impelled from necessity to interact in meaningful ways. Out of this interaction and their "creative misunderstandings"³¹⁶, something new emerged. However, one can accept the hybridity of practices and at the same time deny that what emerges is a social practice where both parties agree on the

³¹³ White, *Middle ground* (n 311) 52.

³¹⁴ *ibid* 52.

³¹⁵ There are even cases in which it was Europeans who had to adapt to indigenous peoples rules, see Kathleen Duval, *The Native Ground: Indians and Colonists in the Heart of the Continent* (Pennsylvania University Press 2006).

³¹⁶ White, *Middle ground* (n 311) xxiii.

terms of cooperation³¹⁷. Perhaps the problem is that White uses the word “accommodation” as a historian interested in showing the hybridity of social practices, whilst Tully uses it as a political theorist to provide an evaluative framework for social and political interaction. Whereas for White, the middle ground might admit asymmetric relations between indigenous peoples and imperial powers, that is, that there is no less middle ground just because one party dictates the organisation of the relation, Tully would understand the middle ground as an instance of constitutional accommodation.

One of the fundamental problems surrounding this usage of the term “middle ground”, as Philip Deloria noted in White’s work, is that it presupposes a relation in which indigenous peoples and Europeans were more or less the same in terms of negotiating power³¹⁸. Becoming part of the fur trade system, for instance, could be said to have been in the interest of both Europeans and indigenous peoples. This may be true, but by participating, indigenous peoples became part of a larger SS of international trade, with its own logic and institutional demands; which as it was seen in the case of the EU, pull towards a particular kind of unity of socio-cultural practices. However, the middle ground is not only silent about the asymmetry of power between those who engage in dialogue. More importantly, it says nothing about who has the power to shape and establish the institutional structure that emerges over time, which determines in the long run how that relation takes place³¹⁹, and who dictates its terms. It may be seen then that the problem is that the middle ground not only neglects existing asymmetries in power, but more importantly, the institutional structuring that underpins the interaction between the WE. White is interested in a historical case in which there was no common institutional framework, but this is not the present situation of indigenous peoples. What indigenous peoples currently face is a constitutional order, already organized and possessing a non-deferrable constitutional identity.

³¹⁷ Shaping practices together need not mean that those practices are just, for there is evidence that, in some places, indigenous women did indeed shape Europeans’ practices, yet they did so as slaves. See Kathleen DuVal, ‘Indian Intermarriage and Métissage in Colonial Louisiana’ (2008) 65 *The William and Mary Quarterly* 267.

³¹⁸ Philip Deloria, ‘What Is the Middle Ground, Anyway?’ (2006) 63 *The William and Mary Quarterly* 16. For an historical background of this asymmetry, see Stannard, *American Holocaust* (n 301).

³¹⁹ See Hans Lindahl, ‘Democracy, Political Reflexivity and Bounded Dialogues: Reconsidering the Monism-Pluralism Debate’ in Emiliios Christodoulidis and Stephen Tierney (eds.), *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate 2008) 113.

Indeed, it is the “common” institutional dimension which lies beyond the middle ground, and which was not present at the beginning of European and indigenous peoples socio-cultural interactions. Common social practices began with the expansion of the fur market, in which both indigenous peoples and European were engaged. Yet, through such interactions, indigenous peoples became part of the SS of European capitalism, and even though dependence on market relations with Europeans did not arise immediately, they did create dependence in the long run. It was already suggested the expansive nature of the market in terms of social practices. Just as in the case of the EU, dependence was not primarily an economic phenomenon, but rather a political one, for that dependence occurred within a process in which settlers consolidated as a WE. Once consolidated, it viewed the other as merely a part of itself, and thus established an institutional relation accordingly. Indeed, after the period of treaties both in Canada and the USA, indigenous peoples came to be ruled by the institutional structures of the British Empire and the new American revolutionaries respectively through the treaty system³²⁰³²¹. This institutional relationship, which is still present today, established indigenous peoples as incorporated peoples, as a part of the constitutional order. It included them, and by force.

So, the key aspect neglected by Tully, that is, that indigenous peoples have already been included in a constitutional order and have to find their way through, entails the language of the constitution. Constitutional dialogue, as Tully sees it, uses the constitution in a way that can maximize its potential to resonate with the demands of minorities, yet with this move it neglects not only relations of power. Fundamentally, he neglects the institutional framework of politically-organized power; in a word, the settler’s constitutional order. Indigenous peoples might have shaped certain practices when they interacted with Europeans, but it was the Europeans who included and excluded them from shaping the new constitutional order. As a consequence, indigenous peoples were deprived of their lands, collective self-determination, and culture. From this point of view, treaty-making marked the institutionalization of their inclusion and exclusion. Of this, Tully is, of course,

³²⁰ This was the reality in Canada; Dickason and McNab, *Canada’s First Nations* (n 148) 242.

³²¹ It should be noted that this does not mean treaties were in all places inert. In fact, there is a point to be made about the importance of treaties from the perspective of indigenous peoples, who believed colonial powers would keep their word. In many cases, they did not. See Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* (OUP 2013).

aware³²², but he gives no clue regarding how to come to terms with this. Tully is then unable to retain a critical edge against that which he obviously aims to criticise: the constitutional order as a mechanism for the assimilation of indigenous peoples, because it seeks to include them.

Tully's reliance on constitutional dialogue ends up missing the fundamental point of indigenous peoples struggle: its political character. To a certain extent, the approach of interpretive conventions depoliticises their political struggle. Indeed, the convention of consent is precisely what is at issue for indigenous peoples, but this cannot be dissolved into a convention that gives meaning to constitutional dialogue. Self-determination cannot be achieved through constitutional dialogue; it represents, on the contrary, the interruption of such dialogue. Engaging in constitutional dialogue is a second best judicial engagement, in the absence of a political response. It does not suffice to adopt new conventions to interpret the constitution, when what is called for is a new constitutional order that makes space for two WE. Breaking traditions by formulating new conventions for understanding constitutionalism³²³ drawn from that tradition itself neglects that if indigenous peoples dialogue constitutionally, this owes to an imposed cultural common background which cannot be avoided³²⁴. Whilst indigenous peoples may have shaped the form of the dialogue, this falls short of seeing them as the subjects of that language, when equally they could be seen as subjected to it.

3.3.2 Distinguishing Collective Self-Determined Agents From Cultural Distinctiveness

It has been attained a theory of constitutional identity that accounts for the processes of constitutional exclusion, which impede indigenous peoples from shaping the legal/illegal, and inclusion, which implicitly considers them assimilated as participants. It appears that

³²² Tully is clearly aware of this problem, for he describes the authoritative traditions that gave shape to the idea of constitutionalism as having a European character informed by the self-understanding of white, middle-class males. Tully, *Strange Multiplicity* (n 235) 45. On this, see Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences' (1992) 6 *Canadian Human Rights Yearbook* 3-45.

³²³ Tully, *Strange Multiplicity* (n 235) 57.

³²⁴ On the strategic use of legal and constitutional vocabulary by indigenous peoples, see Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (OUP 2009) 5. For a case in point, see Rhiannon Morgan, 'Advancing Indigenous Rights at the United Nations: Strategic Framing and its Impact on the Normative Development of International Law' (2005) 13 *Social and Legal Studies* 481.

insofar as the constitutional order assimilates by creating the appearance of participants, resistance to it does not seem unreasonable. This has implications for criminal law, for given it is part of the identity of the constitutional order, acceptance of the latter entails acceptance of the former. In other words, it involves accepting the constitutional order as subject and subjected, and this is precisely what indigenous peoples contest: being subjected to a constitutional order of which they are not its subjects. Now, having acknowledged the specificity of the position of indigenous peoples, grounded in their particular claims to collective self-determination, the question is how the constitutional order should respond to them. Here enters Lindahl's second component of the constitution: constitutional restraint³²⁵.

Constitutional restraint centres on a key concept introduced by Lindahl, the concept of a-legality. This deserves considerate attention. According to Lindahl, a-legal behaviour is not simply illegal behaviour. Although a-legality may manifest itself in the form of the illegal, it is not just mere illegality. Recall the notion of boundaries and limits. Boundaries and limits establish expectations and separate what is legal from what is illegal. Yet a-legality challenges how those boundaries are drawn: a-legality represents a fault-line. In contrast to limits, which in some way reaffirm boundaries, a-legality or fault-lines challenge those boundaries themselves³²⁶. According to Lindahl, there are two main ways in which the constitutional order can respond to the a-legal: either by resetting the boundaries of the constitution by rendering legal what is deemed illegal, or desisting from drawing boundaries at all³²⁷. This is the distinction between weak a-legality and strong a-legality, and when it is strong, it calls for allowing that which cannot be orderable³²⁸. That is, strong a-legality demands the restraint of boundaries, and thus, of the constitutional order itself.

This is what Lindahl means by constitutional restraint: collective self-restraint in drawing the boundaries that confer identity. It should be noted that this is not a complete renunciation of collective identity. Certainly, Lindahl does not reject completely the kind of reciprocity defended by Habermas and Rawls, but seeks to enhance their frameworks by including the possibility of constitutional restraint, thereby acknowledging what has been

³²⁵ Lindahl, *Fault Lines* (n 250) 99.

³²⁶ *ibid* 32.

³²⁷ *ibid* 174-175.

³²⁸ *ibid* 255.

unjustly included and excluded from the constitutional order. Constitutional restraint acknowledges that which resists being part of the WE. Thus, it acknowledges there is an irreducible plurality that cannot be overcome through constitutional dialogue³²⁹. Constitutional restraint then diversifies the ways in which the constitutional order can respond. Otherwise, there would be no choice but to impose the logic of reciprocity, meaning that indigenous peoples would be forced to play by the rules imposed on them as the mechanism to struggle for what they seek, and be satisfied with what they may obtain from courts responsive to a WE which is not theirs.

According to Lindahl, if a-legality limits the circle of reciprocity, then all that can be expected in a case of strong a-legality is limited reciprocity³³⁰. Constitutional restraint accomplishes limited reciprocity by suspending itself, for this limits the reciprocity the constitutional order is premised on. In turn, suspending the constitutional order allows negotiating an exit from that order³³¹. Let us illustrate with two examples the difference between weak and strong a-legality. A case of weak a-legality would be that of immigrants who seek recognition from the state through illegal means. Immigrants may very well intend to revise the unequal distribution of opportunities by seeking, for example, special rights and differentiated treatment, in which case they would not challenge how boundaries are drawn. However, were they to do so illegally³³², they might seek to reset the boundaries in order to have the same opportunities enjoyed by everybody else. In other words, weak a-legality seeks equal recognition within the boundaries of the existing WE in order to reset them. That is, they aim at extending the actualization of the values embedded in the social practices of the WE they seek to join, which is already committed to an equal distribution of opportunities. It follows that this can be accomplished by resetting boundaries, and thus extending the legal over the illegal.

In contrast, a case of strong a-legality, according to Lindahl, occurred when the U'wa indigenous group, occupied the construction sites of an international corporation³³³ in

³²⁹ Lindahl, 'Democracy' (n 319) 110-111.

³³⁰ *ibid* 113.

³³¹ Lindahl, 'Recognition' (n 310) 228.

³³² On the case of illegal immigrants, see Hans Lindahl, 'Border Crossings by Immigrants: Legality, Illegality, and Alegality' (2008) 14 *Res Publica* 117.

³³³ Lindahl, *Fault Lines* (n 250) 64.

Colombia. The U'wa sought access to their lands, while rejecting the notion that what they wanted was self-determination. For the U'wa, that would mean claiming an internal space within the sphere of international law, a space they consider illegitimate "A right to 'internal' self-determination is literally internal to international law. In this strong sense, the U'wa enter the construction sites of Ecopetrol from a place that is outside of international law..."³³⁴. Facing strong a-legality, the appropriate response of the legal system cannot be to draw other boundaries, for this would mean appealing to the relationships of reciprocity the system provides. The appropriate way of responding would have been the suspension of criminal law³³⁵, for this would have opened up a space outside the logic of reciprocity to what cannot be orderable within it.

Lindahl has provided an interesting alternative by which the constitutional order can respond to the demands of indigenous peoples in their engagements with criminal law. However, two further specifications need to be made in order to capture the particularity of the claims of indigenous peoples in this domain. That is, given that it is being considered the implications of Lindahl's approach within criminal law, it is argued that they do not apply as broadly as it seems. The first specification concerns discriminating between collectives and individuals, and the second discriminating between collectives. The first is necessary to single out collectives, thus ensuring analytical objectivity, and the second because not every collective is just by virtue of being a collective entitled to constitutional restraint. Concerning the first specification, Lindahl's theory is problematic. Because the distinction between weak and strong a-legality is couched in terms of that which can or cannot be made compatible with the WE's own practical possibilities, it does not single out the type of subject that appears to the WE as a-legal. That is, it does not discriminate between that subject being an individual or a collective. Equally, this might be a virtue of Lindahl's theory in the sense that by leaving the type of subject open, it is more responsive to a diversity of claims. However, for the present approach, the incapacity to single out a-legal collectives would pose a serious problem, since it is being considered how two WE interact in the domain of criminal law.

³³⁴ *ibid* 64.

³³⁵ *ibid* 258.

Thus it becomes necessary to formulate in a slightly different way the distinction between the two forms of a-legality. In contrast with Lindahl, it is argued that a key difference among these cases lies in the nature of their agency; that is, whether they comprise a collective or not. Not every a-legal seeks to challenge the unitary WE. Certainly, as has been seen, immigrants, on the contrary, seek to join the WE. However, if they join, they do so on the WE's terms. That is, if they seek integration, they will be integrated not as a collective, but as individuals. They would become part of the WE they join, and they may come to claim from within this is 'WE'. Otherwise, they would challenge the unity of social practices, which is neither what they seek nor what the WE would allow. Thus, immigrants' claims for increased funding for language learning or housing do not amount to claims of collective agents that dispute the exclusive political power of the WE. This remains true even if they seek this through the illegal. When they appear as illegal, these are instances of weak a-legality, and they do not warrant constitutional restraint.

In contrast with these cases are those claims made by collectives. Collectives are entitled to reproduce/transform their socio-cultural practices and exhibit a collective nature in their political organisation. They may not seek to be integrated or if they do, they might seek integration while preserving their collective organisation. These are cases of strong a-legality. Overlooking the different nature of the agency of those who appear to the WE as a-legal leads to a constitutional restraint response only towards aggregations of individuals, and as a consequence, it may justify constitutional restraint for the sake of respecting singularity qua singularity. Yet this would again make invisible that the justification of constitutional restraint is due to the collective nature of the agency of those who appear to the WE as a-legal. Accordingly, no consideration would be given to the collective and political claims of indigenous peoples as indigenous peoples. Moreover, it would also make invisible the legitimate entitlement of the WE to claim the socio-cultural reproduction/transformation of their identity, for it does not seem appropriate to suspend its identity just in case an aggregation of individuals claim to be diverse. Discriminating among these cases is fundamentally important for the present approach, for what it seeks to vindicate is not the a-legal as a-legal, but the claims of indigenous peoples who appear as a-legal to the WE.

The second specification is equally important. Lindahl seems to suggest that every instance of strong a-legality entails the interaction of two collectives. Even if it is not questioned

whether the type of subject that appears to the WE as a-legal is collective, it should be questioned why, if it is, it should be entitled to the reproduction/transformation of its socio-cultural practices. To attribute a collective nature to what appears as a-legal in its strong variant, raises the question of how we distinguish, as we should, between the far-right Norwegian terrorist collective led by Anders Behring Breivik³³⁶ and indigenous peoples. In both cases, there are collectives that claim to be diverse, yet this does not justify constitutional restraint for Breivik. Certainly, whilst Breivik appears illegitimate for the WE, indigenous peoples should not. Here it becomes necessary to provide a normative justification for the claim that not every form of collective a-legality ought to be accommodated by constitutional restraint.

For the modified morphogenetic approach, the a-legal behaviour of Breivik does not challenge the WE, but only reaffirms its unity. Why then do indigenous peoples challenge the WE? The claim here is that there is a normative foundation the WE recognises as justifying itself as an independent constitutional order, and this is the principle of collective self-determination. Self-determination relates the claims of indigenous peoples to how the WE describes itself: a self-description of a WE as being self-determined. Granted, there are different degrees of self-determination. However, it is one thing to recognise different degrees of collective self-determination and another completely to ascribe this to what is possibly a collective which is as yet not self-determined. It appears from this perspective that in assessing whether the other is a self-determined collective, the WE applies its own understandings on the matter. As it has been seen, there is no other way, for the WE cannot locate itself outside of the social practices which give meaning to its self-description as self-determined. It seems quite clear that indigenous peoples meet these self-understandings, whilst immigrants and Breivik do not. For the WE, that may exercise self-determination to any degree, it would be illegitimate to consider itself as non-independent, as part of another WE that dictates the four dimensions of the legal form. Indigenous peoples would agree. It turns out then that by appealing to the same social practices by which the WE describes itself as a self-determined collective, the WE can attempt to resolve this conflict not by an empty promise, but by suspending its collective identity. That is, by exercising constitutional restraint.

³³⁶ Lindahl suggests a Jihadist is also an inhabitant of the a-legal, analogously to Breivik, *ibid* 69.

This is the aim of constitutional restraint: the suspension of criminal law as it applies to strong a-legality. On the one hand, it suspends the inclusionary, assimilatory power of the reproduction/transformation of socio-cultural life, driven by the institutional facts of the WE of which indigenous peoples form part. On the other hand, it also secures a space for the larger WE for the reproduction/transformation of their socio-cultural life through their institutional facts. This would allow indigenous peoples to enjoy what they once had: collective self-determination to enable their own socio-cultural practices³³⁷. It should be noted, however, that whilst suspending the constitution is not a definitive solution, nonetheless it may offer the ideal context for negotiating between both WE. The next two chapters aim to explore how the WE handles the encounter between these two forms of a-legality in criminal law. Chapter 4 examines weak a-legality, whereas Chapter 5 explores what conditions the WE would have to meet in order to do justice to strong a-legality.

³³⁷ Holder Cindy, 'Democratic Authority From the Outside Looking in: States, Common Worlds and Wrongful Connections' (2011) 5 *Journal of Ethics and Social Philosophy* 7.

CHAPTER 4

CRIMINAL LAW AND CULTURAL DEFENCE

The overall purpose of this chapter is to explore more closely how criminal law and its critical function, as part of the identity of the constitutional order, engage with weak a-legality. This chapter is divided into two sections. Section 1 explores three interrelated themes; the relationship between criminal law and the constitutional order; how criminal law can be seen as addressing meaning; the key values that structure the critical function and that allow observing how it engages with weak a-legality. Section 2 explores the accommodation of weak a-legality within criminal law through cultural defences, seeking to identify the limits of the pluralism that can be recognised in criminal law.

4.1. Criminal law and the Constitution

4.1.1 The Relationship Between the Constitution and Criminal Law

Chapter 3 claimed that criminal law was part of the identity of the constitutional order, yet did not examine the implications of this view for the relationship between criminal law and the constitutional order. It now behoves us to enquire into this relationship. Some have argued³³⁸ that this relationship is just constraining, that is, that the constitution just places limitations on criminal law. More specifically, the claim is that the constitution sets forth principles that constrain the legitimate content of criminal law. Accordingly, any inconsistency with the constitution entails the illegitimacy of criminal law. While this view has something important to say about the relationship between the constitution and criminal law, but it would be a mistake to believe that this is all there is to say about it. That is, this view becomes problematic once it grants that all there is to say is that the constitution limits punishment. If this view is not supplemented, there is risk of assuming a *deductive* understanding of the relationship between criminal law and constitutional law, according to which criminal law just is a specification of constitutional law. The deductive

³³⁸ See Marcus Dubber and Tatjana Hornle, *Criminal Law: A Comparative Approach* (OUP 2014), see references at 108; also Benjamin Berger, 'Constitutional Principles' in Marcus Dubber and Tatjana Hornle (eds.), *Oxford Handbook of Criminal Law* (OUP 2014) 424.

understanding assumes the constitutional WE is maximally coherent³³⁹: the WE cannot have an unconstitutional criminal law. As a consequence, there is an assumed consistency between criminal law and the constitution and the limits of criminalisation are understood statically. If criminal law is consistent with the constitution, then it follows that it is legitimate; if not, then it should be made to fit constitutional requirements. There is nothing else to be said.

This is an impoverished understanding of criminal law and the constitution that certainly does not represent the relationship in its complexity. This is not only because it assumes that punishment exhausts criminal law. More importantly, seeking justifications for the limits of criminal law in constitutional language leaves criminal law with a derivative task. An attentive reader would note that the main reason this follows is because the deductive view lumps together constitutional law with the constitutional order. However, the relationship is between the *constitutional order* and criminal law, thus the latter need not follow *logically* from the former. Dependence exists between criminal law and constitutional law, but also between criminal law and the constitutional order. It is undeniable that there might be even logical relations between both, but that relationship cannot be reduced to logical relations alone. Indeed, for the same reasons it is a mistake to understand the constitutional order only as constraining, it is also a mistake to understand criminal law as merely limited by the constitution. Criminal law is *institutional*, which makes it irreducible to constitutional law. This is no surprise for if both are institutional, then the relationship between them is also. Criminal law and the constitutional order have been, historically, mutually dependent, and this involves accepting that criminal law might develop that order in ways that resist exhaustion in terms of constitutional law. Criminal law has certain independence from constitutional law, yet it also remains dependent on it. Let us explore more closely this institutional relation.

An institutional relationship between the constitutional order and criminal law means rejecting exhaustion in terms of a hierarchical relation, thus while accepting there might be hierarchical relations it rejects, it amounts to a complete description of the relationship. More specifically, such a relation means recognising that historically, criminal law might

³³⁹ The idea of coherence is grounded in a one-sided image of enlightenment values that obscures how other values are also part of criminal law, see Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' (2001) 64 *Modern Law Review* 358-360.

have followed a different trajectory, and thus, that it may be relatively autonomous from constitutional law in the way that it develops its own social practices and, therefore, its own meanings of what are its limits. How is this even possible? A positive answer to this question can be illustrated with an example from the UK. The fact that there is no codified constitution illustrates better the connection between criminal law and the constitutional order. Take the uncontroversial view that the limits of criminal law can be understood with reference to individual rights³⁴⁰. That is, that respecting individual rights has an important bearing on the legitimacy of criminal law and, therefore, in identifying some of its limits. From this point of view, it seems that the Human Rights Act provided criminal law with a new institutional ground for fixing its limits. However, it would be mistaken to believe that these rights became limits only from 1998, for this would imply that before the reception of the Act, no such rights would have been legally and judicially recognised.

If the rights established by the Human Rights Act are those whose content is derivable in part from the ECHR, then the process by which they came to limit criminal law is as old as the UK's subjection to the authority of the ECHR³⁴¹. One should note, however, that again this would be clearly an understatement, for individual rights existed well before that in the UK. Certainly, if rights are part of the conditions that decide how subjects and the subjected frame their legal interactions, then rights have been part of the constitutional order of the UK since its inception³⁴². This is true even if they figured only minimally – for instance, when recognized for certain privileged social classes - for inclusion in the constitutional order has undergone expansion throughout constitutional history, from merely a few to an increased population. However, the recognition that right-based limits to criminal law predate the UK joining the ECHR does not deny that they did acquire a different character with the reception of the Act³⁴³. This is because a new institutional fact

³⁴⁰ See Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law' in Duff et al (ed.), *The Structures of Criminal Law* (OUP 2011) 101.

³⁴¹ For an overview of cases, see A.T.H. Smith, 'The Human Rights Act 1998: The Constitutional Context' in Jack Beatson and Tony Smith (eds.), *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999) 3, 4. In general, see Anthony Lester, 'Human Rights and the British Constitution' in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution* (OUP 2007) 70-101.

³⁴² Adam Tomkins, *Public Law* (OUP 2003) 6-7; see, for instance, the legal history of the recognition of the idea of liberty in British common law, in Adam Tomkins, *British Government and the Constitution: Texts and Materials* (CUP 2011) 744-748.

³⁴³ On some relevant criminal law cases from the reception of the Act, see Andrew Ashworth, 'A decade of human rights in criminal justice' (2014) 5 *Criminal Law Review* 325.

entered the UK. As a consequence, new “limits” were adopted, even if not fully worked out, or not as strongly as many thought they would be. The Act certainly shaped the constitutional understanding of criminal law in the UK.

What this example shows is that criminal law is able to formulate its own understandings of limits, and that it is an open question whether they may be derived implicitly from constitutional law. Criminal law depends on the constitutional order, yet it develops its own modalities and thus its limits may not necessarily follow from constitutional law. The example of the UK shows that rights can work as limits to criminal law, regardless of whether they are explicitly recognised in the constitution. That is, there can be limits to criminal law in terms of *constitutional rights* not explicitly recognised in constitutional law. Limiting principles may be considered part of the constitutional order, even if they have no explicit constitutional status. This view is not sceptical of the constitution providing limits; it does not suggest that making limits explicit in a catalogue of constitutional rights would play no role. On the contrary, they may limit criminalisation. Explicit constitutional provisions about rights can provide limits to legislation at the stage of deliberative political reasoning, and even more so if that is coupled with a strong form of judicial review. However, the present approach does suggest that criminal law may develop its own forms of limits, even if constitutional law is not explicit about it.

4.1.2 Criminal Law and Meaning in the Constitutional Order

The institutional relationship between criminal law and the constitutional order can be specified further by exploring it from the point of view of the ipse-identity and idem-identity of the constitutional order. Drawing on Chapter 2 and 3, it is possible to assert that the WE requires the critical function to be non-neutral. In other words, that as SS it should be meaning-responsive and axiological-responsive to the social structures and meanings of their participants. To this extent, the critical function assists in enabling participants’ conceptions of the good, which they may endorse and seek to realise by choosing options regarded worthy by the WE. In other words, the critical function contributes to enable the idem-identity of the constitutional order, for those conceptions have meaning within the social practices of the WE. There seems to be, then, a connection between the idem-identity and ipse-identity of the constitutional order, which can be better understood by examining criminal law’s contribution to meaning.

The framework this thesis has been employing emphasises meaning. It understands criminal law as engaging not with purely external displays of human behaviour, but with its meanings and the social practices from which they originate. At this point, it is necessary to broaden Lindahl's understanding of both ipse-identity and idem-identity to refer not just to legal expectations, but also to meanings and social practices more generally, while retaining the distinction. It appears that by directing attention to idem-identity and ipse-identity, it can be better developed the idea that defences contribute to values are shared by a 'we'. At the same time, it is possible to attain a deeper grasp of the role of criminal law for the broader social practices on which it depends, and why this contribution appears to be necessary.

From the point of view of idem-identity, by reproducing/transforming socio-cultural practices, criminal law enables, meaning and social structures to remain available for subsequent cycles. Specifically, in the way participants understand themselves in terms of the values they seek and the interactions they engage in. Thus, the 'we' that Chapter I referred to can be better understood as the idem-identity of the WE: the meanings that comprise its collective character. However, the 'we' can also be understood as the ipse-identity of the WE: the collective agent in the form of a constitutional order that deliberates and decides over its idem-identity. The suggestion is that, in principle, because organising collective life is political, transforming meaning is also political, and thus it should be the result of the political deliberations of ipse-identity. However, from this point of view, crime prevents that transformation is effected through ipse-identity. In other words, when individuals engage in crime, they propose a transformation in social practices that arrogates what they are not entitled to, namely, the political transformation of meaning. Crime arrogates the position of the WE. Therefore, by institutionalising alternatives and consequences, criminal law addresses *individual arrogations of the entitlement* to transform idem-identity.

Criminal law contributes to the political transformation of idem-identity through the WE's ipse-identity, that is, as an activity that "we" do together. Criminal behaviour thus represents an *arrogation* of what lies in the WE's legitimate sphere of action. More specifically, criminal behaviour involves an individual arrogating the normative power to legislate his own case, and therefore the form of the social practices that guide present and future social interactions. Thus, the place the offender arrogates is not only the role of the

legislator. Given that criminal law is part of the identity of the constitutional order, in legislating criminal law the offender occupies its place. Here, it appears that there is an *individual* occupying a space, which it seems is the very type of *agency* that appears to the state in the form of illegality and weak a-legality. From this point of view, illegality and weak a-legality, in the form of individual criminal behaviour, appear as an illegitimate arrogation and thus applying criminal law works also as a legitimate way of transforming meaning. It bears emphasis that criminal law is in a sense self-referential or autonomous, for it does not aim generally to ensure that meaning is transformed in any other case. As it has been seen in Chapter 1, criminal law only assures that meaning is not transformed by what is defined as *criminal* behaviour.

On this framework it could be asked why the contribution of criminal law is necessary, for given its power and resources it seems obvious that after crime, the state remains powerful enough to continue to dictate how individuals should interact in their social practices. There is some truth to this view: perhaps there could be another kind of criminal law, one less harsh and more humane, yet it is not possible to address these concerns here. The present concern is working out the implications of emphasising meaning for understanding criminal law. Vincent Chiao has challenged similar views of criminal law that place emphasis on meaning, demanding they show why criminal law is necessary to that end³⁴⁴. This challenge needs to be responded to. Emphasis on meaning is warranted insofar as it is considered the fragility of socio-cultural life³⁴⁵. Its fragility is not the fragility of the physical world, which in one sense appears completely stable and in another sense, in constant atomic decay and renewal. Its fragility is not the fragility of its participants, for even if individuals are naturally fragile, the social world they inhabit may be far more resilient. The fragility of the social, accordingly, is neither the objective fragility of the physical world nor the subjective fragility of human beings. It is a collective or intersubjective fragility, and it is at this level that it can be understood why ‘something’ like criminal law is necessary. The next chapter explains through examples how criminal law counters the fragility of the social, but before that, it is necessary to get a better grasp of what this fragility is.

³⁴⁴ Vincent Chiao, ‘A Response to Professor Kleinfeld’s Reconstructivism: the Place of Criminal Law in Ethical Life’ (2016) 129 *Harvard Law Review* 260.

³⁴⁵ The present account, in any case, differs substantially from the neo-Hegelian view of Kleinfeld, see ‘Reconstructivism: the Place of Criminal Law in Ethical Life’ (2016) 129 *Harvard Law Review* 1485-1565.

It is noteworthy that the collective fragility of the social is not just the fragility exposed in the likelihood of a future criminal behaviour, and thus the inability to prevent all its occurrences. True, a criminal behaviour represents a failure in how the WE assures members that social practices are reproduced. Yet even in the face of criminal behaviour, individuals expect criminal law to express how they ought to interact in their social practices in the not too distant future. This is not only because punishment or sanction becomes likely in cases of departures from the ‘ought’, but also because individuals expect no change in their social practices in the way crime puts forward. In other words, they do not expect criminal behaviour to impose *new social practices*, and thus change the *meanings* that they *have*. Social reality has meaning, which is what criminal law addresses, thereby revealing that it depends on the practical attitudes of its participants. If the practical attitudes of participants change, if they change their attitudes, motivations, intentions and beliefs, then they will become different participants, and the practice and its meanings will change accordingly³⁴⁶. Thus the critical function is a matter of meaning because it aims to counter the possible re-articulation of social practices implicit in criminal conduct³⁴⁷.

4.1.3 Choice, Character and Pluralism

It is now time to examine criminal law’s encounter with weak a-legality, which requires giving a more detailed account of the critical function. The focus is on those meanings that reveal the constitutional order as institutionalising particular social practices, for they disclose criminal law’s encounter with a-legality. From this point of view, the claim is not about making explicit the fundamental *values* internal to the practice of criminal law, but

³⁴⁶ Here I must acknowledge a fundamental philosophical influence on these thoughts, Robert Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard University Press 1994).

³⁴⁷ Thus, the differences between the present approach and the Chicago norm-focused approach become clear; for whilst the latter is also interested in meaning, it approaches it only as a way to improve ration-choice analysis. For a critique, see Bernard Harcourt, ‘After the ‘Social Meaning Turn’: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis’ (2000) 34 *Law & Society Review* 179; also Robert Weisberg, ‘Norms and Criminal Law, and the Norms of Criminal Law Scholarship’ (2003) 93 *Journal of Criminal Law and Criminology* 467. For a defence, see in general Richard McAdams and Eric Rasmusen, ‘Norms and the Law’ in Mitchell Polinsky and Steven Shavell (eds.), *Handbook of Law and Economics Vol. 2* (Elsevier 2007), for specific approaches, see Lawrence Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943; Lawrence Lessig, ‘Social Meaning and Social Norms’ (1996) 144 *University of Pennsylvania Law Review* 2181; Cass Sunstein, ‘Social Norms and Social Roles’ (1996) 96 *Columbia Law Review* 903; Dan Kahan, ‘Social Influence, Social Meaning, and Deterrence’ (1997) 83 *Virginia Law Review* 349.

those *meanings* that make explicit how the WE came about as a particular order. Surely, some of these values are also fundamental for understanding criminal law as a practice. It would appear it is no coincidence that I adopt the traditional view that modern criminal law has liberal foundations. Yet this is not approached in terms of an intellectual history, but by focusing on how historically, criminal law contributed to the social construction of persons as autonomous individuals. The aim is to achieve in the following a broad understanding of the meanings used in such social construction, in order to detail later how they play out in the case of cultural defence. The focus is on three meanings: individual autonomy, individual character and individual pluralism. Let us start with the first.

In considering the common features of the idea of autonomy in criminal law, it appears that autonomy has as its object the individual person. When autonomy matters in criminal law, it matters for individuals, not for collectives. In other words, as it was seen, individual autonomy for the practice of criminal law helps define its object as a subject; namely, as an individual agent. One of the key components of the standard description of an individual agent seems to be an individual who is rational or otherwise sensitive to reasons³⁴⁸. This is clearly manifest in current criminal law practices, where the legal ascription of blame involves assessing individual choice³⁴⁹. Thus, autonomy fixes its meaning because it takes as its object an individual *agent*, that is, an individual who makes choices³⁵⁰. Choices made by an agent sensitive to reasons are taken as the paradigm of those actions that an agent can be made responsible for. Following Nicola Lacey, this framework for assessing human behaviour can be named capacity-responsibility³⁵¹. Yet, as Lacey has stressed, its importance must be nuanced. True, intended individual actions have a place at the centre

³⁴⁸ This seems to be the standard approach for understanding the human person in criminal law theories. See Nagire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing 2009) 69-80; also with references, see Vincent Chiao, 'Action and Agency in the Criminal Law' (2009) 15 *Legal Theory* 1-23.

³⁴⁹ Berger, 'Constitutional principles' (n 338) 427.

³⁵⁰ This is, of course, a historical accomplishment of modernity. For an argument concerning the institutions of modernity as facilitating individualization, see Beck's essays in Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization: Institutionalized Individualism and its Social and Political Consequences* (Sage 2002); also Zygmunt Bauman, *Liquid Modernity* (Polity Press 2000) Chapter 1. In the same line of argumentation, see also Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press 1991). For how the law plays a role in this process of individualisation, concerning not only the biographical aspects, but also the framing of the idea of responsibility as an individualised matter, see Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge 2007) Chapter 2.

³⁵¹ Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) 9 *The Journal of Political Philosophy* 249-276.

of criminal law. Indeed, they may be able to explain and justify a considerable part of criminal law, most straightforwardly when it deals with agents' intended actions. However, it is one thing to claim this centrality and quite another entirely to assert that this is the only focus of criminal law.

As Lacey suggests, there are many cases in which it is difficult - if not impossible - to distinguish conceptually capacity-responsibility from character-responsibility; that is, the kind of responsibility that attaches not to intended actions, but to the individual's character³⁵². Certainly, the criminalisation of actions performed negligently and more generally of non-intended actions already shows criminal law's detachment from capacity-responsibility. Fitting non-intended actions within criminal law leads one to inquire into alternatives concerning what is doing the explanatory and justificatory work, and this is where individual character comes in. Offences of strict liability, presumptions and prisoners' post-release control measures seem hardly respectful or even interested in the intended mental states of the offender. The same may be said concerning excuses like provocation, necessity, coercion, diminished responsibility, and voluntary intoxication. What seems more important in these cases are those character traits that may lead the individual to behave irresponsibly, and thus to criminal behaviour. These cases put individual character traits at the forefront, as impediments to the responsible exercise of agency. It seems then that character needs to be recognised as an equally important part of criminal law³⁵³. No renunciations of agency are needed, for they remain important even when character is at the forefront. Certainly, character traits matter because they allow for the singling out of individuals who are not reliable in the exercise of their agency; they are irresponsible *agents*. Criminal law's resources in constructing the subject need to be expanded, for here it considers not a rational individual, but concrete individual

³⁵² For the many connections between character and responsibility, see Michael Moore and Heidi Hurd, 'Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence' (2011) 3 *Criminal Law and Philosophy* 147.

³⁵³ It even seems possible to reconstruct all criminals in this way, that is, as considering criminal prohibitions grounded in the failure of adequate motivation. See Richard Brandt, 'A Motivational Theory of Excuses in the Criminal Law', Roland Pennock and John Chapman (eds.), *Criminal Justice: Nomos XXVII* (New York University Press 1985) 165-198. It is worth noting that character matters also more generally, for proving that an individual has committed an offence, as well as during sentencing. For an examination of English law, see Mike Redmayne, *Character in the Criminal Trial* (OUP 2015).

dispositions, habits and motivations and how they impinge on the exercise of responsible agency³⁵⁴.

Finally, the last meaning is tied to the history of the secular constitutional order, an order that defines itself as tolerant and plural. The claim here might prove controversial, but it is supported by good reasons and historical evidence. The claim is that when moral pluralism becomes a respectable value, it follows on from the history of toleration, which took individuals and their choices as bearers of value. When the cultural defence appears later in time, it does so within a context of valuable moral pluralism, thus conditioned to individuals making valuable choices. This was seen in Chapter 2 as conditioning the provision of special rights. For the liberal order, autonomous choices are not valuable per se, but only when they aim at valuable options. Now, historically, in terms of the orientation of the meanings adopted by the nascent constitutional order, which were inspired by Enlightenment political thought³⁵⁵, there is an emphatic contrast with what moderns sought to leave behind. As Perez Zagorin recounts, what the old order left behind was thought of in terms of superstition, tradition and persecution³⁵⁶. In contrast, the new order was thought of as committed to reason, freedom and tolerance³⁵⁷. That moderns sought this contrast does not mean that they succeeded in creating a social order expunged of religious ideas³⁵⁸. On the contrary³⁵⁹, Enlightenment ideas developed from the

³⁵⁴ On the importance of character for the history of England's criminal law, see Martin Wiener, *Reconstructing the Criminal: Culture, law, and policy in England, 1830-1914* (CUP 1990) Chapter 2. For the revival of character in the UK, see Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interest, and Institutions* (OUP 2016) Chapter 3. For the revival of character theories in US criminal law theory, see Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (CUP 2014) 427-434.

³⁵⁵ To be sure, at least the part of it associated with that historical period, for as historians show, there were several *Enlightenments*, and thus, many different schools of political thought associated with that period; see James Schmidt, 'What Enlightenment Project?' (2000) 28 *Political Theory* 734; James Schmidt, 'Misunderstanding the Question: 'What is Enlightenment?': Venturi, Habermas, and Foucault' (2011) 37 *History of European Ideas* 43; James Schmidt, 'Enlightenment as Concept and Context' (2014) 75 *Journal of the History of Ideas* 677.

³⁵⁶ Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton University Press 2003) 290-292.

³⁵⁷ Pluralism and religious tolerance was thought of as consistent with and following on from the idea of the autonomous person. See Peter Gay, *Enlightenment: An Interpretation, Volume II: The Science of Freedom* (Alfred Knopf 1969) 399.

³⁵⁸ On the contrary, Enlightenment ideas developed from foundations laid down by religious scholars; see Quentin Skinner, *The Foundations of Modern Political Thought, Volume I and II* (CUP 1978); also Stephen Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150-1650* (CUP 1982).

foundations laid down by religious scholars, thus political and constitutional thought about freedom and agency was also deeply shaped by religious thought. Now, this contrast must be understood not only in terms of a change of meaning, but also in terms of a change in social practices that took place at that time. The fundamental change here consists in the separation of the church from the state, more precisely, the separation of *religion* from the *state*. Surely, historically religious tolerance facilitated the growth of religious pluralism, and thus created a suitable context for the growth of secular pluralism when religion receded and secularism took its place. In other words, it is possible to consider that the origins of modern secular pluralism were located in the social practice of religious toleration³⁶⁰.

Historically, practices of religious toleration³⁶¹ strengthened pre-existing religious pluralism, facilitating the emergence of modern political and value pluralism. It should be noted that tolerance did not precisely foster diversity, but rather paved the way for enabling a context favourable to its growth. Let us briefly review some historical evidence from England, which was at the forefront of these matters in Europe. By now, it should not be surprising to observe that criminal law was related to this process; changes in criminal law corresponded to changes in the form of the constitutional order and vice versa. Certainly, it is widely recognized that a key factor in the expansion of toleration practices was the enactment of the “Toleration Act” in 1689. The Act contributed to decriminalising religious pluralism³⁶², in the sense that it removed criminal law by exempting Protestant

³⁵⁹ Actually the relationship might be closer. For an argument that secularism was an outcome of Christian political thought, see Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion* (Princeton University Press 1997). Concerning secularisation, for an argument that this process was built and transformed from the rubber of Christianity, see Hans Blumenberg, *The Legitimacy of the Modern Age* (MIT Press 1985) and Michael Allen Gillespie, *Theological Origins of Modernity* (Chicago University Press 2008). For the distinction between secularism and secularisation, see Bryan Turner, *Religion and Modern Society: Citizenship, Secularisation and the State* (CUP 2011) Chapter 7. Also see below (n 376).

³⁶⁰ Zagorin, *How the Idea* (n 356) 7.

³⁶¹ One should note that religious practices of toleration were already present during the early European Middle Ages. That is, religious toleration drew on pre-existing social practices, see John Laursen and Gary Nederman (eds.), *Beyond the Persecuting Society: Religious Toleration Before the Enlightenment* (University of Pennsylvania Press 1998) Part I.

³⁶² Non-compliance was threatened with imprisonment. The Act de-criminalised ‘recusancy’, that is, not attending to religious service or failing to conduct the service according to the Anglican religious tradition. Previous to this Act, the Act of Uniformity (1559) sanctioned the infringement of those duties with fines and imprisonment. The Toleration Act, of course, neither decriminalised all related criminal law nor all religious or non-religious doctrines. Certainly, not all doctrines benefited from the Act; for example, Catholics and atheists were not exempted from fulfilling those rites. However, the Act marks a process of institutionalising

non-conformists from compliance with certain religious rituals of the Church of England³⁶³. Whilst the Act did not foster cultural diversity directly, more moderated institutional religious persecution had important implications for social practices³⁶⁴. This seems to confirm the methodological principle of social holism, for given that there is a two-way feedback relation between criminal law and broader social practices, either transformation or reproduction are to be expected. In this case, this led to unanticipated social and cultural transformation.

Fundamentally, decriminalisation contributed to transform fulfilling religious duties in an individual choice³⁶⁵, and thus aided, in the long run, the formation of a context for the toleration of practices based on individual choice. True, the Act did not thoroughly embrace either the ideal of tolerance or cultural diversity³⁶⁶. Nonetheless, the Act was in step with important changes in Europe, as well as in England: the Act itself contributed to separating state and religion by fragmenting and pluralising religious power³⁶⁷; the

the separation of religion from the state, which seemed even to change how English Catholics were later perceived. According to some historians, following the Glorious Revolution Catholicism was no longer persecuted, but treated with a form of ‘qualified intolerance’; see Geoff Baker, ‘Northern Catholics and the Manchester Jacobite Trials of 1694: a ‘Refined Piece of Villainy’? (2013) 50 *Northern History* 257-271.

³⁶³ It must be noted that the Act lacked an underlining purpose to establish civic equality between religions, see Justin Champion, ‘Toleration and Citizenship in Enlightenment England: John Toland and the Naturalization of the Jews, 1714-1753’ in Ole Peter Grell and Roy Porter (eds.), *Toleration in Enlightenment Europe* (CUP 2000) 133-156. Certainly, as it is well known this Act was more a matter of political conflict and strategy than an intended change to realize toleration, see Richard Ashcraft, ‘Latitudinarianism and Toleration: Historical Myth Versus Political History’ in Richard Kroll et al (eds.), *Philosophy, Science, and Religion in England, 1640-1700* (CUP 1992) 151-177.

³⁶⁴ The same might be possible to find in Scottish culture around the same years, especially after the failed Jacobite rebellion, which rendered important parts of Scottish culture forbidden. Interesting is to note that the British Empire considered highlanders “savages”, and treated rebellious Scots the same as the Spanish empire did with the indigenous population in America, and later the nascent South-American independent states, see Neil Davidson, *The Origins of Scottish Nationhood* (Pluto Press 2000) Chapter 8; Colin Calloway, *White People, Indians, and Highlanders: Tribal Peoples and Colonial Encounters in Scotland and America* (OUP 2008). For the Chilean case Jose Bengoa, *Historia del Pueblo Mapuche: Siglo 19 y 20* (Ediciones Sur 1996).

³⁶⁵ Benjamin Kaplan, *Divided By Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (Harvard University Press 2007) 348-349.

³⁶⁶ Notice that while in England before the Education Act (1944) the Catholic Church could not set up schools, in the millet system of the Ottoman empire no such impediment existed, see Nasar Meer and Tariq Modood, ‘Religious pluralism in the United States and Britain: Its implications for Muslims and nationhood’ (2015) 62 *Social Compass* 530, also John Coffey, *Persecution and Toleration in Protestant England 1558-1689* (Routledge 2013) 11-12. For a discussion of the millet system and its difficulties, see Will Kymlicka, ‘Two models of pluralism and tolerance’ (1992) 15 *Analyse & Kritik* 36.

³⁶⁷ For the argument that diversity empowered a conception of a civil state, see Kirstie McClure, ‘Difference, Diversity, and the Limits of Toleration’ (1990) 18 *Political Theory* 361-391; for the argument that religious

consolidation of the state-form³⁶⁸ that replaced pre-modern administrative institutions³⁶⁹; changes in demography, particularly in urban centres; and market expansion, to the detriment of the household economy³⁷⁰. This signals once again the importance of markets, now for the rise of tolerance. Indeed, not only is there historical evidence of this connection³⁷¹, but also experimental evidence that suggests the mutual reinforcement between increased tolerance and market expansion³⁷². That is, market expansion and trade facilitated and reinforced practices of toleration, which in turn facilitated and stabilised markets and trade.

Changes also appear in the meaning of legitimation, from kings claiming divine rights to elite assent, and later, to relatively popular assent. Following Charles Taylor, these changing social contexts and the rise of practices of toleration may be interpreted as a process in which religion loses its prominent institutional place within the state. As a consequence, the progressive retreat of religion from public life correlates with the further growth of different ways of life³⁷³, pluralism and diversity³⁷⁴. As tolerance increases and markets separate from religion, the state starts turning towards a more secular outlook. It follows that what is of interest here is less secularism as a political doctrine³⁷⁵, and more

toleration threatened the power of the Church because it pluralized acceptable religious belief, see David Nash, *Blasphemy in the Christian World: A History* (OUP 2007) 76-77.

³⁶⁸ Charles Tilly, *Big Structures, Large Processes, Huge Comparisons* (Sage 1984) 9-10.

³⁶⁹ Note that the industrial revolution is standardly dated as beginning in 1760, shortly after the rise of toleration practices, Gregory Clark, *A Farewell To Alms: A Brief Economic History of the World* (Princeton University Press 2007) 198.

³⁷⁰ See Alan MacFarlane, *The Origins of English Individualism* (CUP 1978).

³⁷¹ See Henry Kamen, *The Rise of Toleration* (World University Library 1967).

³⁷² Empirical research shows positive correlations between economic growth and increased toleration, see Niclas Berggren and Therese Nilsson, 'Tolerance in the United States: Does economic freedom transform racial, religious, political and sexual attitudes?' (2016) 45 *European Journal of Political Economy* 53. Furthermore, some have argued that such a correlation can hold only if markets are not neutral towards preferences. Yet, what seems to follow from the non-neutrality of the constitutional order is that markets cannot be neutral neither, see Iain Hampsher-Monk, 'The Market for Toleration: A Case Study in an Aspect of the Ambiguity of Positive Economics' (1991) 21 *British Journal of Political Science* 42. For the meaning of market neutrality, see A. T. O'Donnell, 'The neutrality of the market' in Robert Goodin and Andrew Reeve (eds.), *Liberal Neutrality* (Routledge 1989) 39-60.

³⁷³ Charles Taylor, *A Secular Age* (Harvard University Press 2007) 2-3.

³⁷⁴ This is the standard position of those who describe modernity as a process of social differentiation, among them Durkheim, Parsons, Taylor, Habermas and Luhmann.

³⁷⁵ Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press 2003) 1-3.

secularisation as a form of institutional change³⁷⁶, as a progression towards expanded markets and economic growth inspired by Enlightenment ideals³⁷⁷. It bears emphasis that the process from which tolerance and pluralism emerge is framed in terms of individuals making valuable choices, and this is important to bear in mind, for a key contribution to modern pluralism was the individualising effect of religious pluralism. Other social and cultural processes, of course, strengthened this process, as has been seen. However, the point remains that as religion loses its place, secular forms of pluralism expand, without changing this framing on individual choice.

In modern times, pluralism has a prominent role in the self-description of states, at least during the second half of the 20th century. Now, the scope of participants in the constitutional order has been greatly expanded, which suggests that those who could have a voice started to shape the political public sphere and, accordingly, managed to accomplish diverse forms of legal recognition. Pluralism has now become legalised as part of the modern institutional order. This commitment to pluralism brings the promise of enhanced freedom, the freedom to choose the kind of life the individual wants³⁷⁸. However, at the same time this freedom seems to be severely limited through criminal law because only some options are considered valuable. Examining cultural defences premised on the history of modern pluralism, it is possible to identify with sufficient clarity that what are defined as valuable options establish limits to what can be the object of such a defence. In what follows, cultural defences are examined mainly through cases from the common law world.

³⁷⁶ Thus, this specific conception of secularisation is immune to some of the current critiques of secularisation theory, which hinge on the decline in religious believers; Paul Heelas, 'Challenging Secularization Theory: the Growth of "New Age" Spiritualities of Life' (2006) 18 *The Hedgehog Review* 46. For an overview of secularization and its critics, see Jose Casanova, 'Rethinking Secularization: A Global Comparative Perspective' (2006) 18 *The Hedgehog Review* 7.

³⁷⁷ On this understanding of the Enlightenment, see Joel Mokyr, 'The European Enlightenment and the Origins of Modern Economic Growth' in Jeff Horn et al (eds.), *Reconceptualizing the Industrial Revolution* (MIT Press 2010) 65-86.

³⁷⁸ This kind of pluralism is, of course, compatible with the fact of increasingly standardised ways of life. See Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992) 132.

4.2. Criminal Law and Weak A-Legality

4.2.1 Cultural Defence

Most western modern states have become more or less committed to respecting diverse ways of life and thus can be described more or less as pluralist. In some cases, this has become not only the dominant self-understanding for majorities, but also for minorities as well. In multicultural societies, like Canada, UK and USA among others, states promise to accommodate the claims of minorities and recognise the value of cultural diversity, even when the opposite is happening within criminal law. The accommodation of minorities' claims to recognition seems to be accepted in broad terms, whilst rejected particularly when this may involve justifying harm to others' property, bodies or interests. This, however, is not strictly true, as it was seen: criminal law's responsiveness to diversity has been shaped by and has shaped the development of the history of secularisation and the pluralisation of acceptable ways of life, processes that framed acceptable worldviews in terms of individuals choosing valuable options. Chapters 1 and 2, identified some responsiveness in the WE's commitment to the principle of retribution and to respect for autonomous, valuable choices.

Within this framework, criminal law engages with weak a-legality, and it appears, preliminarily, that criminal law seeks to integrate weak a-legality. Criminal law entails integration in the sense that it makes weak a-legality part of an axiological-responsive and meaning-responsive practice of which citizens are already part. Structuring individual choice in terms of institutional alternatives and consequences involves treating the weak a-legal as individually accountable for what he has done³⁷⁹. Weak a-legality demands a redrawing of boundaries that criminal law cannot provide; the critical function seems inflexible. However, the claim to redrawing resonates with the history of secularisation embedded in some parts of the institutional framework of the constitutional order and its criminal law. Accordingly, the demands of weak a-legality can be translated as a demand for relaxing criminal law insofar as it claims for recognition of cultural diversity, a modern instance of the value of pluralism. This makes sense in that the response of the critical function tends to be reduced in practice, when it targets the weak a-legal. Reduction is not,

³⁷⁹ Christopher Kutz, 'Responsibility' in Jules Coleman et al (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 557.

however, immediate or automatic. There are three ways in which criminal law assesses weak a-legal behaviour in order to determine the possibility of reduction. To this extent, the approach introduces a note of scepticism regarding the potential of cultural defences. A number of scholars have claimed that CD is the main expression of pluralism and the recognition of cultural diversity in criminal law, and that it should be extended far beyond its actual reach. Such hopes will be contested. In particular, it is argued that expectations of accommodation through CD should be diminished, once it is examined the three ways in which the reduction of punishment is achieved.

First of all, a clarification of terminology is in order: what is a CD? A CD is a defence that an accused presents in a criminal trial and which aims to obtain a reduction of punishment. Dundes Renteln is without doubt the one who has most thoroughly investigated this topic, so her work is taken as representing the field. Renteln starts by defining culture as a system of meaning that allows people to adapt to their environment and to communicate with each other³⁸⁰. She criticises the post-modern conception of culture, according to which culture is nothing more than relations of power that marginalise women³⁸¹. Renteln holds, on the contrary, that empirical research shows that culture is not necessarily detrimental to women. More importantly, for Renteln, post-modernists understand culture as being too malleable and this leads them to overlook how culture influences human cognition³⁸². Culture influences cognition by acting as a motivational force that explains and propels human action³⁸³. Culture enters the human mind through processes of socialisation, which

³⁸⁰ Alison Dundes Renteln, *The Cultural Defense* (OUP 2004) 10.

³⁸¹ Renteln, *The Cultural Defense* (n 380) 11. See more on this conception in Chapter 1.

³⁸² *ibid* 11.

³⁸³ Renteln, *The Cultural Defense* (n 380) 14; Harvard Note, 'The Cultural Defense in the Criminal Law' (1986) 99 *Harvard Law Review* 1310; John Lyman, 'Cultural Defense, Viable Doctrine or Wishful Thinking' (1986) 9 *Criminal Justice Journal* 115; Malek-Mithra Sheybani, 'Cultural Defense: One Person's Culture is Another's Crime' (1987) 9 *Loyola of Los Angeles International and Comparative Law Review* 783; Anh Lam, 'Culture as a Defense, Preventing Judicial Bias against Asians and Pacific Islanders' (1993) 1 *UCLA Asian Pacific American Law Journal* 51; Diana Chiu Diana, 'Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism, Multiculturalism' (1994) 82 *California Law Review* 1100-1103; Sharon Tomao, 'The Cultural defense, traditional or formal?' (1998) 10 *Georgetown Immigration Law Journal* 252; Jeroean Van Broeck, 'Cultural Defense and Culturally Motivated Crimes (Cultural Offences)' (2001) 9 *European Journal of Crime, Criminal Law and Criminal Justice* 8; James Donovan and John Stuart Garth, 'Delimiting the cultural defense' (2007) 26 *Quinnipiac Law Review* 124; Gordon R Woodman, 'The Culture Defence in English Common Law: the Potential for Development' in Marie-Claire Foblets and Alison Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009) 18; Emmanuel Ceva, 'Toleration, Respect, and Cultural Defence' in Gideon Calder

Renteln calls *enculturation*. This is the process by which values and norms shape the individual's mind and behaviour, instilling predispositions to act³⁸⁴. These culturally-shaped predispositions explain individual's behaviour³⁸⁵. One should note that enculturation is not assimilation. *Assimilation* occurs when the "whole culture" is taken as guidance for action. Instead, enculturation is consistent with different cultural sources, thus allowing individuals to internalise the culture of the host country while preserving the culture into which the individual was previously socialised³⁸⁶. Thus, even if enculturated in culture A, the individual might maintain the customs³⁸⁷ of culture B.

Criminal law, argues Renteln, cannot ignore these culturally-shaped predispositions to act: taking them into account is a matter of justice. The concern is whether it is just to demand that an individual X change his behaviour to fit the content of the host country's culture³⁸⁸. Majorities do not face that demand³⁸⁹ and it would be unjust to require it only from minorities. What underlies the argument is that disregarding the particularity of cultural backgrounds would be a breach of equality³⁹⁰, leading to unjustified discrimination³⁹¹. Yet not only non-discrimination and equality serve as grounds for CD. There are at least two

and Magali Bessone and Federico Zuolo (eds.), *How Groups Matter: Challenges of Toleration in Pluralistic Societies* (Routledge 2014) 153-155.

³⁸⁴ Renteln, *The Cultural Defense* (n 380) 12.

³⁸⁵ *ibid* 14.

³⁸⁶ *ibid* 13. This is supported by studies which show that in USA, where Renteln bases her study, ethnicity and religion have become individual options. Options about ethnicity need not be an either/or situation, for individuals can adopt many different simultaneous identities; see Mary Waters, *Ethnic Options: Choosing Identities in America* (California University Press 1990).

³⁸⁷ Renteln, *The Cultural Defense* (n 380) 14.

³⁸⁸ *ibid* 17.

³⁸⁹ *ibid* 18.

³⁹⁰ Equality can be used both to argue in favour of CD, as realising equality, or against CD, as a breach of the principle of equality before the law. For rejecting CD on the grounds of equality, see Valerie Sacks, "Indefensible Defense" *Misuse of Culture in Criminal Law* (1996) 13 *Arizona Journal of International and Comparative Law* 542-545; Chiu, 'Cultural Defense' (n 383) 1121; Julia Sams, 'The Availability of the Cultural Defense as an Excuse for Criminal Behavior' 16 *Georgia Journal of International and Comparative Law* 350-351; Doriane Coleman, 'Individualizing Justice Through Multiculturalism: The Liberals' Dilemma' (1996) 96 *Columbia Law Review* 1152; for accepting CD on the ground of equality, see Harvard Note, 'The Cultural Defense' (n 383) 1300; Lam, 'Culture as a Defense' (n 383) 52; on defending CD based on equality, yet limited by an anti-subordination principle, see Leti Volpp, 'Mis-Identifying Culture: Asian Women and the cultural defense' (1994) 17 *Harvard Women's Law Journal* 97-98; James Sing, 'Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law' (1999) 108 *The Yale Law Journal* 1878; Donovan and Garth, 'Delimiting the cultural defense' (n 383) 123.

³⁹¹ Renteln, *The Cultural Defense* (n 380) 187.

other grounds: reduced culpability, for individual X did not know that doing A was unlawful³⁹², and the right to culture³⁹³. These grounds support CD's basic aim: to reduce punishment. Renteln's proposal of CD works as a partial excuse³⁹⁴, for while punishment is considered appropriate it should also be proportional to the individual's culpability³⁹⁵. Let us see how this applies by using a particular example.

The focus is the US case, *People v. Kimura* (1985), one of the classic examples of CD. The defendant, Fumiko Kimura, a Japanese American who lived in California for several years³⁹⁶, was charged with the murder of her two children. When Kimura found out that her husband had been unfaithful to her, she committed *oyako-shinju*, parent-child suicide, by drowning herself and her children in the sea. The children died while she survived. It was argued that Kimura's actions were based on a different worldview; some of the six psychiatrists who examined her testified in court that Kimura was temporarily insane, arguing that she failed to distinguish between her own life and the lives of her children. Initially, Kimura faced a death-sentence, however, she was sentenced to one year in jail, five years of probation and "psychiatric counselling"³⁹⁷. For commentators, this could only be explained by the cultural evidence the defence provided for the defence of insanity³⁹⁸, stressing the distinctive cultural background of the offender. Having a different cultural background seemed to the court sufficient to regard the offender as not sufficiently culpable to deserve full punishment.

³⁹² This is the argument of individualised justice and retributivism. See Harvard Note, 'The Cultural Defense' (n 383) 1299; Bhikhu Parekh, 'Cultural defense and the criminal law', in Will Kymlicka et al (eds.), *Criminal Law and Cultural Diversity* (OUP 2014) 111; Tomao, 'Cultural defense' (n 383) 251; Nancy Kim, 'Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants' (2006) 17 *University of Florida Journal of Law and Public Policy* 218; Chiu Elaine, 'Culture as Justification, not Excuse' (2006) 43 *American Criminal Law Review* 1369; Coleman, 'Individualizing Justice' (n 390) 1115; Fischer Michael, 'The Human Rights Implications of a Cultural Defense' (1998) 6 *Southern California Interdisciplinary Law Journal* 680; Mark Tunick, 'Can culture excuse crime?, evaluating the inability thesis' (2004) 6 *Punishment Society* 405; Claes Lernestedt, 'Criminal law and "culture"', in Will Kymlicka et al. (eds.), *Criminal Law and Cultural Diversity* (OUP 2014) 19-20.

³⁹³ Renteln, *The Cultural Defense* (n 380) 208.

³⁹⁴ *ibid* 187.

³⁹⁵ *ibid* 191.

³⁹⁶ For Renteln, this suggests that assimilation does not occur as quickly as many would think, *ibid* 25.

³⁹⁷ *ibid* 25.

³⁹⁸ See Paul Magnarella, 'Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial' (1991) 19 *The Journal of Ethnic Studies* 71-72.

The aim in the following is to identify in CD three ways in which criminal law assesses weak a-legal behaviour, in order to determine whether punishment can be reduced. First, by relating agency and social determinism, it is observed how freedom and culture are used to construct a notion of choice that wavers between portraying the individual as either rational and fully blameable or irrational and non-blameable. Second, by relating character and excuse, it is observed how criminal law reduces the WE's response when the agent is seen as a reasonable person. Third, by relating pluralism and the exclusion of groups it is observed first, that insufficient integration may lead to the reduction of punishment, and second, the limits of pluralism recognised by criminal law.

4.2.2 Agency and Social Determinism

In the CD literature, there are two incompatible perspectives on human agency that follow from two incompatible accounts of culture. These accounts of culture have been examined in Chapter 1, though here the focus is on their implications for understanding human agency. The first perspective, while considering that cultures are systems of meaning, emphasises their capacity for motivating and explaining human action³⁹⁹. This motivational force turns upon describing cultures as coherent, non-contested and homogeneous systems of meaning. William Torry develops one of the most sophisticated accounts of this kind, providing at the same time an empirical foundation for CD. Torry claims that because cultural backgrounds determine the conduct of individuals, they should not be held completely criminally responsible⁴⁰⁰. He explains this form of cultural determination through what he calls "cultural compulsion". Torry holds that there are cultural imperatives that command certain actions to take place. These cultural imperatives are driven by the causal force of cultural backgrounds, which have the effect of culturally compelling action. According to Torry, cases of cultural compulsion emerge from processes of social identification and group-belonging⁴⁰¹. Individuals belong to groups, identify with them, and as a consequence are compelled to act in certain ways. Kimura is

³⁹⁹ Broeck, 'Cultural Defense' (n 383) 8; Renteln, *The Cultural Defense* (n 380) 11-12; Kay Levine, 'Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies' (2003) 28 *Law and Social Inquiry* 43; Woodman, 'The Culture Defence' (n 383) 11.

⁴⁰⁰ There are other, more extreme versions of this claim: some consider that individuals are not free because their actions are genetically determined; see Nela Gordon, 'The Implications of memetics for the cultural defense' (2001) 50 *Duke Law Journal* 1824.

⁴⁰¹ William Torry 'Multicultural Jurisprudence and the Culture Defense' (1999) 31 *The Journal of Legal Pluralism and Unofficial Law* 153.

Japanese, identifies as Japanese, and is compelled to act as a Japanese. Torry claims that his theory remains true even if the command is not equally obligatory for all, or if members are not all equally susceptible to them⁴⁰². Criminal punishment, he argues, requires that individuals are free⁴⁰³, yet cultural compulsion proves otherwise and therefore renders those actions less deserving of punishment.

It bears emphasis that the theory of cultural compulsion cannot be true if cultures are taken to be incoherent, contested⁴⁰⁴ and heterogeneous, as post-modernist scholars portray them. Culture cannot be a causal force in the explanation of behaviour if it refers to a loose and inconsistent aggregation of social norms. First, it would not be possible to explain someone's actions if culture is incoherent, for this would make it impossible to identify which cultural norms are doing the causal work. Second, if culture is contested at every step of the process of identification, then this would problematise explanations of how socialisation processes enculturate. Third, if culture is heterogeneous, then there would be no particular reason to believe that Kimura was motivated to act the way she did. No doubt, if Japanese culture is incoherent, contested and heterogeneous, a cultural compulsion would be hardly ascertainable. For Torry, and anyone who holds that culture provides causal motivations, such as Renteln, culture is regarded as relatively coherent, non-contested and homogeneous.

Nonetheless, Torry's use of the qualifier 'relatively' seems questionable, for in developing a causal explanation of action, he slides towards a view that requires cultures be 'totally'-not relatively - coherent, non-contested and homogeneous. If one accepts that cultures may be described in such a way, one implication of Torry's view, which he himself tries to avoid, is that if there are causal mechanisms at play, then it is not that there is little room for freedom, but no freedom at all. In effect, if there are psychological laws that govern human actions, then social determinism would be true if mechanisms of social identification are true⁴⁰⁵, and thus members of minorities could not be made responsible⁴⁰⁶.

⁴⁰² Torry, 'Multicultural' (n 401) 147-149.

⁴⁰³ *ibid* 146.

⁴⁰⁴ *ibid* 152.

⁴⁰⁵ See William Torry, 'Culture and Individual Responsibility: Touchstones of the Culture Defense' (2000) 59 *Human Organization* 66. Now, if one removes the processes of subgroup belonging, then it is still true that individuals would be compelled to act. True, no longer because of the group, but because the individual belongs to a large set of social determinants, in which the mechanisms of social identification are included.

Accordingly, if members of minorities cannot be held responsible, then criminal law has no object. Thus, an objectifying attitude⁴⁰⁷ is appropriate, and if so, the appropriate legal response would be education, medical treatment or permanent confinement. Torry claims, however, that his view is not socially deterministic, for he claims culture determines human action only *probabilistically*. It is not clear whether this would make the response non-objectifying⁴⁰⁸. Nonetheless, if true, this would be grounded on an indeterminist view of agency that is, at least, equally as implausible as social determinism. The problem seems to be that whilst Torry aims to develop an empirical-based view of agency, the grounds he offers are fundamentally metaphysical. More importantly, metaphysical and empirical questions, while important, seem inadequate to address the practical question concerning the meaning of human social practices of ascribing responsibility and holding agents to account⁴⁰⁹.

Perhaps what is wrong with this view is Torry's conception of culture. Post-modernist thinkers on culture have appropriately contested this view, as it was seen in Chapter 1. According to the post-modern conception, culture is not a coherent, non-contested and homogeneous system of meaning⁴¹⁰. Cultures cannot be essentialised⁴¹¹, for this would

⁴⁰⁶ Some have argued that criminal law should be restricted to those sets of actions from which individuals can be deterred; see Gordon, 'Implications of memetics' (n 400) 1826.

⁴⁰⁷ Levy thinks immigrants who claim to be obeying other normative standards should be treated with an objectifying attitude. See Neil Levy, 'Cultural membership and moral responsibility' (2007) 86(2) *The Monist* 160.

⁴⁰⁸ It is clear though that this in no way diminishes understanding human actions as causally determined. It is just that, Moore has said, individuals are epistemically unable to single out the sufficient conditions that cause the action. To this extent, probabilistic determination is no less deterministic than its non-probabilistic cousins. See Michael S. Moore, 'Causation and Excuses', in Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (OUP Press 1997) 509-510.

⁴⁰⁹ The insufficiency of accounting for this practical, and thus, normative dimension gives rise to the "intelligibility problem", see Henrik Walter, *Neurophilosophy of Free Will: From Libertarian Illusions to a Concept of Natural Autonomy* (MIT Press 2001). It appears then that the debate that matters for the present purposes is again one in which social practices come to the fore, see P. F. Strawson, 'Freedom and Resentment' in P. F. Strawson, *Freedom and Resentment and Other Essays* (Routledge 2008) 1-28; in a similar line of thought, Jay Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press 1996), and Hilary Bok, *Freedom and Responsibility* (Princeton University Press 1998). On the Strawsonian theme concerning criminal law, Kutz, 'Responsibility' (n 379).

⁴¹⁰ John Comaroff and Jean Comaroff, *Ethnography and the Historical Imagination* (Westview Press 1992) 27; Waldron, 'Minority Cultures' (n 188) 754; Narayan, 'Essence of Culture' (n 73) 92; Sally Engle Merry, 'Changing rights, changing culture' in Jane Cowan et al (eds.), *Culture and Rights: Anthropological Perspectives* (CUP Press 2001) 45; Garland, 'Concepts of culture' (n 68) 438-439; Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (CUP Press 2007) 11; Brenda Carina Oude Breuil, 'Dealing with the Ethnic Other in Criminal Law Practice: a Case Study from the Netherlands' in Marie-Claire Foblets

involve accepting an unjust distribution of power that renders women vulnerable⁴¹². The post-modern conception can reject social determinism⁴¹³, because by taking cultures to be non-coherent, contested and heterogeneous systems of meaning, they remove the grounds for the causal argument to work. Additionally, they also reject the relativism that accompanies social determinism⁴¹⁴. Certainly, if individuals are to be considered irresponsible because of their cultural compulsions, this means that their subjective beliefs about right and wrong can be imposed upon the WE⁴¹⁵. Yet, if individuals are responsible for what they believe and choose accordingly, then they can be made responsible, and then relativism falls apart.

Now, understood as an account that supports a certain view of agency, the post-modern conception is also problematic in that it runs too close to Torrey's determinism. Certainly, in rejecting social determinism, the post-modern conception takes agents to be free *because* culture is non-coherent, contested and heterogeneous. That is, it is a non-coherent, contested and heterogeneous culture which holds a space for the exercise of individual agency⁴¹⁶. The post-modern conception of culture aims at preserving the idea that culture influences behaviour, while retaining room for responsible agency. On the one hand, they

and Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009) 293.

⁴¹¹ This is also the view of many with regards to the CD; see Chiu, 'Cultural Defense' (n 383) 1100-1103; Farah Sultana Brelvi, 'News of the Weird: Specious Normativity and the Problem of the Cultural Defense' (1997) 28 *Columbia Human Rights Law Review* 681-682; Sonia Lawrence, 'Cultural (In)Sensitivity: the dangers of simplistic approach to culture in the courtroom' (2001) 13 *CJWF/RFD* 117; Anne Phillips, 'When culture means gender: issues of cultural defence in the English courts' (2003) 66 *Modern Law Review* 515.

⁴¹² See Maneesha Deckha, 'The Paradox of the Cultural Defence: Gender and Cultural Othering in Canada', in Marie-Claire Foblets and Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009) 267; Nancy Wanderer and Catherine Connors, 'Culture and Crime: Kargar and the Existing Framework for a Cultural Defense' (1999) 47 *Buffalo Law Review* 870; Sacks, 'Indefensible Defense' (n 390) 534-537; Brelvi, 'News of' (n 411) 681-682; Lawrence, 'Cultural (In)Sensitivity' (n 411) 117; Phillips, 'When culture means gender' (n 411) 514.

⁴¹³ Leti Volpp, 'Talking culture: gender, race, nation, and politics of multiculturalism' (1996) 96 *Columbia Law Review* 1589; Garland, 'Concepts of culture' (n 68) 429, Renteln, *The Cultural Defense* (n 380) 12; Donovan and Garth, 'Delimiting the cultural defense' (n 383) 124.

⁴¹⁴ Coleman, 'Individualizing Justice' (n 390) 1123.

⁴¹⁵ Maryin Golding, 'Criminal law and the cultural defense' (2002) 15(2) *Ratio Juris* 157; Eliot Held and Reid Fontaine, 'On the Boundaries of Culture as an Affirmative Defense' (2009) 25 *Arizona Law Review* 246; Erik Claes and Jogchum Vrieling, 'Cultural Defence and Societal Dynamics', in Marie-Claire Foblets and Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009) 312-315.

⁴¹⁶ Merry Engle, 'Changing rights' (n 410) 45; Comaroff and Comaroff, *Ethnography and Historical Imagination* (n 410) 27-29.

need the idea of influence, for otherwise they would not be able to make sense of the need to change unjust relations of power embedded in traditional cultures. For if cultures do not influence behaviour, then there is no reason to change them. On the other hand, they need to retain a strong sense of agency to reject social determinism. If it were true that individuals are not responsible given their cultural upbringings, then neither changing relations of power without resort to coercion nor the exercise of responsible agency would be possible.

Post-modern conceptions of culture lead one to divide those who come from free cultures and those who do not. Had Kimura adopted the way of life of Californians, she would not have been able to afford a CD. Nor is it the case that any culture does the job. Kimura adopted a coherent, non-contested and homogeneous culture, as it seems was the case, and thus she was not regarded as a fully-responsible agent⁴¹⁷. The western world to which immigrants arrive is a culture described as non-coherent, contested and heterogeneous and *by virtue of being such*, the responsible exercise of agency becomes possible. This argument runs on the idea that western culture provides individuals with options⁴¹⁸, so that individuals can be made responsible for their choices. Post-modern culture is not only more appealing, but necessary for agency. Conversely, cultures that provide fewer options increase deterministic fears. Once immigrants adopt western culture, which is presumed to occur once considerable time has passed, they become free agents. In the meantime, individuals such as Kimura cannot be regarded as full agents; hence she should not have been convicted.

Both structuralist and post-modern theories of culture agree that when certain descriptions of culture obtain, individuals are completely socially and culturally-determined. It thus seems they are holding onto the same mistaken assumption, for both, structuralist and post-modernist, socio-cultural practices are external. They play a role only in ascertaining under what conditions an action could be free, regardless of the participant's understanding. For the determinist, culture is a context which causally motivates individuals to act because options are not available from the start, whereas for the post-modernist, culture is a context

⁴¹⁷ On seeing cultures as determining the actions of agents, see Coleman, 'Individualizing Justice' (n 390) 1115.

⁴¹⁸ Being aware of choices and alternatives "...opens up a space of freedom that militates against cultural determinism.", Parekh, 'Cultural defense' (n 392) 109.

that makes actions indeterminate, because there are no causal pathways linking individual actions to the social context. It appears that both theories regard socio-cultural practices as either facilitating or constraining. Neither side acknowledges them as *enabling*. The post-modernist ends up agreeing with Torry that if Kimura comes from a non-post-modern culture, she should be considered compelled. Thus, it seems that criminal law is not really as pluralistic as it is portrayed, for both approaches, by failing to consider culture as enabling, fail to describe CD as a practice internal to a WE.

There is a consequence both approaches must pay: they make the court's ruling a mystery. Certainly, both why Kimura was not sentenced to death and, conversely, why she was not absolved become unexplainable. For if she was blameworthy because she belonged to a culture that provided a reasonable range of options, then she should have been sentenced to death. If she did not, then she should not have been convicted. The judge is in no position to explain either alternative, regardless of whether he adopts the post-modernist or the structuralist approach, for neither of them can clarify the reasons that support the middle position, of reduced punishment. Granted, there was an interest in punishing Kimura based on the need to reproduce/transform meaning for subsequent cycles, but absent a sound internal justification, the court failed to communicate to participants persuasive reasons and offer proper guidance. Needless to say, it also failed to address Kimura as an agent. The next section addresses what might have explained the ruling at the level of excuses.

4.2.3 Character and Excuse

On one count, researchers of CD seem to be in agreement: they all seem to agree that culture plays a motivational role in explaining individual action. Because of this, adequately explaining culture becomes important for criminal law. As it has been examined in the previous section, one basic assumption for criminal responsibility is the availability of valuable options; that is, options that could have been chosen by a free person. Accordingly, any factor that diminishes one's rational capacities for deliberating over and choosing options diminishes the degree of liberty with which they are taken. Motivation is one of those factors and, as such, conditions blameworthiness⁴¹⁹. Formulated in this way, this is a cause-based account of motives: motives are causally relevant for

⁴¹⁹ Renteln, *The Cultural Defense* (n 380) 189.

criminal responsibility, especially for excuses⁴²⁰. Certainly, provocation, duress, necessity, coercion, diminished responsibility, insanity, automatism and voluntary intoxication all involve some form of mental impairment which impacts choosing valuable options. Yet, because the focus is no longer the agent, fully considered as an agent responsive to reasons, it is necessary to turn to another ground on which to justify responsibility: character.

One may consider that the cause-based accounts of motivations are defective, for individuals are not just passive recipients of their environment, but also have capacities of their own and can act based on reasons. Culture is not a causal force, but more generally a normative force⁴²¹ which includes not only causes, but also reasons as figuring in individual's practical reasoning. Reasons involve not just dispositions, but also the set of normative considerations, moral or legal, that justify individual actions⁴²². Because the individual is sensitive to these normative considerations, he can choose which reasons to act on, and as a consequence be seen as responsible for this choice. From this point of view, culture is not a mere fact with causal properties. Culture involves an evaluative judgement about the values the agent should conform to. Scholars claim that excused actions are excused not because they follow causally from a set of cultural facts; rather, excuses are justified in that the culture in question evaluates the action as permissible or even obligatory⁴²³.

This leads to reason-based accounts of excuses. Reasons-based accounts of motivation appeal to idealised conditions concerning how Kimura would have acted, if she had been motivated by the appropriate set of reasons. Its focus is on the kinds of constraints that prevent an agent from engaging in normal, practical reasoning⁴²⁴. The cause-based account sees Kimura not as choosing to follow her culture, but as causally motivated by her traditions. In contrast, on the reasons-based account of motivation, Kimura judges her own

⁴²⁰ Douglas Husak, 'Motive and Criminal Liability' (1989) 8 *Criminal Law and Justice Ethics* 3.

⁴²¹ Held and Fontaione, 'Culture as an affirmative defense' (n 415) 248.

⁴²² See John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman et al (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 440-476.

⁴²³ Donovan and Garth, 'Delimiting the cultural defense' (n 383) 135; Woodman, 'The Culture Defence' (n 383) 11.

⁴²⁴ Moore, 'Causation and Excuses' (n 408) 525.

culture, evaluates it and concludes with an “ought”⁴²⁵: she ought to commit *oyako-shinju*. This account fits with the preconditions taken as necessary for holding someone accountable. Certainly, it appears that what matters is not whether the conduct was causally compelled or not, but that the person was not sensitive to the reasons underlying a criminal prohibition. Kimura’s choice and the values it upholds are the problem, not her motivation per se⁴²⁶. Let us consider an example with other excuses, for the point applies more generally.

Take provocation, a doctrine that in common law jurisdictions allows lessening punishment for intentional killings. Whilst the grounds for identifying its rationale differ, one standard requirement is to have acted under the description of a reasonable person⁴²⁷. The requirement means that not any event would justify a loss of self-control or interference with practical reason so as to ground the defence, but only those which would move a reasonable person to act in the way the offender did. Thus, whilst a nazi person with nazi dispositions would not be considered reasonable if his motivation were explained in nazi doctrine, it is generally accepted in the western world that provocation can be grounded on the husband’s knowledge that his wife is being unfaithful to him, for it is deemed reasonable for a man to have such a reaction. This shows that underlying this defence, there is more than a mechanistic examination of the capacity to act. There is also an evaluative judgement, according to which only a subset of cases of loss of self-control would be acceptable for the defence. And here enters character, for what defines a person as having a good character is what allows for the identification of what is reasonable, for it seems that a person of good character would be a reasonable person.

It is standard for character to be taken not as a transient response to changes in the environment, but some form of lasting disposition which arises in response to some states

⁴²⁵ This is the familiar, Aristotelian, practical syllogism, in which the conclusion is an action, see Sergio Tenenbaum, ‘The conclusion of practical reason’, in Sergio Tenenbaum (ed.), *Moral Psychology* (Rodopi 2007) 323-343.

⁴²⁶ See Jeremy Horder, *Provocation and Responsibility* (Clarendon Press 1992) 127-128.

⁴²⁷ For the relevant cases in the USA, see Joshua Dressler, *Understanding Criminal Law* (Fourth Edition, LexisNexis 2006) 575-578. For the United Kingdom, see A.P. Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Fifth Edition, Hart Publishing 2013) 403-405. For Scotland, see Timothy Jones and Michael Christie, *Criminal Law* (Fifth Edition, Green 2012) 228-231. For Canada, see Kent Roach, *Criminal Law* (Sixth Edition, Irwin Law 2012) 412-415.

of affairs⁴²⁸. Yet, criminal law seems uninterested in enquiring comprehensively into the individual's life in order to identify those who have good and bad characters. Certainly, it seems it would not matter even if it was possible to prove that X's character cannot explain why he did A, or that X has a good character. In this sense, it does not matter whether doing A was due to X's enduring dispositions or if it was just a fleeting emotional response. Character operates more as a locus for the values the WE cares about than a permission for the state to enquire into X's character. A person's particular character matters less than the general norms of conduct which describe a person of good character. In other words, character is a model for what could be appropriate choice, and thus a connection emerges between excuses and substantive conceptions of the good; a connection that most criminal law scholars seem to accept. True, this connection is clearer on conceptions that implicitly reject the neutrality of criminal law⁴²⁹. Within other more liberal frameworks, such as the work of Michael Moore, to the extent they define provocation as a failure of practical reasoning, how criminal law evaluates the offender according to a model of character is rendered invisible. Yet, to the extent Moore accepts character as part of criminal law⁴³⁰, he recognises that criminal law singles out aspects of persons not fully explainable in terms of a failure of practical reason, and thus he should further recognise that relying on character connects criminal law and the good life.

Excuses aim to realise particular values that depend on substantive conceptions of the good, and this becomes the frame for assessing weak a-legality, casting a different light on what happens with immigrant minorities in claiming CD. When criminal law addresses citizens, it does not require an overall change in their motivations, for they are taken to have the corresponding motivations for civil life. Certainly, shared social practices are the

⁴²⁸ See Anthony Duff, 'Choice, Character, and Criminal Liability' (1993) 12 *Law and Philosophy* 364-365.

⁴²⁹ While these accounts are not explicit on the issue of neutrality, they do ground provocation on evaluative judgements concerning what would be an appropriate response from the offender, and to this extent, they become views that understand criminal law, importantly, as non-neutral. See Andrew Von Hirsch and Nils Jareborg, 'Provocation and Responsibility' in Ferdinand Schoeman (ed.), *Responsibility, Character, and the Emotions* (CUP 1987) 248-249; Horder, *Provocation* (n 426); Duff, 'Choice, Character' (n 428) 357-358; Kyron Huigens, 'Virtue and Inculpation' (1995) 108 *Harvard Law Review* 1444-1446; Dan Kahan and Martha Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 306-310; Victoria Nourse, 'The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law' (1998) 50 *Stanford Law Review* 1458-1459; John Gardner, 'The Gist of Excuses' (1998) 1 *Buffalo Criminal Law Review* 592; Alan Norrie, 'The structure of provocation' (2001) 54 *Current Legal Problems* 344; Victor Tadros, 'The Characters of Excuse' (2001) 21 *Oxford Journal of Legal Studies* 519.

⁴³⁰ A regrettable part, it seems; see Heide Hurd and Michael Moore, 'Punishing Hatred and Prejudice' (2004) 56 *Stanford Law Review* 1081.

ground for such a demand, for they have supposedly shaped citizens' motivations and characters. Yet, when addressing minorities criminal law demands not only conformity with legal prescriptions, but also with the social practices that citizens take for granted. Thus, criminal law demands of immigrants what it does not demand from the majority. An agent, as part of the political community, has a good character because he has dispositions to act in the ways permitted by the constitutional WE, or has endorsed the WE's values and acts on those as reasons. This agent would have never countenanced *oyako-shinju*, and if he had, he would have been sentenced - in the USA - to death. In other words, the norms of good character are connected with the political and cultural background that shapes predispositions and offers reasons for action. Thus, criminal law demands that Kimura not just change her behaviour, but further, she must change her conception of the good by taking up a role as a participant in the social practices of the WE of which she is now part. Once a participant, the WE would expect Kimura to endorse new values and beliefs, those not to be found in the cultural background that explained her motivation. Moreover, the WE would expect Kimura to adopt the moral norms that underlie good character, and thus, to become a *reasonable person*.

In sum, character depends on the forms of sociality that arise in a particular political community. Kimura's reasons and dispositions to act would have been different, had she endorsed different values. If she had, she would have acted differently: she would have conformed to the law of the political community. It is worth remarking here upon how criminal law constructs agency. The premise is that Kimura's agency expresses values not upheld by the constitutional WE. Yet, if she were not treated as an agent, if there were no freedom in Kimura's decision to act, she would have been considered culturally determined, and thus completely excused. Instead, modern criminal law treated Kimura as a meaningful agent rejecting determinism, yet did not fully discard the mechanistic view, for she was not regarded fully sane; actually, she was obliged to undergo psychiatric counselling. In the same way as provocation, by punishing Kimura she is made individually responsible for her actions, and thus asked to change the motivations she had for doing what she did. She is asked to join the WE, and thus to endorse the WE's practices and values: to become assimilated into the WE. In other words, she is asked to become a *reasonable person*, a participant that seeks the good inside her new WE.

4.2.4 The Impossibility of Radical Pluralism

Defenders of CD view criminal law as open to accepting wider considerations of values and ways of life as standards that bear on judgements of responsibility⁴³¹, concluding that criminal law has been pluralised. Indeed, some scholars consider that CD can expand indefinitely, thus dissolving the critical function. They ascribe to the WE an unlimited capacity to recognise cultural diversity. However, scholars seem to overlook that the concept of person has not been redefined; individual agency and individual character still frame how institutions assess criminal responsibility. It may be true that criminal law has been pluralised, in the sense that it has expanded what options are valuable. However, this has taken place mainly through expanding a prior individualistic frame. One may sound a note of pessimism about CD. James Sing⁴³² holds that CD fits the defence of provocation. Sing claims that the criteria used to assess whether someone is reasonable requires considering the offender's cultural background. Otherwise, the offender would be understood as part of "us", thereby reducing the recognition of pluralism. Indeed, without reliance on the offender's cultural background, the jury and the judge would construe reasonability from what is reasonable for them. Thus, they would excuse Kimura if she were to fit with what is reasonable from their point of view. In other words, if a reasonable American had acted in the same way, then Kimura could have claimed a complete excuse⁴³³. This means that Kimura, according to Sing, would be treated according to the values of the American majority, which is precisely what CD challenges. That is, Sing claims that CD allows the offender to be treated according to the values and practices of his own cultural background. Supposedly, this would mean that criminal law recognises cultural pluralism.

Sing raises an interesting point concerning the conditions that would have to be met for judicial consideration of the offender's cultural background, and thus for a full recognition of cultural diversity in criminal law. Assume that Sing is right, and that criminal law is

⁴³¹ Harvard Note, 'The Cultural Defense' (n 383) 1296; Fischer, 'Human Rights Implications' (n 392) 684-685; James Sing, 'Culture as Sameness' (n 390) 1848; Chiu, 'Culture as Justification' (n 392) 1367-1372.

⁴³² Sing, 'Culture as Sameness' (n 390) 1876. A similar observation is made by Chiu, 'Cultural Defense' (n 383) 1113; Sarah Song, 'Majority Norms, Multiculturalism, and Gender Equality' (2005) 99 *American Political Science Review* 473; Sigurd D'hondt, 'The Cultural Defense as Courtroom Drama: The Enactment of Identity, Sameness, and Difference in Criminal Trial Discourse' (2010) 35 *Law and Social Inquiry* 67.

⁴³³ Sing follows here Chiu, 'Cultural Defense' (n 383) 1113-114.

capable of recognising pluralism, and examine the case of Kimura. One may ask in the first place, how can Kimura's cultural background be considered? Sing assumes the American jury would be capable of judging correctly how another culture would understand what the offender did. However, there is compelling evidence that in this sort of assessment the jury systematically construes negative stereotypes in understanding the other⁴³⁴. It appears an American jury would not do the work; something else would be needed. Thus, to avoid prejudice and lack of knowledge on the part of the jury, and assuming it is possible to identify Japanese cultural experts, would it suffice to replace the jury with experts? No, it seems, insofar as the judge would be in the same position as a non-expert in Japanese culture, which would necessitate a Japanese judge⁴³⁵. Criminal proceedings are in principle public, and so should the public at large have the authority to call the offender to account, should the trial be conducted according to Japanese rules of criminal procedure? It deserves emphasis, however, that even a trial conducted in this way would be shallow, if the social practices which criminal law contributes to⁴³⁶ were not Japanese. As it was seen in Chapter 1, whether criminal law aims at coordination, reformation, restoration, retribution, deterrence or ratification, it needs to rely on the customs and social practices of its participants in order to be minimally effective. It results that without enculturating Americans into Japanese socio-cultural practices, all the above modifications would not be sufficient, and yet this proposal would seem to go too far.

The point of this *reductio* is that by considering these stronger conditions, there is a shift from evaluating an individual's conduct to the *standards* on which evaluations are based. More specifically, this signals a turn from evaluating the individual's conduct to whether there is a collective claim to the rules which are used to evaluate what he did. Certainly,

⁴³⁴ This standard of reasonableness was used in Australia, yet it led to essentialising indigenous peoples, see Simon Bronitt, 'Visions of a Multicultural Criminal Law: an Australian Perspective', in Marie-Claire Foblets and Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009) 125-126; also in the USA, see Alexander Kozin, 'Native American Identity and the Limits of Cultural Defence' (2011) 22 *Law and Critique* 39-57; also in Canada, see Charles Reasons et al, 'Race and Criminal Justice in Canada' (2016) 11 *International Journal of Criminal Justice Sciences* 75-99.

⁴³⁵ In Canada and concerning the claims of indigenous peoples, Chris Tennant has suggested that at least in some cases prejudice might be solved by the presence of indigenous judges, see Chris Tennant, 'Justification and Cultural Authority in s. 35(1) of the Constitution Act, 1982: Regina v. Sparrow', (1991) 14 *Dalhousie Law Journal* 372-386.

⁴³⁶ Which includes legal and non-legal customs, see Frederik Schauer, 'Pitfalls in the interpretation of customary law' in Amanda Perreau-Saussine and James Bernard Murphy (eds.), *The Nature of customary law* (CUP 2008) 13-34.

these stronger conditions progress from making the criminal law more responsive to pluralism, to deferring to another collective's rules on which the cultural background supervenes. In other words, it converts pluralism into deference towards another WE. However, because this implication remains obscure, so do the WE's claims, and thus the proposal of radical pluralism becomes fundamentally inconsistent with possessing responsive institutions and, more generally, with collective self-determination. It also replaces the critical function with something else, for by transposing different social practices, it detaches criminal law from the practices it draws on and the practices it contributes to. It should be remarked upon that this move does not render the defence radically subjective⁴³⁷, because it is controlled by Kimura's set of subjective beliefs, but rather it detaches and reattaches criminal law to another WE. Thus, it is a move that undermines the critical function. The problem is that anything short of adding the stronger conditions will not be sufficient to satisfy Sing's ambitions. Yet such a proposal is not only unrealistic, but lacks any reasonable justification.

It is the WE's cultural and social background that provides the context in which the judge and the jury decide what is reasonable⁴³⁸. A quick review of CD cases confirms that the excuses are provided only when the subject is regarded to have acted as a reasonable individual⁴³⁹ from the perspective of the WE⁴⁴⁰. In this way, criminal law applies equally both to members of the WE, the citizens, and also to immigrants, even if for the former the values criminal law reproduces/transforms are not foreign in the sense they are for those like Kimura. For citizens, the values the constitutional WE is committed to are familiar; for Kimura, they are not. For citizens, reasonability is familiar; for Kimura, it is not. Some have suggested things should be this way. Some consider that if criminal law is understood as a form of instruction on the national concepts of right and wrong⁴⁴¹, then it sets legal

⁴³⁷ Held and Fontaione, 'Culture as an affirmative defense' (n 415) 246.

⁴³⁸ See Bronitt, 'Visions of a Multicultural' (n 434) 125-126; more generally, Timothy Macklem and John Gardner, 'Provocation and Pluralism' (2001) 64 *Modern Law Review* 815-830.

⁴³⁹ More or less the same claim is made by Benjamin Berger, 'Cultural Limits of Legal Tolerance' (2008) 21 *The Canadian Journal of Law and Jurisprudence* 245.

⁴⁴⁰ This applies more generally. Post shows this occurs concerning freedom of expression; see Robert Post, 'Law and Cultural Conflict' (2003) 78 *Chicago-Kent Law Review* 503-504. For understanding Post's position as self-defeating, see Michael Michelman, 'Must Constitutional Democracy Be Responsive' (1998) 107 *Ethics* 706.

⁴⁴¹ Lyman, 'Cultural Defense' (n 383) 97.

conformity as a duty owed to the nation⁴⁴². It seems to follow that immigrants have a duty to assimilate⁴⁴³, as it is incumbent on them to master the WE's social practices. If they do not, then there would be no reason to establish a CD in their benefit. Surely, if they are responsible for breaching their duties, then no reason would support the claim for reduced punishment. However, while it might be true that there is a justified interest in immigrants adopting the WE's social practices, individual pluralism is also recognised as an important value guiding institutional facts. Indeed, even if there is an interest in Kimura being better enculturated, it does not generally follow that any form of coercive assimilation can be legally imposed. It does not follow then that criminal law should not be responsive. On the contrary, there are reasons that support the view that criminal law should be responsive, especially for the weak a-legal.

4.2.5 Distinguishing the Other and the Limits of Pluralism

Related to the problem of how much pluralism criminal law can recognise, scholars seem unable to offer a principled distinction between those who should and those who should not be afforded a CD. This is so since it seems natural that CD may be applicable to all individuals and all groups equally, even sub-cultures like gang cultures. Nonetheless, it seems necessary to justify discriminating between the case of Kimura and a gang-member, in order to include the former yet exclude the latter. Let us see how the problem appears. A basic justification for CD is the appropriateness of blame. One important motivation for the need for CD is that punishment fits the defendant's blame. CD's role seems to be epistemic, for it provides the knowledge needed in order to judge whether this is the case. If correct, any attempt to discriminate between offenders by relying on the principle of blameworthiness fails. Certainly, emphasis on blame imposes the general requirement that criminal punishment be proportionate to the seriousness of the wrong, and this remains valid regardless of how the defendant was motivated to act. Because blame requires individualised justice, basing CD on individual blame fails to discriminate between

⁴⁴² *ibid* 105.

⁴⁴³ *ibid* 111.

members of different groups⁴⁴⁴. Moreover, by being applicable to any person the specificity of CD is lost, and the defence itself is rendered meaningless.

This incapacity to discriminate among offenders has a practical implication for the plausibility of CD. Indeed, if punishment tracks blame, then there is no reason to exclude gang members from it. Indeed, they might have been motivated by their gang-culture, in the same way a member of a minority-culture would. Whether Kimura is Japanese or whether she belongs to the Yakuza of California makes no difference for the purposes of blame. One of the aims of CD is to avoid the ethnocentrism of mainstream culture, yet if CD may also benefit Kimura from Yakuza, this would cast serious doubt on its plausibility as a defence. To avoid the gang paradox, as it will be called, CD must be able to discriminate and not give support to any person, regardless of the group to which he belongs⁴⁴⁵. However, the predicament CD faces is to be able to offer a principled rationale for such discrimination. For one thing, as Renteln explains, members of sub-groups like gangs are not radically different from mainstream society. If those groups can generate their own rules of belonging and behaviour, they might be considered radically different. Because this might entitle Kimura from Yakuza to a CD, Renteln considers that this would oblige neither judges nor juries. Yet, the same could be said of members of minorities: neither do their claims oblige judges nor juries. What then justifies discriminating between both, between Kimura from Yakuza and Brevik, and between immigrants and other minorities? Radical pluralism seemingly cannot offer sufficient guidance in these matters.

An alternative would be to argue that only those entitled to the right to culture are entitled to a CD, for this would supposedly exclude Kimura of Yakuza and Brevik. Yet not all those entitled to a right to culture are entitled to a CD. Consider immigrants who have been living for many years in the USA. Let us say Kimura was born in Japan but lived in California from as early as she remembers. She may still preserve some of her parents' social practices, yet she has also adopted those of the USA. If she meets the conditions to be considered enculturated, should she be entitled to CD? She may well be entitled to

⁴⁴⁴ Almost every theorist is committed to this consequence; Kim, 'Blameworthiness' (n 392) 223; Lacey, 'Community, culture' (n 27) 305. Others just presume that there is a criteria available without specifying what this would be, Renteln, *The Cultural Defense* (n 380) 207-208; Kent Greenawalt, 'The Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act' (2008) 6 *Ohio State Journal of Criminal Law* 304.

⁴⁴⁵ Renteln, *The Cultural Defense* (n 380) 207.

‘positive action’ in case of ethnic discrimination, which is especially relevant since she might be a descendent of a Japanese imprisoned in the USA’s Japanese ‘internment camps’ during the Second World War. However, if she has indeed chosen to become a member of Yakuza, it seems she should not be entitled to a CD. It should be noted that cause-based excuses do not register differences between Kimuras, for the motives which matter are those that can figure in causal explanations, and they would figure in both cases. Reasons-based excuses come close but they seem also insufficient, for in both cases Kimura could have acted out for reasons that would have motivated anyone to act; for instance, out of loyalty or friendship. These can be normative reasons, yet they seem insufficient for singling out the property of being part of an undesirable group not entitled to a CD.

There is a third alternative to this quandary. This understands CD as premised on a conflict between cultures, that is, as a cultural clash. Jeroen Van Broeck develops this alternative. Broeck builds CD upon the notion of *cultural offense*⁴⁴⁶. The idea is that (i) in a culture X doing F is an offense (ii) individual A *because* he is a member of X has the duty to punish or sanction the transgression that F represents (iii) doing G as a response to F, while permitted in culture X, is considered criminal in culture Y, which is where A commits the crime. What matters according to Broeck is that for culture X, doing F is accepted as a transgression⁴⁴⁷, which means that the individual must have acted out of the values of culture X⁴⁴⁸. Once the individual A is acting out of the values of his culture X then it follows, according to Broeck, that what explains CD is a clash of cultures: X acts out of values that are inconsistent with the values of the majority of culture Y. In the case of Kimura, these conditions are met. (i) Kimura’s husband committed an offense against her honour; (ii) Kimura’s culture, also Japanese, sanctions that offense because this would be necessary for her to regain her honour; (iii) finally, Kimura commits *oyako-shinju*, which while a crime in California, is seen with sympathy by Japanese culture⁴⁴⁹. Thus, the framework is of no help here, for Kimura from Yakuza could also meet the conditions, granted the substitution of the group “Japan” by “Yakuza”; Kimura would still be able to

⁴⁴⁶ Broeck, ‘Cultural Defense’ (n 383) 5-7.

⁴⁴⁷ *ibid* 15.

⁴⁴⁸ *ibid* 16-17.

⁴⁴⁹ Yoshitomo Takahashi and Douglas Berger, ‘Cultural Dynamics and the Unconscious in Suicide in Japan’ in Antoon Leenaars and David Lester (eds.), *Suicide and the Unconscious* (Jason Aronson Inc. Publishers 1996) 250-252.

act from the values of Yakuza, if they also regarded what her husband did as impermissible. Therefore, not even the best available framework provides sufficient criteria for discriminating among groups.

In sum, the alternatives explored by scholars of CD do not provide a plausible, principled argumentation for the exclusion of gangs. More generally, no account offers a principled distinction, so long as the focus remains on the principle of individual blame. Because of this focus, proponents are drawn to reason that what matters is the *factual* existence of a group that upholds a set of values, whichever they may be. It is noteworthy that they appeal to the group's values as part of an *explanation* of the member's conduct in light of individual blame, but not as having *normative* force. In effect, it might be the case that Japanese culture does value *oyako-shinju*, but the broader point concerns whether or not it is permitted for that collective subject. In other words, what should be considered is the group as a self-determined collective and thus a source of political authority, a connection which is not fully drawn out just by considering the culture of a group. This move makes salient not whether an action was *approved* by Japanese culture, but what is *right* conduct for Japan. In effect, it is considered what the Japanese, as a self-determined collective, decide should or not be permitted. It becomes clear that the issue is no longer only about the interaction between cultures, but fundamentally concerns a political interaction between groups. The question becomes clear: why should it matter for the constitutional WE of the USA, which upholds a culture in their territory according to which *oyako-shinju* is a serious crime, what the constitutional WE of Japan consider should be permitted?

Whether or not the USA ascribes value to Japanese norms would constitute an expression of its own collective self-determination, but concerning groups that exist within a self-determined collective, the issue is more complex. At this level, the real problem of the incapacity to discriminate among groups becomes apparent: whilst some minorities might be entitled to self-determination, it seems clear gangs are not. Whilst some minorities are entitled to dictate how social life ought to be, gangs clearly are not. Finally, it is possible to observe within criminal law the relevance of the criterion for distinguishing groups: the entitlement to collective self-determination. The problem is that this now necessitates an argument on the nature and reach of collective agency and collective actions, but the literature either does not consider them or does so but too late, at best, as an unprincipled corrective to the scope of CD. Certainly, all that figures in their reasoning is individual

agency, individual character or individual pluralism. Scholars should start from the outset with a clear understanding of collective actions and collective entitlements for clarifying what is at issue in CD when it engages with a-legal behaviours.

Since scholars do not start in this way, they end up unable to respond to the gang paradox, and thus are unable to offer a principled basis for a differentiated treatment of the particular needs of the minorities that claim for recognition from the legal system. Indeed, none of the accounts examined can offer sound principles on which to discriminate, firstly: between individuals and groups; and secondly, between cases of a-legality and simple cases of illegality. This, however, is not to deny the worth of scholarly work on CD, for this has the merit of identifying the challenges and grounds for excusing offenders in cases in which criminal law seems to reach the limits of the pluralism it can recognise. Surely, most accounts can be seen in this light: Macklem and Gardner⁴⁵⁰, in considering the kind of social pluralism that provocation can recognise; Nuotio⁴⁵¹ and Lacey⁴⁵², in recognising the critical function; Matravers and Phillips, in defending mainstream culture⁴⁵³; Greenawalt⁴⁵⁴ and Lyman, in recognising the role of shared values upheld by the state⁴⁵⁵; Waldron, in suggesting the fundamental interests in freedom⁴⁵⁶.

Now, to the issue at hand: where there are no self-determined collectives interacting there is no deference to identify; yet CD have made salient cases that diverge from mere

⁴⁵⁰ Macklem and Gardner, 'Provocation and Pluralism' (n 438) 817; Helen Power, 'Provocation and culture' (2006) *Criminal Law Review* 872.

⁴⁵¹ Kimmo Nuotio, 'Between Denial and Recognition: Criminal Law and Cultural Diversity' in Will Kymlicka et al (eds.), *Criminal Law and Cultural Diversity* (OUP 2014) 78.

⁴⁵² Lacey, 'Community, culture' (n 27) 294-308.

⁴⁵³ Phillips, 'When culture means gender' (n 411) 529, Matravers, 'Responsibility, Morality and Culture' (n 185) 101.

⁴⁵⁴ Chiu, 'Culture as Justification' (n 392) 1365-1367, argues that by allowing the defendants to tell their true history, it allows criminal law to be an arbiter on moral issues, and what can be regarded as morally right and wrong; Greenawalt, 'The cultural defense' (n 444) 302, takes as given that criminal law reflects the values of the majority.

⁴⁵⁵ Harvard Note, 'The Cultural Defense' (n 383) 1307-1308 considers the limits of shared values; Robert Post, 'Democratic Constitutionalism and Cultural Heterogeneity' (2000) 25 *Australian Journal of Legal Philosophy* 195-197; Levine, 'Negotiating the Boundaries' (n 399) 71; D'hondt, 'The Cultural Defense' (n 432) 92; Tamar Tomer-Fishman, "'Cultural Defense,' 'Cultural Offense,' or no Culture at all?: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and of the Factors Affecting Them' (2010) 100 *The Journal of Criminal Law and Criminology* 507-509.

⁴⁵⁶ Waldron, 'One Law' (n 27) 27-28.

illegalities and which can be understood as instances of weak a-legality. As it was seen, this is because they are particular claims to recognition of cultural diversity that resonate with historical secularisation and the pluralisation of acceptable ways of life. Resonance is given in terms of relaxing punishment according to three different rationales by which criminal law assesses the weak a-legal. First, criminal law assesses the case in question through the lens of structuralist or post-modernist theories of culture. This has consequences for whether the agent can be seen as responsible or not. Second, criminal law assesses whether the agent can be seen as a reasonable person from the point of view of the meanings of the WE. Third, criminal law assesses the level of integration of recently arrived immigrants. It seems characteristic of recently arrived immigrants to be insufficiently exposed to the practices of the host country, which may make it difficult for them to conform to criminal law. That is, if there is no reasonable opportunity for integration, then there is reason to believe that immigrants might face a situation of unfair opportunity for choosing valuable choices, which may justify reducing punishment. Significantly, the connection between exposure and social practices point to the difference between integration and lack of integration into those social practices. Whereas immigrants might claim they have not been sufficiently integrated into the host's social practices, members of gangs cannot⁴⁵⁷. Obviously, members of gangs cannot claim insufficient exposure. On the contrary, if they have chosen that membership, there might be even more reasons to increase punishment⁴⁵⁸.

In sum, while pluralism seems to introduce a tension, this is only an appearance, for what are broadly defined as valuable individual choices establish limits to potential objects of accommodation in criminal law. This, as it has been argued, does not mean that criminal law cannot or should not be responsive. However, to the extent weak a-legality does not aim to challenge criminal law but seeks to be better integrated, they have no recognised political status and thus the survival of its culture is left to the individual marketplace of ideas. It was possible to identify, nonetheless, a three-fold rationale for reducing punishment for cases of weak a-legality: (1) whether the agent is determined or not, with consideration given to two alternative conceptions of culture; (2) whether the agent can be

⁴⁵⁷ This does not mean they cannot claim to be not integrated by other grounds. Lacey has argued, implicitly, that gang members might receive a reduced punishment if socio-economic conditions did not provide a fair opportunity for choosing, see Lacey, 'Community, culture' (n 27) 304-305.

⁴⁵⁸ Greenawalt, 'The cultural defense' (n 444) 303.

seen as a reasonable person (1); (3) whether the agent had a reasonable opportunity to integrate⁴⁵⁹. Importantly, these rationales may figure independently from each other. Thus, (2) the agent may be seen as a reasonable person without being integrated, or (3) the agent may be insufficiently integrated even if he were unreasonable, or (1) he might be unreasonable and sufficiently integrated, yet culturally determined.

Scholars researching CD have recognised the much-needed cultural sensibility that CD brings to criminal law⁴⁶⁰, yet as it was seen, they have systematically overlooked the connection between the claim to access culture and the political claim to be collectively entitled to it, and how this is expressed in criminal law. This has led them to overlook how limited a pluralism the WE actually recognises. It has been examined how criminal law engages with weak a-legality, or minorities who though they claim to be accommodated, do so as individuals seeking integration. Now it is time to examine how criminal law engages with strong a-legality, for in contrast they might not seek not integration, and whether they do so or not, they seek integration as a self-determined collective. To the extent CD represents a form of integration, it cannot be an appropriate response to the demands of indigenous peoples. Moreover, it is premised upon the institutional alternatives and consequences of the critical function, thus is neither able to register their claims nor to recognise them as political. The next chapter examines how criminal law may address the demands of strong a-legality; that is, in a way which at least recognises the collective and political character of their claims.

⁴⁵⁹ From this perspective, a cultural defence might be seen as part of a larger process of fair adaptation; for a normative position on these lines, see Joseph Carens, 'The Integration of Immigrants' (2005) 2 *Journal of Moral Philosophy* 29-46; David Miller, 'Immigrants, Nations, and Citizenship' (2008) 16 *The Journal of Political Philosophy* 371-390.

⁴⁶⁰ John Caughey, 'The Anthropologist as Expert Witness: the Case of a Murder in Maine', in Marie-Claire Foblets and Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009); Donovan and Garth, 'Delimiting the cultural defense' (n 383) 112; Gaurav Desai, 'Travelling culture and "cultural defense"', in Barbara Arneil et al (eds.), *Sexual Justice/Cultural Justice: Critical Perspectives in Political Theory and Practice* (Routledge 2006) 79; Parekh, 'Cultural defense' (n 392) 104.

CHAPTER 5

CITIZENSHIP AND THE SUSPENSION OF CRIMINAL LAW

Introduction

In Chapter 3 it was argued that criminal law aims at reproducing/transforming two different domains of the identity of the constitutional order, its idem-identity and ipse-identity, and Chapter 4 went on to sustain that neither of these domains is put into question when the WE encounters weak a-legality. On the contrary, weak a-legality seeks to be included in the WE. Integrating weak a-legality would achieve equality. Criminal law is part of this process of integration, insofar as it treats persons as responsible individual *agents*. By so doing, criminal law contributes to reproduce/transform the idem-identity and ipse-identity of the WE. In contrast to weak a-legality, strong a-legality does not seek integration or integration only, but more fundamentally to attain collective self-determination⁴⁶¹. When criminal law encounters strong a-legality, the situation is qualitatively different in comparison with weak a-legality. Surely, what differentiates weak a-legality from strong a-legality is that the former has as objects individuals, whilst for the latter it is self-determined collectives. In encountering strong a-legality, the WE engages with another WE. Thus, when drawing boundaries through criminal law and thus including the other within itself, the WE simultaneously deprives the other of the mark of its constitutional identity. Accommodating means inclusion and the denial that indigenous peoples are self-determined.

Chapter 5 examines how criminal law engages with strong a-legality in light of how criminal law achieves integration. Whilst integration has been examined in general, it has not been detailed how and why it is needed. It is argued that criminal law integrates by shaping citizenship, and how the need for integration makes accommodating another WE impossible. For this purpose, it is necessary first to explore more closely the ways in which criminal law integrates, that is, how it contributes to the idem-identity and ipse-identity of the constitutional order. We can examine how criminal law integrates by observing the relationship between criminal law and citizenship. Given that citizenship is one of the

⁴⁶¹ For a critique of external protections of this form, based on how they may entail internal restrictions, see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP 2001) 4-5.

fundamental ways by which the WE sets its boundaries, seeing how criminal law shapes citizenship will show how criminal law draws the boundaries of the political community. Second, it is also necessary to develop a broader understanding of integration. For this purpose, it is argued that a political community requires abstract and material integration of participants as a condition for the existence of that community. Because criminal law is required to integrate into the WE, the accommodation of indigenous peoples' demands are impossible. However, the chapter identifies a key condition for them to achieve self-determination: that they access to their own penal practices⁴⁶². In other words, an independent penal practice is necessary for indigenous peoples to achieve self-determination, independent of the WE which they are part of.

This chapter is divided into 4 sections. Section 1 examines the debate on criminal law and citizenship through the views of Nicola Lacey, Antony Duff and Peter Ramsay. Section 2 draws out the implications of these views holding, basically, that criminal law shapes citizenship. Section 3 examines two cases that illustrate how criminal law contributes to shaping citizenship and thus integrates into the political community. Section 4 concludes on the impossibility of accommodating indigenous peoples practices within criminal law. It is remarked upon the reasons which have led the thesis to reach that conclusion, and recommend suspending criminal law as a condition for devolving self-determination to indigenous peoples, for this would allow them to have an independent penal practice.

5.1. Citizenship and Criminal Law

5.1.1 Criminal Law, the Subject and the Subjected

Citizenship and community are closely-related concepts. By community, it is alluded to participants having something particular in “common”⁴⁶³, namely, the social practices they engage in. The purpose of employing the idea of community is to allow the observation that moral values do not vanish once the state centralises political power through its

⁴⁶² On penal practices see below (n 519).

⁴⁶³ Warren Brown, ‘Community’ *Encyclopedia of Political Theory* (2010) 256; for a history of the idea of community as an ideal, see Gerard Delanty, *Community* (Second Edition, Routledge 2010) Chapter 1; for a historical interpretation of the idea of community as fundamentally political, see Craig Calhoun, ‘Community: Toward a Variable Conceptualization for Comparative Research’ (1980) 5 *Social History* 105-129, also Jeannine Quillet, ‘Community, Council and Representation’ in J. H. Burns (ed.) *The Cambridge History of Medieval Political Thought c.350-c.1450* (CUP 1991) 520-572.

institutions. That is, when political communities transition to the modern form of the constitutional order, moral values are still present in it. In the following, the idea of political community is employed in order to emphasise the presence of moral values within the constitutional order. Now, the modern idea of political community is understood in terms of citizenship. Characterising an individual as a “citizen” means considering them a member of a political community, giving rise to a particular kind of tie⁴⁶⁴ between them and the group. From this tie emerges the recognition of both rights and duties corresponding to members and the group, which include civil, social and political rights. This tie may be characterised in terms of two interrelated domains: active citizenship or the condition of subject, and passive citizenship or the condition of subjected. These domains are set within a broader context, as it was done with criminal law and the constitution. The implication of this move is to conceive of citizenship beyond legal and moral rights existing between the individual and the group⁴⁶⁵. Citizenship is a general tie that unites an individual with a political community. In other words, by becoming part of the constitutional order as a citizen, citizenship entails membership of the WE’s social practices.

Read in this way, citizenship’s meaning depends on a social practice that includes cultural and moral values and which contributes to that social practice on which it depends⁴⁶⁶. It appears that there is no such thing as “the” institution of citizenship, for citizenship involves membership in multiple and different levels of the socio-cultural practices of the WE. Within these levels, the examination is narrowed down to how citizenship is shaped by criminal law and figure out the implications. The focus is on examining the beginning of a CS cycle, that is, how these cultural values enable the meaning of citizenship from

⁴⁶⁴ Jean Hampton, *Political Philosophy* (Westview Press 1997) 219.

⁴⁶⁵ Michael Blake, ‘Immigration and Political Equality’ (2008) 45 *San Diego Law Review* 963.

⁴⁶⁶ While not in these words, the thesis joins other theorists who understand citizenship as connected in one way or another with social practices, thus involving more than the mere recognition of formal rights, see T. H. Marshall, *Citizenship and Social Class and other Essays* (CUP 1950) 40-41; also Will Kymlicka and Wayne Norman, ‘Return of the Citizen: A Survey of Recent Work on Citizenship Theory’ in Richard Bellamy and Madeleine Kennedy-Macfoy (eds.), *Citizenship: Critical Concepts in Political Science, Volume I, What is Citizenship? Theories of Citizenship: Classic and Contemporary Debates* (Routledge 2014) 170-171; Michael Walzer, ‘Citizenship’ in Richard Bellamy and Madeleine Kennedy-Macfoy (eds.), *Citizenship: Critical Concepts in Political Science, Volume I, What is Citizenship? Theories of Citizenship: Classic and Contemporary Debates* (Routledge 2014) 91; Richard Bellamy, *Citizenship: A Very Short Introduction* (OUP 2008) Chapters 1-2. On the different meanings of citizenship, see Roger Smith, ‘Modern Citizenship’ in Engin Isin and Bryan Turner (eds.), *Handbook of Citizenship Studies* (Sage 2002) 105-116.

within criminal law. For these purposes, it is employed Lacey's description of the political community of modern western states. The main reason for choosing Lacey is that she develops understandings of criminal law quite compatible with the framework developed in this thesis. Lacey understands membership within the political community in terms of a combination of liberal and communitarian values⁴⁶⁷, values that help to define citizenship. This is not only a good description of the values embedded in the practice of citizenship, but also provides a suitable narrowing of the domains of issues that are the focus here.

Lacey understands the political community in terms of how it becomes justified, mainly in terms of the community's self-description as sharing liberal and communitarian values. While in principle both forms of values seem to oppose each other, they may also be seen as closely related. More specifically, Lacey reunites the liberal value of individual autonomy with the communitarian view of the social constitution of the individual. Lacey does this by claiming that individual autonomy depends on the relationships individuals have with others, for those relationships define their basic interests⁴⁶⁸, among them, their interests in living an autonomous life. This allows for reconciling a version of utilitarianism, focused on social utility, with the Kantian maxim that persons should be treated with equal respect. Amid this description enters the role of criminal law. If individual autonomy depends on the social relationships that define human interests, then individuals would not be used as means if criminal law contributes to the maintenance of those relationships without which they would not be autonomous. Yet, criminal law appears at the same time as a form of social utility, for Lacey denies that it⁴⁶⁹ is a good in itself: it must be socially useful. Criminal law aims at preserving the social order where the values individuals share as members of a political community can flourish⁴⁷⁰. Criminal law maintains the relationships members care about⁴⁷¹. It appears that this form of social utility cannot be understood just as an aggregation of individual welfare. The set of social relationships that define individuals' basic interests is built around sharing the same values,

⁴⁶⁷ Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988) 169.

⁴⁶⁸ Lacey, *State Punishment* (n 467) 172.

⁴⁶⁹ *Ibid* 172-173.

⁴⁷⁰ *Ibid* 177.

⁴⁷¹ *Ibid* 176. For a similar view that emphasises social relationships, see Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (CUP 2000) Chapter 1-2.

values that in turn contribute to forming the political community⁴⁷², the community of citizens.

According to Lacey, criminal law is committed to protecting the values of the community⁴⁷³, which leads, as it was seen, to the proposal for a critical function within criminal law, a democratically-legitimated function⁴⁷⁴. Now, Lacey does not provide a full political justification for the authority of these shared values, yet rightly considers that the community settles democratically which values should be protected by criminal law⁴⁷⁵. Lacey then characterises the community not only in terms of the liberal and communitarian values members are supposed to share, but also in how members associate, deliberate and change the terms of the association as they consider fit. Thus, it appears that insofar as the social order construes political authority, the community is also a political community⁴⁷⁶. Here, there is a shift from the values shared by the community to how that community forms and makes its decisions. This emphasis, by considering political authority in terms of democratic authority, can link with Antony Duff's views on the political legitimacy of criminal law⁴⁷⁷.

Antony Duff, like Lacey, also starts by combining a liberal-communitarian view of the political community, considering that the fundamental value of autonomy is socially constituted⁴⁷⁸. In this area, Duff's ideas of citizenship can be seen as extensions of Lacey's. Duff has further developed the idea of democratic community and how it becomes legitimate. According to Duff, the question is how criminal law claims to bind its members, suggesting to move beyond merely asserting that there is a community of shared values. If criminal law is legitimised democratically, then this implies it is more than a mere procedure for arriving at correct decisions, with the implication that epistemic

⁴⁷² Lacey, *State Punishment* (n 467) 173-174.

⁴⁷³ Ibid 183.

⁴⁷⁴ Ibid 185.

⁴⁷⁵ Ibid 185.

⁴⁷⁶ Ibid 175.

⁴⁷⁷ RA Duff, 'A criminal law for citizens' (2010) 14(3) *Theoretical Criminology* 293-309.

⁴⁷⁸ RA Duff, *Punishment, Communication, and Community* (OUP 2001) 54-55; RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 44-45.

conceptions of democratic legitimacy are insufficient⁴⁷⁹. Duff considers that criminal law binds its members because they are citizens⁴⁸⁰; that is, because they can be seen as the “subject” of criminal law. Underlying democratic legitimacy, there is a connection between being *subjected* to the law and being the *subject* of law. Democratic authority is said to make law legitimate because the law is self-willed: the subject of democratic authority is said to impose rules on itself⁴⁸¹.

Citizenship is the key, understood as inclusion in the sphere of those who get to democratically deliberate and decide. In other words, by participating in the WE’s ipse-identity, one is entitled to shape its idem-identity. Membership in the political community becomes a condition for the legitimacy of criminal law, for inclusion as a citizen means that they are regarded as the ‘subject’ of criminal law. This line of argument leads Duff to endorse a republican conception of citizenship, “For a republican, law must be our law as citizens, a ‘common’ law that we make for ourselves, not a law made for us and imposed on us by a sovereign; citizens must be able to understand themselves as authors as well as addressees of the law...”⁴⁸². In sum, the criminal law of citizens is not imposed from above, because they are themselves not only subjected to criminal law, but also their subject⁴⁸³.

⁴⁷⁹ For an influential defence of a qualified epistemic version of democratic authority, see David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008).

⁴⁸⁰ Duff, ‘A criminal law’ (n 477) 300.

⁴⁸¹ This is the idea advanced by Habermas, *Facts and Norms* (n 217); similarly Charles Larmore, *The Morals of Modernity* (CUP 1996); also John Rawls, *Political Liberalism* (Columbia University Press 1996); and Charles Taylor, ‘Cross-purposes; the Liberal-Communitarian Debate’ in Nancy Rosenblum (ed.), *Liberalism and the Moral Life* (Harvard University Press 1987) 178; Michelman, ‘Law’s Republic’ (n 249).

⁴⁸² Duff, ‘A criminal law’ (n 477) 301.

⁴⁸³ Ibid 301; also Marcus Dubber, ‘Criminal Law between Public and Private Law’ in Duff et al (eds.), *The Boundaries of Criminal Law* (OUP 2010) 211-212. For a general outline of a republican criminal law, see Philip Pettit, ‘Republican Theory and Criminal Punishment’ (1997) 9 *Utilitas* 59-79; Philip Pettit, ‘Criminalization in Republican Theory’ in Anthony Duff et al, (eds.) *Criminalization: The Political Morality of Criminal Law* (OUP 2014) 132-150. Significantly, this casts republicans as inheritors of Hegel, for he and earlier thinkers have understood criminal law in this way. Joshua Kleniefeld locates in this tradition social philosophers like Durkheim, Nietzsche and Foucault, as well as criminal law theorists, such as Jean Hampton, Jeffrie Murphy, David Garland, Antony Duff, Dan Kahan, Paul Robinson, Nicola Lacey and Günther Jakobs; see Kleniefeld, ‘Reconstructivism’ (n 345) 1486-1565.

5.1.2 Criminal Law and the Construction of Citizenship

Considered generally, criminal law contributes to defining who and under what conditions one may be regarded as citizen. Certainly, citizenship appears partially constructed by criminal law, insofar as criminal law diminishes or suppresses the status of citizenship. I consider two ways in which criminal law contributes in constructing citizenship: abstract citizenship and material citizenship. Duff develops the conception of abstract citizenship, while using different words, by clarifying how citizens can be regarded as non-members. This can occur in different ways: linguistic, factual and normative. The substance of Duff's argument is devoted to explaining non-membership normatively, in order to reject the notion that criminal law is justified when it treats individuals as non-members. According to Duff criminal law construes membership when it treats individuals in ways consistent with the values shared by the community, and non-membership when it does not⁴⁸⁴. Criminal law thus construes non-membership when it denies treatment as a member of the community of values; for instance, when it aims merely to incapacitate the offender. This is so because criminal law would treat individuals as being outside of the community, and thus as not entitled to claim to be treated according to the set of values with which the community would treat their members. Merely treating individuals as objects to be incapacitated denies treating them as autonomous individuals, as individuals who can reflect on their choices and have a particular responsibility for their character, and thus as members of the community⁴⁸⁵.

What Duff says here needs to be qualified. Certainly, when criminal law treats offenders as a danger that needs to be prevented, they are not considered bearers of rights; non-members cannot claim the value rights express. However, when criminal law only seeks to deter, it need not define the individual as a non-member. True, when criminal law treats individuals as members of the community, it aims to communicate and engage with them as citizens, but this may also be when it aims to deter them. There is a reason why Duff emphasises communication. As it was seen, Duff develops his theory by understanding criminal law as a process of communication between individuals who are considered

⁴⁸⁴ Duff, *Punishment* (n 478) 76.

⁴⁸⁵ *Ibid* n 78.

agents and who can guide their conduct by recognising reasons⁴⁸⁶. Yet, treatment as a non-member does not mean treating X as someone who lies outside of the community. Treating someone as a non-member would entail a complete absence of the meanings shared by the political community: it would mean treating him as a force of nature. It appears, then, that treating someone as a responsible individual agent is not an empty designation, for it requires that criminal law treats them as a participant in the WE's practices. This should be stressed, for there are ample, less humane alternatives available to the WE, which could be pursued if the individual is not considered an agent⁴⁸⁷. So long as this is not the case, even if deterred they remain treated as members⁴⁸⁸. As a result, abstract membership is compatible with imprisoning the deterred, if that is premised on treating him according to the values of the political community.

Abstract citizenship can be seen as a concept that aims to make explicit the moral values shared by the community, because these meanings are part of the practice that contributes to the social construction of citizenship in terms of how the subject treats the subjected. Abstract citizenship does not refer to any set of specific rights or social circumstances of citizens. Citizenship is abstract in the sense that it considers the general faculties of sensibility to reasons as a basis for defining citizenship, without making a further argument concerning the social conditions that make it a real capacity for action. In this regard, abstract citizenship mirrors the ideal of formal equality⁴⁸⁹, the weak sense of agency underlying criminal law I explored in Chapter 4. True, Duff in no way ignores material circumstances⁴⁹⁰, but they are better addressed by specifying the conditions that enable citizens as individual agents. Ramsay has specified these conditions by connecting them to

⁴⁸⁶ Ibid 79-81.

⁴⁸⁷ See Levy, 'Cultural membership' (n 407) 153. Also, suggesting the permissibility of treatment as an enemy, see Carlos Gómez-Jara Díez, 'Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants' (2008) 11 *New Criminal Law Review: An International and Interdisciplinary Journal* 529-562.

⁴⁸⁸ Perhaps this may not be the case when the individual is killed, as in countries where the death penalty is applied systematically.

⁴⁸⁹ Peter Ramsay, 'Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) *Modern Law Review* 45.

⁴⁹⁰ Duff, *Answering for Crime* (n 478) 191-193.

the historical emergence of the welfare state and thus to T. H. Marshall's famous classification of rights into civil, political, and social⁴⁹¹.

For Ramsay, civil, political and social rights not only point to the conditions of agency, but also to what space there is for justified criminalisation. To this extent, Ramsay's view can be seen as extending both Lacey's insights into justified criminalisation and Duff's conception of public wrongs, insofar as he further fleshes out citizenship in material terms or specific domains of rights. For Ramsay, these rights form the environment in which criminal law develops⁴⁹², and their breach defines the scope of wrongs committed against the political community⁴⁹³. It appears that criminal law shapes citizenship, both in terms of the reasons for criminalisation grounded on the protection of citizenship, and the kind of treatment that an offender is supposed to receive. The point in using Lacey, Duff and Ramsay, however, concerns the connection between the treatment given by criminal laws and the meanings shared by the political community. That is, that possession of these rights implies the abstract condition under which citizens become agents and the material circumstances under which members are enabled to participate and deliberate as subjects. Both dimensions help to explicate how criminal law shapes citizenship by specifying how it treats members.

5.2. Integrating Citizens in Theory

This section draws a broader connection between citizenship and integration, illustrating how criminal law takes part in it. In the previous section, it was argued that criminal law shapes membership both abstractly and materially, in terms of the kind of treatment it renders to citizens. In other words, membership of the political community means that individuals would need to be treated by criminal law both as abstract citizens, addressed as agents, and also as material citizens, addressed in terms of the possession of political, social and civil rights. It becomes necessary, it seems, to clarify how to understand the status of the prisoner within this framework. Above it was stated that even in prison and

⁴⁹¹ Ramsay, 'Responsible Subject' (n 489) 40.

⁴⁹² Ibid 40. This environment has changed, according to Ramsay, transitioning from the welfare state to the neoliberal states in which criminal law construes citizenship in terms of vulnerable agents. See Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012).

⁴⁹³ Ramsay, 'Responsible Subject' (n 489) 40-41.

without liberty, the individual can still be considered a member. Put differently, the fact that individuals have their rights to liberty - in particular, freedom of movement rights - suspended, does not mean they are not considered citizens in the broad sense it has been understood in this chapter.

It seems that only on a narrow conception of citizenship are prisoners excluded from the political community. However, as shown above, if imprisonment meant the loss of citizenship in the broad sense, this would mean criminal law does not address individuals as sensitive to reasons and worthy of respect. Yet, the fact there are constraints on how to treat prisoners suggests that they are regarded at least as members. This implies that it would be imprecise to say prisoners have lost completely the condition of citizenship, even if this entails having suspended certain political and civil rights. Surely, not all political and civil rights are suspended: freedom of expression⁴⁹⁴, property rights and the right to life are, among others⁴⁹⁵, rights that they can still claim. Because prisoners have suspended many, yet not all of their rights, this status can be designated as conditional citizenship⁴⁹⁶. In conditional citizenship, the values that comprise the WE and the treatment criminal law supposedly provides reflect a broader connection between the subjected and the subject. It reflects that the offender is still a member.

Conditional membership provides a way to begin disclosing the need for integration into the WE, as shall be seen. Criminal law treats an agent not as a material citizen if it does not recognise any of their entitlements to participate in public and private domains of the political community; namely, any civil, political or social rights. On the contrary, if criminal law treats an agent as a material citizen, then it reflects that individuals are being

⁴⁹⁴ Freedom of expression is partly a civil, yet also a political right, and is extended to prisoners; see Eric Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998' (2009) *Indiana Law Journal* 852. For the political nature of freedom of expression, see Habermas, *Fact and Norms* (n 217) Chapter 3-4; Joshua Cohen, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 82-84; Emiliios Christodoulidis, *Law and Reflexive Politics* (Springer 1998) 6-7; Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton University Press 2007) Chapter 2; also Seana Valentine Shiffrin, *Speech Matters: on Lying, Morality, and the Law* (Princeton University Press 2014) 110.

⁴⁹⁵ True, the quality of access is hardly the same as for citizens, yet this does not prove the argument false. See Vivien Stern, 'Prisoners as Citizens: a Comparative View' (2002) 49 *Probation Journal* 130-139.

⁴⁹⁶ Ramsay names this a condition of suspended citizenship. See Peter Ramsay, 'Voters should not be in prison!: The rights of prisoners in a democracy' (2013) 16 *Critical Review of International Social and Political Philosophy* 421-438.

integrated, for integration means at least to be entitled to treatment as a material citizen. Not surprisingly, this understanding is related to crime rates. To the extent that an important area of crime can be explained by insufficient social and civil integration, crime, while representing an individual failure, also more importantly signals a political failure. If responsibility for crime is at least in part political, then the political community, instead of criminalising citizens, should make equally available opportunities for them to become active members, to improve their social and private conditions so they can participate freely and as equals in the public domain⁴⁹⁷. This would strengthen the WE and reduce crime. It is in line with this interpretation that Ramsay's view on the abolition of punishment should be understood⁴⁹⁸. Whilst this is certainly not the point of view of Lacey⁴⁹⁹ and Duff, it seems they nonetheless would agree with the claim that the better members are integrated into society, the less reasons there will be for crime and thus punishment. Ramsay designates his view democratic retributivism, for it aims to realise the authority of rights by punishing those who have denied, through crime, their existence⁵⁰⁰. Ramsay seems to consider the justification of criminal law symmetrical to the degree that social conditions realise both abstract citizenship and material citizenship⁵⁰¹. It follows that all citizens should value political equality⁵⁰², for realising political equality means being better integrated into the dimensions of citizenship⁵⁰³. Therefore, the stronger the political community, the better integrated its members, and the need for punishment lessens. Accordingly, the less integrated members, then the greater risk of increased crime, and thus social fragmentation and conflict.

⁴⁹⁷ For a discussion of different models of criminal justice systems as more inclusionary or more exclusionary, see Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (CUP 2008).

⁴⁹⁸ Perhaps Lacey and Duff would not agree here, for Ramsay adopts a predictive point of view, aligned with the social-scientific point of view he advocates. See Ramsay, *The Insecurity State* (n 492) 7.

⁴⁹⁹ Lacey certainly agrees with criminal law being socially "useful".

⁵⁰⁰ Ramsay adopts partially the views of Alan Brudner on legal retributivism; see Peter Ramsay, 'The Dialogic Community at Dusk' (2014) 1 *Critical Analysis of Law*, 318.

⁵⁰¹ Ramsay, 'Dialogic community' (n 500) 326.

⁵⁰² Peter Ramsay, 'A Democratic Theory of Imprisonment', in Albert Dzur et al (eds.), *Democratic Theory and Mass Incarceration* (OUP 2016) 89. Here the key divergence between Brudner and Ramsay appears, for while for Brudner, the key shared interest that grounds the sovereign is the institutional embodiment of self-reflective agency or freedom, for Ramsay it is political equality.

⁵⁰³ Ramsay, 'A Democratic Theory' (n 502) 96.

Now, one may contest whether there is reason to believe that there is a risk of social fragmentation and conflict. However, it suffices to point to considerable research evidencing how criminal law contributes to excluding people from a variety of domains, social, civil and political⁵⁰⁴. If these domains are part of the conditions for social, civil and political rights, then mass incarceration - because it is massive – assists in undermining the political community⁵⁰⁵. Something similar occurs with immigrants, who can also be seen as enjoying a form of conditional citizenship. Part of what is problematic about the emergence of new criminal law offences that target immigrants is that they make integration difficult, if not impossible⁵⁰⁶. Lucia Zedner has examined the new immigration offences⁵⁰⁷, their exclusionary ambition and almost xenophobic tone⁵⁰⁸, whereby integration of immigrants is rendered unattainable⁵⁰⁹. Now, as suggested above, if integrating immigrants and socially deprived citizens can contribute to strengthening the political community, then for strategic reasons a solution would be to provide the kind of goods and services that make non-integration less likely. Surely, improving social, health, educational and police services would improve their social opportunities and thus diminish

⁵⁰⁴ Timothy Black evidences in the USA that one third of released prisoners go back to jail in six months; within a year, this increases to half. See Timothy Black, *When a Heart Turns Rock Solid* (Pantheon Books 2009) 168. Yet the number increases to two thirds within three years; see Cheryl Lero Jonson, 'The Effects of Imprisonment' in Francis Cullen and Pamela Wilcox (eds.), *Oxford Handbook of Criminological Theory* (OUP 2012) 672-686; for an overview of a compelling sociological explanation of this phenomenon, see Loic Wacquant, 'Marginality, Ethnicity, and Penalty: A Bourdieusian Perspective on Criminalization' in Duff et al (eds.), *Criminalisation: The Political Morality of Criminal Law* (OUP 2014) 270-290.

⁵⁰⁵ For understanding the political community in USA as emphasising the passive conception of citizenship, see Turner, 'Outline of' (n 249) 208-209; also Brunella Casalini, 'American Citizenship: Between Past and Present' in Richard Bellamy et al (eds.), *Lineages of European Citizenship: Rights, Belonging and Participation in Eleven Nation-States* (Routledge 2004) 186-206; for a contrast with the Greek collective conception of citizenship, see Martin Ostwald, 'Shares and Rights: "Citizenship" Greek Style and American Style' in Eric Robinson (ed.), *Greek Democracy: Readings and Sources* (Blackwell 2004) 159-171; more generally, Robert Bellah et al, *Habits of the Heart: Individualism and Commitment in American Life* (California University of Press 1985); for a historical comparison between the Roman legal understanding of citizenship and the Greek political conception of citizenship, see Ellen Meiksins Wood, *Citizens to Lords: A Social History of Western Political Thought From Antiquity to the Middle Ages* (Verso 2008).

⁵⁰⁶ On understanding immigration offences in terms of punishing social status, see Alessandro Spina, 'Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law' (2014) 8 *Criminal law and Philosophy* 635-657.

⁵⁰⁷ Lucia Zedner, 'Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment' in Katja Aas and Mary Bosworth (eds.) *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (OUP 2013) 46.

⁵⁰⁸ Zedner, 'Is the Criminal' (n 507) 47.

⁵⁰⁹ In arguing against naturalisation for the right to vote, see Claudio Lopez-Guerra, *Democracy and Disfranchisement: The Morality of Electoral Exclusions* (OUP 2014) 87.

social discontent, thus preventing fragmentation⁵¹⁰. Suggesting the sufficiency of social and economic integration leads us to wonder whether it has been overlooked something important; that is, the political components of citizenship. After all, if providing sufficient goods and services prevents social conflict, then active citizenship seems inconsequential. However, there is a fundamental problem in this strategy, for it overlooks the many levels at which passive and active citizenship are mutually dependent.

In historical terms⁵¹¹, passive and active citizenship emerged and have grown together, so that if they have been mutually dependent, there is little reason to consider that today citizens can have one but not the other. Diminishing passive citizenship seems to diminish active citizenship, and the absence of the latter may lead to an absence of the former. As Bellamy stresses with regard to immigrant integration, immigrants' interests are at stake if they are denied space as active citizens. In effect, political participation in the political community and the benefits of living in a state that affords a possibly better future are mutually dependent. What make countries appealing for immigrants, Bellamy suggests, are their living conditions; yet, these are also political achievements⁵¹². Seen in this way, integration appears in a different light. Surely, it is in immigrants' best interests to be integrated into the political community, but it is also in the best interests of citizens themselves. Active citizenship is as central as passive citizenship, for the benefits which adhere to the latter were obtained during the historical course of a progressive strengthening of active citizenship⁵¹³. Passive citizenship can neither emerge nor be sustained without a strong active citizenship.

This examination of prisoners and immigrants makes explicit the need for integration in general. Certainly, the same conditions that lay the groundwork for diminishing crime rates

⁵¹⁰ Lacey argues, for instance, that countries that have invested more in welfare provisions have closer social bonds and less severe penal regimes, Lacey, *The Prisoners' Dilemma* (n 496) 164-165.

⁵¹¹ On the history of this distinction, see J. G. A. Pocock, 'The Ideal of Citizenship Since Classical Times' in Richard Bellamy and Madeleine Kennedy-Macfoy (eds.), *Citizenship: Critical Concepts in Political Science, Volume I, What is Citizenship? Theories of Citizenship: Classic and Contemporary Debates* (Routledge 2014) 67-85; also, William Sewell, 'Le Citoyen/La Citoyenne Activity, Passivity and Revolutionary Conception of Citizenship' in Richard Bellamy and Madeleine Kennedy-Macfoy (eds.), *Citizenship: Critical Concepts in Political Science, Volume I, What is Citizenship? Theories of Citizenship: Classic and Contemporary Debates* (Routledge 2014) 93-115.

⁵¹² Bellamy, *Citizenship* (n 466) 11.

⁵¹³ See Meiksins, *Citizens to Lords* (n 505) Chapter 4.

and preventing immigrant social fragmentation are those which make active citizenship stronger. These are the conditions that have made historically possible the kind of society citizens need for *having meaning*. In other words, the connection between citizens being better integrated, with the rights and social conditions which make them members of the political community, and social fragmentation is premised on members being integrated into the practices and values of the constitutional order⁵¹⁴. Undoubtedly, it is because they are expected to share those values and practices that there is the belief that the more integration, the less crime and social fragmentation. Seeing weak a-legality in this way, strengthens the case for the WE to seek greater integration⁵¹⁵, and the same applies to prisoners. The need for integration makes visible another kind of relationship between the WE's idem-identity and ipse-identity. It has been argued earlier that the WE relies on the social practices of its participants and that these are necessary for them *having meaning*, but now it also appears that guaranteeing citizens' living standards is also at stake. The WE needs citizens not only to master its social practices, but more importantly to engage robustly in shaping its ipse-identity.

Now, it may be observed the dependence between active and passive citizenship, in terms of how attaining concrete standards of living relies on integration into the WE. The WE requires robust democratic participation, because what participants value and believe worthy of respect depends on the political practice of strong active citizenship. Standards of living are conceptualised in light of particular social practices that are understood from an internal perspective, for it is the participant's point of view that continuously reconstructs the institutional facts they inhabit⁵¹⁶. Participants need to understand and identify with their social practices in order to fulfil their role as active citizens⁵¹⁷. As highlighted above, the political community is also a moral community embedded in particular cultural meanings; without endorsing these, there is little reason to believe the

⁵¹⁴ Lacey shows that countries that devote social resources to facilitate social and political integration have more moderate penal legislation, see Lacey, *The Prisoners' Dilemma* (n 497) 79-82.

⁵¹⁵ Then, it seems, the more reason for a responsive CD.

⁵¹⁶ It is not coincidental that research concerning immigrant integration concludes that the key elements of better integration for immigrants comprises what would constitute integration for the participants themselves. Among these elements are employment, housing, health and education; see Alastair Ager and Alison Strang, 'Understanding Integration: A Conceptual Framework' (2008) 21 *Journal of Refugee Studies* 166-191.

⁵¹⁷ For the connection between engaged citizenship and adopting a participant's perspective, see Aletta Norval, *Aversive Democracy: Inheritance and Originality in the Democratic Tradition* (CUP 2007).

participant might undertake such an active role. Understanding integration as endorsing the meanings and social practices of the WE makes democracy workable. Of course, this includes integration into the idem-identity of the constitutional order, which requires, at least, having the capacities to be regarded as equal. For this would involve, at least, having the capacities necessary to develop as a participant in the political community, and thus, to integrate into the WE's ipse-identity.

Citizenship, both abstract and material, shows the need to integrate citizens, prisoners and immigrants into the political community, to obtain the social practices that give meaning to members' lives and their standards of living. This, in turn, comes directly into tension with the claims of strong a-legality, which typically seeks to fragment the political community. They do not seek to attain political equality, understood as an individual right to participate in the active citizenship of the WE⁵¹⁸. Surely, they might be *individually* politically equal, yet fail to be *collectively* equal, which is what they seek to attain: collective political equality. It seems the WE cannot have active citizenship without the reproduction/transformation of the practices members rely on for giving meaning to what they do. And the WE cannot defer its criminal law, for criminal law integrates by shaping abstract and material citizenship, thus contributing to enable the idem-identity and ipse-identity of the WE. It appears that indigenous peoples have an important interest at stake in aiming to prevent their practices being undermined by another WE's criminal law, and thus to access their own penal practices. In other words, as a condition for indigenous peoples' self-determination they need to be independent from another WE's criminal law, for this is necessary to reproduce/transform their idem-identity and ipse-identity. Insofar as they have a practical interest in being self-determined, they have an interest in having an independent penal practice.

5.3. Integrating Citizens in Practice

The cases this section presents aim to elucidate the importance of having an independent penal practice as a necessary condition for indigenous peoples' self-determination. More specifically, the cases illustrate how a WE treats minorities when they seek to draw their own boundaries, and thus, they show examples of how penal practices, and therefore

⁵¹⁸ This is the typical understanding underlying active citizenship; see Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press) 9, 20.

criminal law, shapes citizenship when two WE interact. This is important to bear in mind, given that neither of these cases, especially the first, is a case that concerns directly criminal law. They relate to criminal law insofar as they demonstrate how minorities engage in drawing the boundaries of their communities by way of their penal practices. The first case, *Hoffer*, shows how a community defines its boundaries through their penal practices, and what would happen in the case of interference in this domain by another WE, which sets its own boundaries. The second, *Thomas*, shows how the WE defines the boundaries of a minority through criminal law, and how in doing so it depoliticises both what the WE is doing and the claims of indigenous peoples. In order to appreciate criminal law's contribution in these cases, it is necessary to adopt a broad understanding of criminal law in terms of penal practices⁵¹⁹ under the lens of the modified morphogenetic approach. The approach, however, might fail to convince a sceptic that the cases shed light on criminal law. Yet, even if the sceptic remains unconvinced, this does not disprove that the examination of penal practices concerns much of what would standardly be designated as criminal law. That is, even if the rules of the minority do not appear as "criminal law", their penal practices can be characterised in more or less the same ways as it would be the basic elements of state criminal law. This is because both contribute to shaping membership.

The above brings out an important implication, which follows from adopting a broader understanding of criminal law. A broader point of view, focused on penal practices, makes it possible to identify when the state interferes with what would be another WE's criminal law, and therefore, with its identity. In contrast, a narrower point of view would fail to identify what would fulfil the same function as state criminal law within a minority. Thus, it would fail in identifying interferences with their penal practices, and thus how through them they define their citizenship. The narrow view inevitably fails because transformation/reproduction is understood from the point of view of the larger WE, which has judicial overview for the minority's practices. This seems natural, for courts cannot

⁵¹⁹ I follow here, in broad terms, Emile Durkheim's thoughts concerning the role of criminal law in terms of the "penal practices" of a community and how they foster social cohesion, see Emile Durkheim, *The Division of Labour in Society* (Second Edition, Palgrave MacMillan 2013). I said in "broad terms" because my thesis concerning social practices is wider than Durkheim's. For Durkheim, penal practices fulfil a role for the cohesion of the moral feelings of the community, whereas in this thesis they are understood as social practices that concern with the reproduction of meaning. In the following I take the position that all criminal law is a form of penal practice, but that not all penal practices take the form of criminal law. In other words, there can be a penal practice without having the property of being "legal".

avoid understandings based on their own meanings. Thus, the cases illuminates why there can be no self-determination if the relationship between the WE and indigenous peoples is understood in terms of constitutional dialogue, for apparently trivial changes might have massive consequences for indigenous peoples' practices. To this extent, the cases elucidate the broader implications of indigenous peoples' dependence on a WE that seeks to transform/reproduce their constitutional identity.

5.3.1 Lakeside Colony of Hutterian Brethren et al v. Hofer et al

Broadly considered, in the Canadian Supreme Court case, *Lakeside Colony of Hutterian Brethren et al. v. Hofer et al.*, the Court recognised the Hutterites, as a religious minority group, as having a weak form of self-determination. The facts of the case were the following: as a member of the Hutterites community, Hofer decided to sell what was regarded as a part of the collectively-owned property of the group. This was considered as an important wrongdoing committed against the community. Initially, they tried to punish Hofer in the particular Hutterite way; sentencing him to separation from the community for a short period of time. However, Hofer did not accept his punishment and was expelled from the community. As a consequence, he was considered as having lost any proprietary interest in the land. Hofer sued the Hutterites, alleging the expulsion was illegal⁵²⁰. In examining the Court's argumentation, Denise Reaume reveals that the Hutterites combined the requirements to be part of the community with the legal requirements of Canadian contract law⁵²¹. Members entered by consenting to abide by the "constitution" of the community. Thus, Hofer entered the community by consent, and had access to the communally-owned property by accepting the rules of entry. When Hofer and others were expelled, the Supreme Court agreed with the community and thus considered they had no more interests in the property because there was a justified breach of a contractual obligation⁵²².

⁵²⁰ Denise Reaume, 'The Legal Enforcement of Social Norms: Techniques and Principles' in Alan Cairns et al (eds.) *Citizenship, Diversity, and Pluralism: Canadian and Comparative Perspectives* (McGill-Queen's University Press 1999) 181.

⁵²¹ Reaume, 'The Legal enforcement' (n 520) 180.

⁵²² Ibid 180.

Reaume agrees with the Court's ruling that Hofer accepted the terms of the contract, and thus, the consequences of non-compliance⁵²³. By employing a social contract theory, Reaume adopts the perspective of the individual as the basic unit of meaning. However, while initially the case seems nothing out of the ordinary, it provides an entry into how membership is shaped by penal practices. Naturally, in order to register this, it is necessary to adopt a different approach. The modified morphogenetic approach allows for framing the case in terms of a mutual relationship between criminal law and the organization of political power (the constitutional order), and it identifies the contribution of the former to the boundaries of the latter. It approaches membership of Hutterites as a process of social construction in terms of boundary setting. Preliminarily, upon this framework, it appears that the Hutterites' penal practices shaped their membership, for by evaluating Hofer's conduct and attaching certain consequences to it, they reproduced/transformed their cultural meanings and social structures for subsequent cycles. As a result, they managed to preserve their idem-identity and ipse-identity.

Let us examine more closely this alternative explanation of the case. In *Hofer*, there is a property owned by a collective under the condition that members endorse its "constitution". Once one is considered a member, they can access the land, obtain material benefits from harvesting and undertake other activities, which allow them to achieve a spiritual completeness by engaging in traditions shared by other members. The Hutterites are a very close community: all its members share, more or less, the same fundamental values and together engage in collective practices that give meaning to what they do as a community. Thus, the collective has an idem-identity and ipse-identity. Now the plaintiff appears, intending to sell what he deems his part of the property without agreement from the community. From the point of view of the Canadian WE, the intention to sell a minor part of a very fertile land is a trivial matter. Certainly, it amounts to an event occurring within the private sphere, a matter concerning individual rights and economic benefits. However, it is not trivial for the community. According to them, a serious offence is committed, for significantly, Hofer intended to reset the boundaries of the community.

From the point of view of the community, the transgressor is doing two things. First, he is transgressing the terms of the collective idem-identity of the community, an ingredient of

⁵²³ Ibid 184.

which are the expectations of what it means for members to live together. Community members' property rights are seen as permissions for engaging in sacred collective work, and thus define what they expect and value in the actions of others when they labour on the land together. The offender thus challenges the meaning of the group's fundamental values, that the land should be harvested collectively, and the meanings that follow from collective labour. Second, he also transgresses the terms of the collective ipse-identity. By seeking to sell his part of the property without agreement from the community, the offender arrogates the position of the community's WE; that is, the group's position as the legitimate subject entitled to organise collective social life. This remains true regardless of the offender's intention. Certainly, even if he did not intentionally aim to negate the WE's authority, he nevertheless did so in trying to divide its collective property.

There are many elements at play here that together resemble a particular penal practice⁵²⁴. First, there is a moral, cultural and political community, social practices and meanings that the group seek to make available for subsequent cycles. Second, there are the basic terms of citizenship, in both their active and passive dimensions: the duties and rights to participate and deliberate collectively and the benefits of the collective endeavour, and thus, something close to a constitutional order. But what kind of penal practice might be at play here? Perhaps the group has a different penal practice, one without prisons⁵²⁵. Third, the offender arrogates the position of the constitutional WE. Fourth, the rules that handle

⁵²⁴ Paul Roberts would of course contest whether this is criminal law, since for him, if there is no centralised governmental authority, then there is little reason to call these rules legal, thus Hutterites would not only lack a criminal law, but hardly have something like it. Yet, as Fernanda Pirie has contested, it should not be pushed too far the demand for an existing centralised governmental authority as a condition for characterising rules and practices as legal, and thus, as these practices, as penal practices similar to state criminal law. The position of the thesis would be a middle ground between Roberts and Pirie, in terms of the following four propositions: first, centralisation can be decentralised without losing the idea of unity. Markets and sub-state autonomies show centralised political power can be decentralised. Second, this does not imply that in a context of governmental centralisation, the law needs to be characterised in the same way as in a non-centralised context. Third, the existence of a form of political organisation suggests law is connected with domination, yet contrary to Pirie, the law cannot be understood independently of social practices. Fourth, domination need not deny the connection between law and cultural meanings, and thus, it need not deny a moral interpretation of those relations of domination. It appears that even if Roberts is right in that this is not criminal law, it would still be the case that it fulfils similar functions for the minority and thus share with the law the fact that both are penal practices. See Simon Roberts, 'After Government?: On Representing Law Without the State' (2005) 68 *The Modern Law Review* 1-24; critiquing the centralisation thesis, see Fernanda Pirie, 'Law before Government: Ideology and Aspiration' (2010) 30 *Oxford Journal of Legal Studies* 207-228.

⁵²⁵ One should note that current criminal law incorporates alternatives to imprisonment, like paying a fee or community services, so this would not be as controversial as it first appears.

the conflict evaluate the meaning of the offender's actions, and by implication they might remove the initial non-conditional status of the offender. It seems that there is a critical function at work. Indeed, what the individual has done is evaluated with reference to members' passive and active citizenship, which may result in a redefinition of the status of the offender. Fifth, this form of critical function is triggered by a wrongdoing committed against the political community. All these elements in this penal practice are also typical of state criminal law, which - even if insufficient to convince a sceptic that this is criminal law- should at least be sufficient to convince them that this is a penal practice as state criminal law is and, thus, that it can provide information about the shared features both have in common. Fundamentally, both responses shape their membership.

The Hutterites' penal practice shape their membership in the way it defines conditional citizenship and delineates how offenders are to be treated. In the present case, the community's rules prescribe that the offender be sanctioned by having to eat and praise separately from the community for a certain time. By accepting this "punishment", the individual would be reconciled with the community; he would regain his status as a citizen, and be treated accordingly. Significantly, punishment is voluntary, for the offender need not accept it. Yet, neither conditional citizenship nor expulsion from the community are voluntary: these rules are coercive⁵²⁶. Indeed, in *Hofer* the offender did not accept the "offer"; he was subsequently expelled from the community and accordingly lost his proprietary interest in the land. From Hofer's perspective, it is possible to interpret what he did in rejecting "punishment" as refusing reconciliation with the community, but also as denying the meanings upheld by the group, and denying his membership. It appears there is meaning-responsiveness, for to engage in this practice the member needs to master its meanings; otherwise it would not be possible to understand the practice, for instance, that by accepting the "offer", the offender is assigned a status of conditional membership. Moreover, not only does this procedure involve the meanings of the group, but engaging in

⁵²⁶ It is noteworthy that both Hutterites and Canadians regard the consequences of punishment as "coercive": it is the group that decides whether and in what conditions a member is characterised as a conditional citizen, and what kind of treatment will be given to members who fall into that condition. "Punishment", for the Hutterites, puts members in a situation of conditional membership, which involves being divested of certain possibilities for action and being prescribed to engage in others. This is certainly different from imprisonment in Canadian jails. However, coercion need not entail coercive enforcement. Thus, if prisoners go voluntarily to prison, this would not make imprisonment any less a part of criminal law. On distinguishing coercion from coercive enforcement, see Robert Hughes, 'Law and Coercion' (2013) 8 *Philosophical Compass* 231-240.

it also advances the community's ends. Surely, by expelling the member, the WE assures that in subsequent cycles, decisions about property are to be collective and deliberative; that is, that transformations of idem-identity should be effected by the WE's ipse-identity. Thus, there is also axiological-responsiveness.

Now, suppose a future case involving the Hutterites in which the Canadian Supreme Court reverses its position and considers that property cannot be collective, and thus, that any member can sell part of the land as an individual owner. It seems that this would not entail considerable transformation in the community's practices, for it would just be a "trivial" change in the way property is understood. One should note, however, how this would bear on the Hutterites' penal practice and thus on how they draw their boundaries. It appears that the Hutterites' penal practice has lost its capacity for construing membership. Certainly, countering individual arrogations of the WE in matters of collective property ownership would prove ineffective, for this would no longer be regarded as a crime. Their rules can neither transform the meaning crime conveys, nor reproduce the meanings outside of crime for subsequent cycles. Now, if the individual does not accept the "offer", he can still unilaterally sell and fragment the community's property. The community becomes externally reorganised, for non-compliance with the community is redefined as compliance. It appears to members that if, in subsequent cycles, they individually aim to sell the property, they will be able to do so without any institutional consequences.

This penal practice might still offer some guidance for subsequent cycles, but as part of the CS, relying on the values and individual attitudes of its members. Certainly, collective agreement for fragmenting property and individualising labour is no more necessary for transforming meaning; meaning can change unilaterally and individually. Perhaps this can lead to understanding property solely as individually-owned, thus undermining the religious and collective meaning that harvesting had before the ruling. Perhaps the community would turn secular and thus either be assimilated into the rest of the Canadian population or transformed into a new community. This would be a revolution for the community, a fundamental transformation of its idem-identity and ipse-identity, their social practices and meanings. All of these transformations would be consequences of the Canadian WE's interference in the Hutterites' response to crime. As Chapter 4 argued, the social world is collectively fragile, for it depends on participants' intentions, attitudes and dispositions to engage in certain social practices to enable *having meaning*. This is what

penal practices aim to counter in cases of crime, and what the WE would be deprived of, if another WE were to interfere with what appears to be a trivial matter. A similar revolution might result if Canadians were unable to apply their criminal law. Surely, if property were no longer protected by criminal law, it would still be protected by other legal SS, but this would still bring changes in the idem-identity of the Canadian WE. If it became non-criminal to take property by force and without consent, this would redefine this practice and thus the meanings criminal law previously played a part in reproducing/transforming. It would also redefine the ipse-identity of the Canadian WE, and thus endanger both active and passive citizenship.

Finally, in consideration of how things would be if the case were decided differently, it can be observed better how constitutional dialogue unfolds. Consider the case as it was actually decided. To some extent, the Canadian legal system allowed for connecting two different sets of practices of different groups, creating the appearance of agreement between them. Furthermore, this did not necessarily contradict a constitutional dialogue premised on mutual recognition, consent and cultural continuity, as long as the parties relied on the language of the constitutional order guided by these new conventions. However, first, there was no agreement, just the appearance of dialogue. This appearance was created by the fact that the community's decision was compatible with Canadian property law; that is, with how the Canadian legal system understood valuable options. Yet whereas for the Hutterites, an individual not accepting the offer of punishment involved setting boundaries by expelling a member from the community, for the Canadian legal system there was just a breach of the contractual rules the individual had consented to. That is, whilst for the Hutterites, the issue was fundamentally public because it implicated their citizenship, for Canadians, it was nothing more than a private dispute over the breach of a contractual obligation⁵²⁷. Second, when the Hutterites engaged in the legal dispute, they did so because they had no other choice: having been placed inside the Canadian WE, they were compelled to participate. If this is constitutional dialogue, then it seems quite shallow in intercultural terms, for both communities are *doing* completely different things. Not only did the meanings they reproduced differ significantly, but so did how they understood their interaction.

⁵²⁷ Reaume, 'The Legal Enforcement' (n 520) 181.

It appears that the Hutterites, as with any other political community, require an independent penal practice in order to be able to define the identity of their constitutional order, given its contribution to idem-identity and ipse-identity. The WE cannot renounce to their penal practices, for in so doing, it would renounce both drawing its boundaries and construing citizenship through it. The WE needs an independent penal practice; independent, that is, from another WE.

5.3.2 Thomas v. Norris

5.3.2.1 Citizenship and Indigenous Peoples' Rights

Now, let us consider a case in which the Canadian Supreme Court was not in agreement with the minority and how - by setting the boundaries of the WE -neither the indigenous peoples' claims to self-determination, nor the political character of the WE's denial, were registered. This occurred in the Canadian Supreme Court case, *Thomas v. Norris*⁵²⁸. In this case, Thomas, a would-be member of the Coast Salish indigenous nation, sued members of the community for battery, assault and false imprisonment. The facts considered by the Court were the following: the Salish community decided to make Thomas a member motivated by Thomas's wife, whose aim was to resolve some personal problems they had as a couple⁵²⁹. The Salish required that certain, specific conditions be met in order to gain recognition as a member⁵³⁰. Basically, the potential member would need to undertake practices including fasting and flagellation. Against his will, Thomas was taken from his home at night, flagellated and forced to fast. The rite was supposed to take a few hours, yet Thomas started to feel ill and was driven to the hospital to check his condition. His health was not in danger and he was able to leave the hospital shortly thereafter.

⁵²⁸ [1992] 2 C.N.L.R. 139 (B.C.S.C.)

⁵²⁹ The Salish held also that they were aiming at Thomas' well-being. Notably, some believe that integration is so important that *not being integrated* is cast in terms of harm; see Corey Brettschneider, 'Equality as a Basis for Religious Toleration: A Response to Leiter' (2016) 10 *Criminal Law and Philosophy* 542-543; also Brian Leiter, 'Reply to Five Critics of Why Tolerate Religion?' (2016) 10 *Criminal Law and Philosophy* 555, drawing their conclusion in light of *Wisconsin v Yoder*. So, it seems reasonable to believe that the community held the belief that through the initiation, they would spare the would-be member from harm, just as Leiter and Brettschneider would if Amish children were integrated into the USA's social practices.

⁵³⁰ Not unlike western rites of naturalisation for immigrants. For a comparative perspective on the practices of naturalisation in Europe, see Rainer Baubock et al (eds.), *Citizenship Policies in the New Europe* (Expanded and Updated Edition, Amsterdam University Press 2009).

Following these events, Thomas sued the members of the tribe, which replied, mainly, that the rite was within the scope of rights under Section 35 of the Constitution Act, and thus protected from state interference. In principle, indigenous peoples rights under Section 35 are exempted from Section 1 of the Constitution Act⁵³¹, which grants the Canadian state the possibility to subject rights to limits by laws that "... can be demonstrably justified in a free and democratic society."⁵³² However, the Supreme Court, relying on its previous ruling, *R. v Sparrow*⁵³³, considered that indigenous peoples rights were not absolute⁵³⁴. Accordingly, Canadian law can establish legitimate limitations. Reaume suggests the standard the Court took for limiting those rights that "...only those practices consistent with laws of general application can attract the protection of Section 35."⁵³⁵ In other words, notwithstanding that indigenous peoples rights are exempted from Section 1, they are nonetheless subjected to the same kind of limits any right would be; namely, limits that all Canadians would accept as part of a free and democratic society.

Close examination of the Court's reasoning is relevant, for it elucidates how the states which indigenous peoples find themselves in typically deny their self-determination, without acknowledging this as a political event. This illustrates, more broadly, the asymmetric interaction between two WE, when there is no collective political equality between them. Certainly, relations between indigenous peoples and states appear in stark contrast with the relations between EU member states. Whereas in the latter, the relationship is one in which there is, more or less, collective political equality between the WEs, in the latter there is none. The first important issue to bear in mind is how Canadian institutions frame the case. The task under Section 1 requires, first, identifying a breach of rights, and second, whether that breach is justifiable or not, yet the first stage is decisive, for it frames both alternatives and consequences.

⁵³¹ Patrick Monahan, *Constitutional Law* (second edition, Irwin Law 2000) 464.

⁵³² Canadian Charter of Rights, Constitution Act 1982 Part I.

⁵³³ [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160.

⁵³⁴ In truth, the Court did not rely on *Sparrow* as a precedent for this case, yet did employ something close to the Sparrow test in order to limit, in this case, indigenous peoples rights. Thomas Isaac, 'Individual Versus Collective Rights: Aboriginal People and the Significance of Thomas v. Norris', (1992) 21 *Manitoba Law Journal* 625. On the conditions set by the Sparrow test, see Monahan, *Constitutional Law* (n 529) 464-469.

⁵³⁵ Reaume, 'The Legal Enforcement' (n 520) 192.

The Court starts by considering all affected parties as Canadians citizens, including indigenous peoples. It thus frames the case explicitly as one involving membership. Indeed, Section 1 of the Canadian Charter takes as basic two sets of considerations: the individual rights of Canadians and Canadian democratic decision-making. In other words, passive and active citizenship, and thus, idem-identity and ipse-identity. When the Canadian Charter extends the conditions of a just society “to all” Canadians, it draws the WE’s boundaries upon the unity of what are considered *his* practices. Even though indigenous peoples are recognised in the Canadian constitution as collectives, by including them within the boundaries of Canadian citizenship, their self-determination is denied. Surely, by including them and Thomas, the Court denied that they could include Thomas and exclude Canadian Courts. The Court considers there to be only one constitutional order. Upon this argumentation, the Court considered that Thomas’ rights were breached by the Coast Salish practice of citizenship.

Now consider the very particular role that criminal law played in this case as part of the second prong of the task under Section 1; that is, whether the breach of rights was justified. It is notable that the constitutional order frames the issues it confronts similarly to how it was characterised criminal law in Chapter 1, as structuring individual choice in terms of institutional alternatives and institutional consequences. It appears now that the constitutional order does the same when it draws the boundaries of membership. Institutional alternatives are structured around individuals and their interests, so it is no surprise that the Court understands the case in terms of individual rights. More to the point, it seems that given how the issue implicates the terms of citizenship and thus the identity of the constitutional order, the application of criminal law should necessarily follow. Criminal law would be, from the point of view of the constitutional order, a constitutional consequence. However, this is not necessary. As has been seen, citizenship involves multiple relations, regarding many other forms of legal and non-legal relations. The suggestion is not then that any issue concerning citizenship implicates criminal law, for the constitutional order may respond, as it did in *Thomas*, with tort law. Now, it could be said this seems to undermine the present argument, for initially it was discussed criminal law as part of the constitutional order, and now it is discussed tort law.

By way of reply, one could make the challenge that there is a stark distinction between torts and criminal law⁵³⁶, yet this is unnecessary. Surely, criminal law did enter the Court's reasoning. However, it did not do so as SS, but as part of CS. Based upon the aforementioned encompassing conception of citizenship, the Court considered that there was a breach of rights, yet the question remained whether that breach was justified. Indigenous peoples rights are a fundamental concern, for as rights they may work as justifying the breach of individual rights. Thus, it is pivotal to determine whether in this case, it is possible to identify a concurrent right. Here enters criminal law, shaping both Canadian and indigenous peoples citizenship. The Court considered that even if there were an indigenous peoples right to practice such a rite, the practice did not survive the introduction of the Criminal Code into the Canadian legal system in the early 19th century. That is, in determining the boundaries of the Coast Salish rights, the Court appeals to what *passing the criminal code* signified for all Canadian citizens. The new WE, through that code, established new forms for protecting rights. That is, the passing of the code, by criminalising certain setbacks to individual rights, afforded protection to *all Canadians*⁵³⁷. Accordingly, the breach of Thomas' rights was not justified.

What stands out here is the different kind of criminal law to that which scholars are accustomed to in standard cases of criminalisation. In standard cases, criminal law operates as a SS: there is a court that decides whether a person has committed a crime, given a certain base of evidence. Yet in *Thomas*, the Court shaped its legal reasoning considering criminal law not as SS. If the Court had done so, then members of the Salish would have been indicted, but they were only made responsible for a tort⁵³⁸. Instead, the Court uses the WE's criminal law as part of CS, and thus criminal law becomes part of the case. Notice how this move starts depoliticising indigenous peoples' claims, for their rights can be

⁵³⁶ From a modified morphogenetic perspective, it seems that torts may also play a role in CS and SS cycles, if the focus shifts from 'shared values' to social practices. For a similar approach, see Lindsay Farmer, 'Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalization' in Duff et al (eds.), *Criminalization: the Political Morality of Criminal Law* (OUP 2014) 86; proposing a master principle for a strict difference between both, see, among others, Marcus Dubber, 'Criminal Law between Public and Private Law', in Duff et al (eds.), *The Boundaries of Criminal law* (OUP 2010) 191-213; also Ambrose Lee, 'Public Wrongs and the Criminal Law' (2015) 9 *Criminal Law and Philosophy* 167.

⁵³⁷ The Court considered the initiation ceremony was "contrary" to criminal law and not the exercise of an indigenous right, see Isaac, 'Individual Versus Collective' (n 534) 624-625.

⁵³⁸ It cannot be excluded here that the prosecutors decided not to charge them in use of their discretionary powers, for the conduct of the accused could be easily subsumed under criminal assault according to section 265 of the Criminal Code.

justifiably restricted in the interests of *all Canadians*⁵³⁹. Among the Canadians, it is possible to find Thomas and the Coast Salish community, so it appears to be also in their interests, yet as individual citizens of Canada, their practices can be restricted. That is, the restriction of their practices appears justified in the interests of indigenous peoples themselves. By including them in active citizenship through Section 1, indigenous peoples themselves are taken to be the legislators who place limits to their own rights. As it was seen in Chapter 3, the WE considers them - for these purposes - already as participants in his practices, which is an implication of having denied their self-determination. Otherwise, the Court could have challenged that prior inclusion of indigenous peoples, which of course it could not, because in framing the issue in terms of the idem-identity and ipse-identity of the Canadian WE, the Court already asserted there was only one constitutional order.

5.3.2.2 Repoliticising Indigenous Peoples Rights

The way the Court used criminal law depoliticised indigenous peoples claims by including them in the Canadian WE, which gave the impression that they themselves willingly placed justifiable limits upon their constitutional identity. If criminal law confers protection on all Canadians, and this includes indigenous peoples, then indigenous peoples also willed these limits to their practices. This legal argument appeals to how citizens themselves engaging in democratic decision-making can place justifiable limits on their rights, including indigenous peoples rights. But there is a previous line of argumentation, just in case the argument about criminal law is regarded as flawed. That is, absent the role that criminal law played in proscribing indigenous peoples rights, as shown above, it would have appeared to the Court that if there was such a right, then the breach of Thomas' rights could have been justified. However, under the alternative line of argumentation, the Court could draw upon another consideration to conclude that the breach of Thomas' rights was unjustifiable.

This alternative consideration appears implied in Section 1, that is, in the kinds of rights members would recognise for each other. As it was seen, the critical function contains an underlying conception of the good, and it is there *because it underlies the constitutional*

⁵³⁹ Hamish Stewart, 'Group-differentiated rights: a challenge to penal law' (2014) 15 *Studia Iuridica Toruniensia* 185.

order. That is, conceptions of the good underlie criminal law because it is an institution doubly responsive to participants in the constitutional order, which as has been shown, emerged in a particular place, Europe, at a particular time, with state centralisation. These conceptions of the good guide the selection of rights that individuals recognise each other as having. In effect, according to the Court the initiation practice cannot be a right⁵⁴⁰, because a free individual agent⁵⁴¹ would not accept this kind of treatment even if there were such a rite. It should be emphasised that this argument depoliticises the claims of indigenous peoples, by sustaining that no ‘reasonable’ Canadian would will a norm which implied depriving individuals of liberty of movement and physical integrity. Yet it also depoliticises the Canadian WE, because it is not the Canadian WE which establishes limits to indigenous peoples self-government, but the non-reasonability of the Coast Salish community⁵⁴². Whereas the first argument, the “criminal law argument”, depoliticises by including indigenous peoples in the WE, the second argument, the “natural reasonability argument”, depoliticises by including them and the WE in humanity.

Let us repoliticise *Thomas* by demonstrating the political nature of both arguments. This can be achieved in two steps. First, by connecting values to social practices, and second, connecting those social practices to the constitutional order. With these steps it appears that: first, indigenous peoples values have been undermined by the social practices of settlers; and second, that these practices were part of a collective subject, the constitutional order. By reproducing/transforming its identity, it is the WE, not criminal law or a natural sense of reasonability, which effectively included indigenous peoples and deprived them of self-determination. Without these connections, both the criminal law argument and the reasonability argument conceal both the inclusion of indigenous peoples and the existence

⁵⁴⁰ Reaume, ‘The Legal Enforcement’ (n 520) 192; Isaac, ‘Individual Versus Collective’ (n 533) 622.

⁵⁴¹ Political theorists generally understand inclusion and exclusion only in terms of individual rights. See Arash Abizadeh, ‘Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders’ (2008) 36 *Political Theory* 37-65; Lea Ypi, ‘Territorial Rights and Exclusion’ (2013) 8 *Philosophy Compass* 241-253; Sarah Fine, ‘The Ethics of Immigration: Self-Determination and the Right to Exclude’ (2013) 8 *Philosophy Compass* 254-268; Chandran Kukathas, ‘Why Open Borders?’ (2012) *Ethical Perspectives* 649-675; Maxime Lepoutre, ‘Immigration Controls: Why the Self-Determination Argument Is Self-Defeating’ (2016) 47 *Journal of Social Philosophy* 309-331; Alan Brudner, *Constitutional Goods* (OUP 2004) 379; Urbinati, *Democracy Disfigured* (n 517) 28.

⁵⁴² There are, without doubt, colonial undertones in the Court’s reasoning, which it should be noted have become institutionalised in Canada. On the colonial remnants of the relation between the Canadian state and indigenous peoples, see Mariana Valverde and Adriel Weaver, ‘The Crown Wears Many Hats: Canadian Aboriginal Law and the Black-boxing of Empire’ in Kyle McGee (ed.), *Latour and the Passage of Law* (Edinburgh University Press 2015) 93-121.

of the Canadian WE. The Court's alternative consideration avoids confronting indigenous peoples self-determination by basing its decision on a seemingly universal repository of cultural meanings. Certainly, it seems naturally reasonable that a free individual agent would not accept the rite of initiation. Let us accept for the sake of the argument that the practice is contrary to this "natural reasonability", because no reasonable free individual would accept such a practice. Why should the political community ascribe authority to those principles of natural freedom in defining institutional rights? Importantly, endorsing these natural law values implies adopting a natural law approach by which to assess the values breached by the Salish community. With this move, freedom as a value is detached from social practices, for the natural reasonability of human agents forms the ground that explains the authority of freedom. In turn, this presupposes a natural law understanding of the political community.

Natural law theorists⁵⁴³ start from the 'natural', practical rationality of human beings and then claim it allows humans to take as ends basic goods, the attainment of which allow them to flourish⁵⁴⁴. The theorist might claim that these first principles are known through something like intuition, as does Finnis⁵⁴⁵, or through theoretical reason, as does Murphy. Either way, the good becomes independent from social practices. The good is not socially constructed but discovered through 'determinations' or specifications of more general principles rooted in human nature. Not surprisingly, this account aligns with a view of institutional facts as merely facilitative or constraining. Importantly, this need not deny that it is morally autonomous individuals who are to self-impose the good as an end. On the contrary, as Haakonssen has argued, historically the appeal to the morality of an autonomous individual was already present in the natural law tradition⁵⁴⁶. As it was seen,

⁵⁴³ Here I consider mainly natural law theorists who develop *legal theories* grounded in human nature; see Murphy, *Natural Law* (n 191) 1-3.

⁵⁴⁴ John Finnis, *Natural Law and Natural Rights* (Second Edition, OUP 2011) 30; Murphy, *Natural Law* (n 191) 3.

⁵⁴⁵ True, Finnis considers his view as not intuitive, insofar as he claims intuitions do not require sense-data, whilst his theory of "insight" does. However, in this light knowledge and understanding become "automatic" or spontaneous and thus analogous to how it is acquired knowledge by intuition. See Finnis, *Natural Law* (n 542) 30; John Finnis, 'Introduction', in John Finnis, *Reason In Action: Collected Essays*, Volume I (OUP 2011) 2-3; for a similar point, see Murphy, *Natural Law* (n 191) 7-8; on the connection between causation and knowledge by intuition, see Alvin Goldman and Joel Pust, 'Philosophical Theory and Intuitional Evidence' in Alvin Goldman, *Pathways to Knowledge: Public and Private* (OUP 2002) 74-75.

⁵⁴⁶ Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (CUP 1996) 339.

criminal law understands agents in terms of morally autonomous individuals pursuing valuable options. This points to an important implication for the understanding of citizenship. By emphasising the individual benefits of a political association⁵⁴⁷, the natural law theorist not only individualises citizenship; more importantly, conceives of citizenship exclusively in terms of individual rights or values, and thus at the expense of the political community as subject. Accordingly, active citizenship vanishes as a consequence of the rejection of the argument of social construction; the good is no longer socially constructed⁵⁴⁸.

Now, let us reject the first move. If there were a universal and natural repository of meanings, then this would imply that they are external to social practices. Surely, they would obtain regardless or independently of social practices, which is what the natural law theorist seeks to sustain. However, as it has been seen, meanings depend on social practices and thus they can only be internal to them. The value of freedom from harmful interferences is achieved from the inside, from the perspective of participants themselves who understand the meaning of harm and the value of freedom. Importantly, this relates to the idem-identity of the political community and thus with passive citizenship. If social practices are understood as facilitative, it is overlooked that the value of freedom from harmful interference has emerged within practices that are social and political achievements. Of course, this is precisely what the natural law theorist would like to claim. By considering the political community merely as an aggregate of individuals that pools the common good, it overlooks both the historic social movements that made possible the very contexts in which such values *have meaning*. In other words, the obtaining of those contexts was a process of the social construction of reality, and thus, the meanings of freedom and harm were socially enabled.

⁵⁴⁷ For Finnis, territorial boundaries follow from distributive principles, in the sense that only those who have assumed the burdens of social cooperation can be entitled to benefit from it. As a result, active citizenship does not figure. See John Finnis, 'Migration Rights' in John Finnis, *Human Rights and Common Good: Collected Essays*, Volume III (OUP 2011) 119-120. For Murphy, political authority is based on the capacity of the community to direct their members to the common good, and thus, as in Finnis, active citizenship does not figure. See Murphy, *Natural Law* (n 191) 123.

⁵⁴⁸ Exploring the political nature of indigenous peoples membership in CANZUS states (Canada, USA, New Zealand, and Australia), see Kirsty Gover, *Tribal Constitutionalism: Stets, Tribes, and the Governance of Membership* (OUP 2010).

As was shown earlier, active citizenship and passive citizenship have resulted historically from a combination of particular forms of cultural, social, and political organisation. These contexts for having meaning are not for free, but require a constant and dynamic reproduction/transformation. It appears, then, that passive citizenship and natural reasonability can, after all, be linked to active citizenship and, therefore, to the subject of social and political organisation, which endows social practices with self-determined political authority⁵⁴⁹. Thus, it is achieved the second step as well. Certainly, it now appears that the Court relies on the meanings of the Canadian WE to deny indigenous peoples self-determination. These meanings are the outcome of a process of social construction, which active Canadian citizens regard as social and political achievements. That which has transformed indigenous peoples self-determination is a constitutional order, the Canadian WE. It appears, then, that the claims of indigenous peoples and their denial are both political. For it is the criminal law of a WE that was imposed on them, and it was not humanity, but the Canadian WE, that deprived them of self-determination.

Observing indigenous peoples claims to access their practices and that oppose state criminal law leads to an important conclusion regarding the possibility of accommodation. As it was seen, the WE needs to integrate citizens. The meaning of active and passive citizenship depends on the intentional practical attitudes of members, for they are the building blocks on which social practices are constructed. These attitudes enable the meanings social practices generate, the meanings on which those intentional attitudes depend. A constitutional order aims at transforming/reproducing social practices so as to preserve the meanings on which their members depend. But this makes the constitutional order dependent on the meanings on which individuals depend, and thus requires that its members be integrated into its practices, for it is they, as participants, who construe their own active and passive citizenship. The need for integration thus entails the impossibility of accommodating another WE. The WE cannot provide the space that indigenous peoples require in order to have at least some degree of control over their socio-cultural practices,

⁵⁴⁹ Kent McNeil thinks that the Court should have considered that indigenous peoples rights were constitutionalised, while common law rights were not, so the balance should have been struck in favour of the Coast Salish nation. See Kent McNeil, 'Aboriginal Governments and the Canadian Charter of Rights and Freedoms' (1996) 34 *Osgoode Hall Law Journal* 75-76. However, this overlooks that common law rights have also been constitutionalised, and thus the kind of balance that would have to be made, at least between rights of equal constitutional status. Seen in this way, the problem would be that constitutional rights figure in the balance, but the clash between two sovereign WE would remain invisible, which means that the framing is still in terms of individual rights.

for it cannot relinquish, as has been shown, its criminal law. Accordingly, the political question of accommodation needs to be rephrased as a question of collective political equality. Seen in this way, indigenous peoples must be assured the space to draw their own boundaries. This requires, at least, having control over their penal practices. In other words, to be treated as equals, they require the suspension of the constitutional order of the WE they inhabit⁵⁵⁰, for this seems to be the only way to enable an independent penal practice.

5.4. Suspending Criminal Law

It was illustrated with *Hofer* how penal practices contributed to set the boundaries of a community, the role they played for the reproduction/transformation of their socio-cultural practices, and how constitutional dialogue may interfere and suppress them. With *Thomas*, it was illustrated how a WE defined the boundaries of a minority through criminal law, and how it depoliticised their claims and the implicit denial of self-determination. Earlier it was examined the situation of Rapa-Nui, which were in no better position. It is possible to argue that the problem for Canadian indigenous peoples was that they became the object of a process of “under-criminalisation”⁵⁵¹. Certainly, it could be argued that by being under-criminalised, indigenous peoples were placed in a much more vulnerable position, for this would have removed the traditional protections provided for defendants during criminal proceedings. However, recall the case of Rapa-Nui, who ended up in the very same position within an institutional system far less responsive to the claims of indigenous peoples, as is the Chilean legal system. Recall that: their actions were institutionally structured by criminal law in terms of individual choices; institutional consequences were attached; they were prevented from being registered as a group; they needed to grasp the meanings and further the ends of the legal institutions they were forced to engage with; and finally they were regarded as part of that group participants who share the same values, as Chileans. It appears that even with the “protections” awarded by criminal law indigenous peoples remain inevitably in a situation of subordination and at risk of being assimilated.

⁵⁵⁰ For a deontological argument that grounds self-determination on individual freedom of expression, see Christopher Wellman, ‘Freedom of Association and the Right To Exclude’, in Christopher Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (OUP 2011) 13-155.

⁵⁵¹ Andrew Ashworth and Lucia Zedner, ‘Preventive Orders: A Problem of Undercriminalization?’ in Duff et al (eds.), *The Boundaries of Criminal Law* (OUP 2010) 59-87.

The position of indigenous peoples amidst a domain of foreign institutions, meaning-responsive and axiological-responsive to the WE of which they have been forced to be part, amidst a WE that seems justified in integrating its members to reproduce/transform its own social practices, is one in which it is impossible to be accommodated. Criminal law cannot be accommodated to provide space for indigenous peoples' social practices to have the meaning they seek, and cultural defences are not real accommodations after all. Indigenous peoples, as self-determined collectives, need an independent penal practice; independent, that is, from the criminal law of the WE. It is here that Lindahl's proposal comes into force. For indigenous peoples require a solution that courts cannot provide. Certainly, when they appear as strong a-legality, they require, as the WE itself requires, access to their own ways of drawing boundaries and enabling forms of citizenship. By suspending the constitutional order of the WE in which they find themselves, they can be protected from its criminal law and develop their own penal practices.

Significantly, the proposal does not aim at the complete suspension of the constitutional order, but only the suspension of criminal law. In effect, while suspending the constitutional order involves suspending the application of criminal law, the suspension of criminal law does not entail the complete suspension of the constitutional order. This is the sense in which, while there are mutual relations between criminal law and the constitutional order, there are also hierarchical relations between both. Therefore, negotiating the exit of a group would not amount to a complete suspension of the constitutional order. This cannot be, for this would mean that the exit of a group would not be a political event, given the suspension of the constitutional order. True, if the constitutional order is the form of the political organisation of the WE, then suspending the constitutional order would entail suspending the political. However, secession or autonomy cannot but be political events, and the suspension of criminal law would indeed be a tremendously important political event for indigenous peoples, as well as for the WE.

The constitutional order cannot suspend itself. Of course, there are cases when the constitutional order is superseded, as when raw power resets the organisation of political power, as is typical of military coups. But this is also a political event. In military coups, the constitutional order is not *self-suspended*, but externally suspended. In contrast,

suspending criminal law through the constitutional order is internal self-suspension⁵⁵². One should also note that the suspension of criminal law is transitional. The real challenge is how to outline an institutional form that provides non-transitional autonomy, presumably through sub-state forms, which at the same time respects the boundaries of the larger WE. These are matters of constitutional design in what Sujit Choudhry designates divided societies, or societies in which cultural differences become politically salient⁵⁵³. Seen in this light, Lindahl's proposal aims at securing a transitional space in which indigenous peoples can negotiate their position within the WE. This may lead to the fragmentation of the state, for secession remains a possibility. However, the fear of fragmentation is at odds with evidence that strongly suggests that devolving self-determination to minorities does not lead to external self-determination or independence from states⁵⁵⁴.

From this perspective, it seems there can be space for a multicultural citizenship, insofar as self-determination falls short of secession. This would have to have consequences for the kind of criminal law that would be at play in the interactions between two WE. Once strong, internal-self-determination is granted, the situation would resemble the relations between member states within the EU. It has been stressed that self-determination needs to address the question of jurisdiction over the WE's criminal law. A case in point seems to be the Navajo indigenous peoples who, while enjoying a considerable degree of internal self-determination, with their own systems of justice and jurisdiction to try many forms of

⁵⁵² Suspension does not amount to the suppression of the constitutional order, unless broader social practices are completely suppressed, as in cases of mass extermination of the population or genocide.

⁵⁵³ Sujit Choudhry, 'Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies' in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 4-5.

⁵⁵⁴ The social scientific debate to date has been largely framed by the ideas put forward by Arend Lijphart and Donald Horowitz. Both favoured accommodation over integration, depending on the social context meeting certain specific political and social conditions; see Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (Yale University Press 1977) 24; Donald Horowitz, *Ethnic Groups in Conflict* (California University Press 1985) 588. Contemporary views, more or less along the same lines proposed by Lijphart and Horowitz, include the following: Yash Ghai, 'Ethnicity And Autonomy: A Framework For Analysis' in Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (CUP 2000) 23; John McGarry, 'Asymmetry in Federations, Federacies and Unitary States' (2007) 6 *Ethnopolitics* 108; John McGarry et al, 'Integration or accommodation? The enduring debate in conflict regulation' in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008) 52; Markku Suksi, *Sub-State Governance Through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011) 624. For a general overview, see Brendan O'Leary, 'Governing Diversity' in Steven Vertovec (ed.), *Routledge International Handbook of Diversity Studies* (Routledge 2015) 203-215.

offences⁵⁵⁵, find that federal USA law still encroaches upon their autonomy to try almost all serious offences⁵⁵⁶. It follows that there is a major space for interference in the Navajo constitutional order and their social practices, with the implications already examined. In contrast, strong self-determination would demand at least the kind of autonomy enjoyed by European member states in the EU, which involves understanding criminal law as part of the identity of the constitutional order.

The case of the EU, even if unsatisfactory in many important respects, as an ideal-type illustrates the domains of criminal law in which a WE is typically not disposed to defer to another WE. From this point of view, the existence of a practice in which many self-determined groups remain connected yet self-determined offers an important alternative to the apparently simple yet hard-to-achieve option of secession. The EU shows that there is no need to exit the constitutional WE in order to remain self-determined, notwithstanding the recent disagreement of the UK. The purpose of highlighting the EU as an alternative in terms of the WE's relationship to criminal law is to open the mind to the distinct degrees of autonomy that groups can achieve, and while it is not part of this work to propose the multiple ways in which this could be effected, this may provide an interesting line of research for the future. Whatever this typology might offer, it would need to consider what might constitute an adequate balance in the interrelations of different penal practices from different WE, as a key for achieving autonomy. In other words, jurisdiction over penal practices needs to figure in any acceptable form of strong self-determination. For as it has been claimed, those practices occupies a central place in how the constitutional order understands its idem-identity and ipse-identity, and this cannot be plausibly denied without risking a self-defeating strategy for internal self-determination. In sum, without an independent penal practice, there cannot be true self-determination.

⁵⁵⁵ It is seen by Navajo themselves as the emergence of their own common law; see Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (Minnesota University Press 2009).

⁵⁵⁶ The Major Crimes Act and the Public Law 280 restrict tribal jurisdiction in criminal law substantially, granting considerable jurisdiction to the USA Federal government and States governments to regulate jurisdiction of criminal law in Indian reserves. For an overview see Bryan Wildenthal, *Native American Sovereignty on Trial: a Handbook With Cases, Laws, and Documents* (ABC-Clio 2003) 69-71.

CONCLUSION

Indigenous peoples, and minorities in general, are increasingly becoming more active in requiring from courts the protection of their cultural practices. While addressing these demands 30 years ago was exceptional, now they are becoming regularly part of judicial practice, at least in some multicultural states. Throughout this thesis I have sought to explain the challenges these claims represent for the constitutional order in general and for criminal law in particular. More specifically, I have sought to explore whether the claims of indigenous peoples to access their cultural practices could be accommodated within criminal law. The conclusion was they could not. At least in the terms through which criminal law framed accommodation, I argued that accommodation was not an appropriate response to the claims of indigenous peoples. In reflecting and exploring this argument and its conclusion I developed the literature on the constitutionalisation of criminal law, and elaborated the key contribution of my thesis: to understand criminal law as a part of the constitutional order. There were, however, two other important contributions: within political philosophy I contended that we should broaden our understanding of state neutrality, and within constitutionalism I defended the notion of constitutional order and constitutional identity. Let us start with the first and key contribution.

I sought to understand criminal law as part of the constitutional order to explicate the significance of the claims of indigenous peoples to access their cultural practices, for both indigenous peoples themselves and the larger state within which they are located. The purpose was to challenge the standard response to the claims of indigenous peoples inspired by Will Kymlicka's theory: the strategy of awarding individual rights and individuals defences within criminal law. I argued that this strategy that many 'multiculturalists' advocated, overlooked how the response of criminal law as part of a constitutional order assimilated cultural differences. In other words, I claimed that understanding criminal law as part of the constitutional order meant that criminal law sought to assimilate the claims of indigenous peoples by framing them as claims made by individual human beings. In effect, I demonstrated how accommodation was achieved by framing indigenous peoples' claims through the individualising language of rights and defences. As a consequence, indigenous peoples could not claim what they were after: access to their own practices of self-determination.

A second important contribution concerned the standard principle that grounds the claims to access cultural practices, the principle of state neutrality, and the means by which it promotes that access: special rights. I showed that these rights aimed at enhancing individual choice, a value that criminal law was committed to defend. The important point was to see that the principle of neutrality concealed that the social order, and its criminal law, were committed to endorse a conception of the good; a liberal one focused on the value of individual autonomy. The implication was that accommodation was a process that aimed at strengthening individual autonomy, and thus stopped where minorities departed from endorsing liberal values. In other words, because accommodation aimed at enhancing individual autonomy, within criminal law it operated as a process of assimilation into the values and practices of the liberal order. Against this strategy, I argued that we should broaden the question of whether the institutions of the liberal order are or not neutral, with the enquiry on how these institutions are responsive to certain way of understanding the world. That is, with the enquiry of how criminal law is responsive to a liberal understanding of the social world.

Third, I developed the notions of constitutional order and constitutional identity, with which I explained that assimilation occurred within “a collective subject” of which criminal law was a part. The notion of constitutional order brought out the political components of the process of accommodation. This order, I claimed, aimed at organising political power within the state. My purpose was to show that criminal law, as a part of the constitutional order, was also a process that aimed to assimilate into the institutions of the constitutional order and thus contributed to organising its political power. To articulate the idea of inclusion more precisely I argued that the constitutional order developed a constitutional identity. I described this as an historical process that had a fundamental importance for indigenous peoples: at the time that the constitutional order developed his identity it included indigenous peoples within his territory. As a consequence indigenous peoples were regarded as existing within the boundaries of a single constitutional order. Indigenous peoples’ lack of access to their cultural practices and political institutions followed from this historical and institutional process of inclusion that deprived them from their self-determination.

Now let us recall the beginning of the thesis. I began from the research question of whether the claims of indigenous peoples could be accommodated within criminal law, and initially

I found that there was a particular moderate response from criminal law to the claims of indigenous peoples in the form of cultural defences. After close scrutiny I demonstrated that this form of response involved the assimilation of indigenous peoples. What was fundamentally problematic of this response was that their assimilation and inclusion as collective political agent never registered. That is, their inclusion as a self-determined group never registered nor had any implications for the criminalisation of their practices. What it was clear was that within criminal law they were asked to assimilate into the values of the liberal society. Accordingly, I claimed that cultural defences were never designed to address the claims of indigenous peoples, but the problems that the constitutional order regarded as the object of criminal law. Self-determination in its different varieties was never part of the debate within criminal law, and accordingly, the claims of the indigenous peoples could never be heard.

As it can be observed, the second and third contributions allowed me to arrive at the first, and thus allowed me to reach the conclusion that the claims of indigenous peoples could not be accommodated. In other words, the contributions were connected in allowing me to reach the conclusion. In aiming to answer the research question I first provided a theory to understand better the social and cultural components of criminal law and its critical function. Second, I identified what were the implications of the theory for thinking about special rights and neutrality in criminal law, all in order to specify better the process of social construction on which criminal law took part (second contribution). Third, the fact that criminal law contributed to this process provided support to the claim that accommodation was a part of a process of assimilation, which in chapter 3 I claimed that it was assimilation into the constitutional order of which criminal law is part (third contribution). Chapter 4 applied the theory so built to the claims of non-indigenous minorities and demonstrated that criminal law assimilated them to the constitutional order. And finally, chapter 5 applied the theory to the claims of indigenous minorities and demonstrated that criminal law assimilated them by treating them in certain ways and pursuing certain ends, all with the purpose to demonstrate that indigenous peoples claims could not be accommodated. Then I concluded with the suggestion that we should shift the focus from achieving accommodation to reaching collective political equality.

During the thesis I argued that the claims of indigenous peoples should not be reduced to claims to access only cultural practices or directed to solve problems of individual inequality. Their claims are political claims to access their practices of self-determination, and while these claims could not have room within criminal law, they nonetheless are claims that can be addressed by the constitutional order. From this point of view, the thesis has important implications for research concerned with the conditions for achieving self-determination. Certainly, I argued that addressing indigenous peoples' claims requires going beyond what the individualising language of individual rights and individual defences can provide. The response should be developed from within the constitutional order and would need to consider a fundamental component: constraining the use of criminal law. I argued that constraining the use of criminal law for specific groups implicated devolving them a fundamental power to shape their own forms of membership. The thesis suggests then to shift the question from how to achieve accommodation to how to achieve collective political equality. This of course, should be the object of further research.

Although the focus of the thesis has been the situation of indigenous peoples' claims within criminal law, the theory I have developed is general in character, and thus it is capable to be applied to many other related topics. That is, the theory's focus on meaning (culture) and social structures (institutions) as components of a socially constructed world provides a suitable starting point for examining both general questions of legitimate authority and more specific questions concerning the authority of criminal law and practices of criminalisation. It appears that future research on the constitutionalisation of criminal law need to consider more closely the contribution that criminal law plays for the constitutional order. There is here an important first avenue for research: to enquire on how criminal law contributes to that order by criminalising certain market practices. Indeed, I have argued that there is a close connection between the expansion of political power and markets, and criminal law. Insofar as there is such a connection it appears a question concerning how criminal law contributes to the process of market expansion within state borders and even beyond them globally.

A second avenue for research, also concerning criminal law yet more specifically criminal law theory, starts from considering that the theory I developed focuses, to understanding criminal law, on social practices. This framework provides a rather novel standpoint from

which to develop a theory of criminal law. Certainly, my approach focuses on how meaning is transformed and maintained independently of any pre-conceived end criminal law might pursue. Surely, the theory needs to be further developed for what I provided was only a broad understanding of criminal law. That is, I only provided the basic grounding for developing a theory of criminal law inspired in social theory and Wittgenstenian insights on meaning. The pending task then would be to develop a more substantive account of criminal law. Pursuant to the focus of my theory, the purpose would be neither determining the nature of criminal law nor its basic principles, but the key processes involved in maintaining social practices.

A third avenue for research concerns, more generally, exploring the methodological implications of my theory for legal theory and legal philosophy. Certainly, the theory I developed can be seen as extending research that seek to develop an account of law based on the insights provided by the later Wittgenstein. However, in contrast with them my theory went further in seeking to connect Wittgenstein's insights on meaning with Archer's insights on the dynamics of the social world. Thus, I provided a richer account of the components and dynamics of social reality. This has implications for traditional questions concerning the function and role of the legal system more generally. True, I have explored these implications in relation to the claims of indigenous peoples. I have examined them in depth in cases concerning the practices of minorities, yet the same can be done in relation to the majority and their institutions. That is, the framework I have developed can potentially shed light on the role of the legal system in general and not only when it target the practices of minorities. These, I believe, can be fruitfully explored through the lens of the theory I have elaborated.

In answering the research question, of which the critique of cultural defence was part, I developed a broader theoretical framework that is not only capable of understanding how the constitutional order and its criminal law relate each other. Certainly, I have provided not only a fruitful way to understand criminal law, but also a framework to understand social practices in general. This last point should be underlined: I have strived to develop a framework that takes into account the social practices on which criminal law takes part, its different components and its dynamics. Recognising them and its implications is necessary to understand how legal responses are developed and which might be their effects when they are directed to handle or minimise the conflicts that arise with the increasing

recognition of cultural diversity. Overlooking these dynamics imperils the capacity of the constitutional order to address with justice and to promote peaceful coexistence between different peoples.

Certainly, as I have underlined, if it is adopted a reductive framework in order to understand the process of accommodation, then this would lead to overlooking those components and dynamics. Hence, it will appear inevitable or rather natural the disappearance of the collective claims of the Rapa-Nui when they aim to access a natural monument. I have argued at length against this strategy. It thus seems not only theoretically fruitful to adopt a framework that takes social practices and its dynamics into account, but also practically necessary in order to develop sensible constitutional and legal responses to the claims of indigenous peoples. For as I have argued, it is not only a matter justice to revert the injustices that have been committed against them; to respond to them in an appropriate manner seems the best way to cultivate a real inter-cultural dialogue and to avoid political and social fragmentation.

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