Multiculturalism: A Challenge for Modern Criminal Justice. A Latin American perspective

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Abstract
Increased migratory flow has given rise to the formation of culturally heterogeneous societies, and with it the discussion of multicultural states. Specifically, what we call multiculturalism is presenting new challenges for criminal law, as certain conduct may be evaluated differently according to the cultural context of the perpetrator. In order to determine the scope of multiculturalism and exactly how criminal law should deal with the issue, it is necessary to examine the theses that address the typical problems of cultural diversity, specifically, liberalism and communitarianism. One can then understand what is meant by “culturally motivated crimes” and whether the key to the penal treatment of such crimes is to be found in the study of justifications or excuses. Considering the multicultural character of American society, it would be impossible to discuss the subject without a recognition of the “cultural defenses” stemming from the literature and jurisprudence of the nation.

Key words
Multiculturalism, defences, error, liberalism, comunitarism, communitarianism.

Resumen
El aumento del flujo migratorio ha dado lugar a la conformación de sociedades culturalmente heterogéneas, y con ello que se comience a hablar de Estados multiculturales. Precisamente, el llamado multiculturalismo ha supuesto nuevos desafíos para el Derecho penal, pues la valoración que puede tener un determinado comportamiento variará conforme el contexto cultural al que pertenezca el autor. Para precisar cuál es el alcance del multiculturalismo y cómo debe enfrentarlo el Derecho penal, es indispensable examinar aquellas tesis que se dirigen a resolver los problemas propios de la diversidad cultural, a saber, las liberales y las comunitaristas. Lo anterior permitirá comprender qué se entiende por delitos culturalmente motivados y si la respuesta, para su tratamiento penal, debe hallarse en la esfera de la antijuridicidad o en la culpabilidad. Considerando, el carácter multicultural de la sociedad norteamericana, no es posible responder a dicha interrogante sin conocer las ‘cultural defences’ que han surgido de su literatura y jurisprudencia.

Palabras clave
Multiculturalismo, eximentes, error, liberalismo, comunitarismo.

Introduction

Today the field of criminal justice is facing a series of dilemmas largely the result of the evolution of society as a whole. The globalization of society has led to a series of challenges that penal theory cannot avoid. One of them—the one on which this work will focus—deals with what is called multiculturalism.¹

To begin with, it must be kept in mind that the criminal justice system is perhaps the most sensitive instrument available for gauging the prevailing values in a society.² Traditionally, it has been thought that a legal system was derived from the idea of a government reflecting the values of a society considered to be culturally homogeneous. Today such perceptions must be challenged,³ not only because of the advent of international criminal prosecution, but also because the very existence of culturally uniform, homogeneous nations today is highly debatable. We speak therefore of multicultural states, which have always existed in Latin America and in the United States and are becoming more prevalent in Europe as well. As we shall see, these realities have repercussions for principles as fundamental to criminal law as legality and culpability.⁴ One need only imagine the potential consequences of endorsing practices that clash with prevailing social mores.⁵

In order to better understand the dimensions of the problem and establish some basic working assumptions, the following pages will outline the basic features of multiculturalism and the various theories that have been advanced to resolve the dilemmas surrounding the issues of cultural diversity and minority protection specifically, liberalism and communitarianism. This review, though brief, will allow us to better determine the role of the criminal justice system in the current controversy and whether we can properly speak of culturally motivated crimes.

1. Fundamental Issues of Multiculturalism

1.1 An Approach to the Problem

One of the more remarkable consequences of the modern phenomenon of globalization is the tendency toward the harmonization of certain common interests that are now arising. In the legal field, it is not uncommon to speak of a kind of globalization of criminal law, manifested, for example, in the institution of the International Criminal Court,⁶ which in a way reflects a global social view of certain acts.⁷

It may appear that the global community is coming to some kind of consensus regarding an understanding of basic human rights, for example, but that is not the case. As we will see, such a consensus is hindered by some important conflicts. It is interesting to observe that, while a tendency does exist toward cultural homogenization, there have also been some noticeable assertions of cultural differences. Silva Sanchez described the situation in Europe at the turn of the century as an obvious manifestation of the struggle between homogenization and diversification. Even as post-industrial societies moved toward regional integration, they showed clear signs of internal atomization. Harmony was
achieved among different ways of life, but there was still a tendency to emphasize individual cultures.\textsuperscript{8}

The increase in immigration due to more convenient methods of transportation and communication means that modern societies are having to deal with new realities, such as the formation of culturally diverse communities.\textsuperscript{9} This diversity has given rise to situations especially relevant to criminal law, in particular, the conflict between the ideas of cultural homogenization and cultural identity, which results in crime-producing factors such as discrimination and racism.\textsuperscript{10}

Among multicultural societies, one of the factors that puts particular strain on community relations is the tendency of some minorities to emphasize their culture, seeking to more strongly establish their identity. Interestingly, this tendency appears more and more pronounced as the globalization process develops. Interaction and rivalry with other groups seems to heighten cultural sensitivity, resulting in an attitude of cultural mobilization rather than isolation.\textsuperscript{11} Add to this phenomenon the fact that some minorities have no interest whatsoever in sharing the values of the dominant culture where they reside,\textsuperscript{12} and the eventuality of cultural confrontations should come as no surprise.\textsuperscript{13} It is uncommon (though possible) for these confrontations to result in violence; more often the clash that results is between the penal system of the host nation and the conflicting customs of some cultural groups.

Some rather striking situations can result from this drive to strengthen cultural identity, such as an individual trying to choose with which of two cultures to place his or her loyalties between, for example, England and the Islamic fundamentalist group to which he or she belongs.\textsuperscript{14} While it is not uncommon for a person to consider himself (or herself) a product of two different cultures,\textsuperscript{15} problems arise when a conflict between those cultures appears irreconcilable and the person feels one of them must be subjected to the other. Pavarini points out several examples of this struggle in American society, where the greatest difficulties have to do with second-generation immigrants (those born in the United States). It is this generation that most often faces a “conflict of loyalties” regarding which set of values —familial or social—to respect. The first generation tends to be more concerned with settling and finding work; by the third, the conflict has usually been resolved.\textsuperscript{16}

The statement that multiculturalism is a modern phenomenon bears qualifying. Despite the special significance it has taken on recently, examples of multiculturalism in history are hardly a novelty. Suffice it to say that the Austro-Hungarian and Russian Empires were built upon pillars of cultural diversity, with the Roman Empire providing an even earlier example.\textsuperscript{17} Although today such multicultural political structures have been replaced with the concept of the nation-state, it should be remembered that the association of a territory with a nation is a modern one, particular to the 19th century and the rise of nationalism. More a vision than a reality; the notion of a nation-state resembles a kind of ideological Utopia.\textsuperscript{18} As Walzer explains it, the term does not refer to an homogenous population, but rather to one in which the dominant group imposes its culture and heritage on the minorities it tolerates but does not achieve the degree of autonomy common in the early empires.\textsuperscript{19} It was precisely this domestic cultural tension —testing the dominant culture’s tolerance for the cultural expression of minorities—that gave rise to various conflicts following the Cold War, some of them extremely violent, such as the territorial
1.2. Distinguishing Features of Multiculturalism

In this work, the term “multiculturalism” refers principally to the joining of different cultures together as a nation in a specific spatial context, or rather, to the concurrence of common cognitive elements regarding their understanding of their environment, morality, religion, laws, and society, connected by a common language. Consequently, a state can be called multicultural to the extent that cultures from different nations coexist in one place, whether they be societies in which long-present indigenous cultures are beginning to seek greater recognition, as in some Latin American nations today, or in which new cultures have been integrated as a result of immigration, as in Europe. Noting the existence of over 600 modern languages and around 5000 ethnic groups today, one can appreciate the magnitude of this issue and the problems it presents for modern society. Put another way, only 18% of the countries of the world can be labeled nation-states in the purest sense of the word, that is, with 90% of their populations made up of members of a single ethnicity. Of the 500 ethnicities that have been studied, only 28 are found entirely within a single state; the rest are scattered throughout several nations.

This work does not, therefore, recognize as multicultural problems, and will not attempt to analyze, conflicts involving minorities attempting to assert their rights in a system of which they are already considered, and consider themselves, a part —a system in which they are playing by the same rules— minorities such as, for example, feminists and homosexuals. These conflicts would more properly be called problems of pluralism, centered on different lifestyles or social movements. Problems of pluralism deal with different customs or points of view that can be held by members of a single nation. Problems of multiculturalism, as defined here, refer to the efforts of certain cultural groups to assert their identities, which have been denied or marginalized, part of a system in which the majority culture makes the rules and imposes them on the minority.

Throughout history, states have approached the issue of cultural diversity in various ways, ranging from segregation to the establishment of multicultural states. Segregation originally implied submission, as was the case during the European colonization of Africa and the Americas. It later evolved into a policy of assimilation into the dominant culture, a policy whose basic theory (“all are equal under the law”) translated to the practice of disregarding cultural differences (“some are more equal than others”). In varying degrees, both segregation and assimilation served ethnocentric views, in which the imposition of predominant values was a way of achieving unity with the rest of the population and in which religion, through evangelization, played an important role in the acculturation process. In addition, the conceit of racial superiority led to a belief in cultural superiority, easily resolving the question of which values to accept and which to reject.

Today, states are referred to as multicultural for their acceptance of cultural plurality, as demonstrated by the various constitutions of Latin American countries reflect the multiethnic and multicultural character of those nations, implying a certain recognition of cultural diversity. An explanation of how to legislate this acceptance follows, but it is interesting to note that there are international accords that require states with minority populations to take the appropriate steps to promote cultural diversity, such
as Article 27 of the International Covenant on Civil and Political Rights\textsuperscript{35} and the 1989 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.\textsuperscript{36} On a national level, Chile passed Law 19.253 concerning the protection, promotion and development of indigenous peoples and the creation of the National Indigenous Development Corporation (CONADI).\textsuperscript{37} Similarly, a number of theories have been advanced regarding how states should approach cultural diversity. It is one thing to acknowledge that diversity exists, but quite another to establish means by which it can be expressed in a sphere in which other cultural norms take precedence. The question, in other words, is whether it is sufficient merely to accept diversity, or whether it is necessary to enact laws that guarantee the rights of certain groups. The solution to this problem is not an easy one; while it may seem only fair to protect and foster minority cultures, we must not ignore the possibility that unbalanced favoring of diversity may exacerbate cultural defensiveness, thereby creating barriers, rather than bridges, to integration.\textsuperscript{38}

Likewise, from the perspective of the criminal justice system, differential treatment in punishing crimes could lead to resentment of certain cultures. One need only imagine the possible dangers of complete cultural equality: expressions of intolerance toward certain customs not shared by the majority. Should a Muslim who practices polygamy be treated any differently from the rest of the population?\textsuperscript{39}

Nevertheless, we cannot ignore the possibility that such choices may be undermining their integration into the host society. With these issues in mind, we reiterate the previous question: should the state limit itself to noninterference, or should it rather assume an active role in promoting cultural diversity?\textsuperscript{40} Should states restrict public cultural practices, limiting cultural identity to the private sphere, as is the policy in France?\textsuperscript{41} Or follow the example of Quebec, which requires children of French families to attend French schools?\textsuperscript{42}

\textbf{1.3. Between Liberalism and Communitarianism}

The two main schools of thought in the current controversy regarding the protection of minorities and the necessity of collective cultural rights for the welfare of peoples are liberalism and communitarianism. The debate hinges on whether it is necessary for a society to uphold cultural diversity in some specific way, or whether it is sufficient to protect minority cultures by guaranteeing the civil and political rights of all citizens: in short, whether the interests of the group should be valued over those of the individual or vice versa.\textsuperscript{43} The previously mentioned example of Quebec serves to illustrate the concern: are states justified in limiting basic liberties to protect certain cultures?

In the pages that follow, this work will give a brief overview of the central theses of liberalism and communitarianism. A more in-depth discussion would go beyond the scope of this work. Before doing so, however, it would be well to clarify a concept that is central to the discussion: what is meant by the term \textit{cultural rights}.\textsuperscript{45} The discussion of cultural rights is concerned with preserving cultural distinctiveness through measures that vary according to the culture to which the member belongs. These rights can be individual or collective in nature; individual rights are those exercised by individuals as members of a group (such as the right of a Muslim woman to wear a \textit{hiyab}, or veil, in public), whereas collective cultural rights are extended to groups in such a way as to trump those of the individual, whose rights are thereby limited (as exemplified in the case of francophone
families in Quebec). Cultural rights can also be classified as either positive or negative. Negative rights are loosely similar to individual rights in that their exercise is guaranteed to be free from interference by either the state or other individuals (as, for example, the freedoms of assembly and worship and freedom in education). State noninterference can, however, translate to the institution of collective rights, depending on how the policy is administered. Conversely, positive rights are those by which the state adopts measures intended to preserve certain cultures, such as the preservation of a language, as in Quebec, or the construction of places of worship.

Indeed, one of the most effective ways of strengthening collective positive rights is by establishing rights of representation, so as to grant minorities appropriate representation in public decision-making bodies.

The fundamental tenet of liberalism is that the state should guarantee to each citizen his or her fundamental rights so as to ensure the greatest freedom of choice, with no conditions imposed, either by the state or other citizens, except those necessary for each citizen to be able to develop independently. According to this view, the state should assume a position of neutrality with respect to different ways of life, respecting the expressions of various cultures while favoring none, since doing so would violate one of its basic principles: that all are free and equal. This neutrality would also preclude “paternalistic” legislation that restricts liberties in cases of harmful behavior on the part of the individual himself (such as the consumption of addictive drugs).

Arguing for personal liberties, Kymlicka also points out the importance of mistakes as expressions of personal freedom. In effect, the author considers it important that individuals make mistakes, as it allows them to appreciate and evaluate conceptions of the good life, rather than having them imposed by the state. No one wants to live on the basis of false beliefs. According to Kymlicka, two conditions are necessary for a good life. The first is “that we lead our life from the inside, in accordance with our beliefs about what gives value to life,” for which freedom of choice is necessary. The second is “that we be free to question these beliefs,” making education and freedom of expression and association essential to a free society.

According to liberal thought, the state can best deal with issues such as multiculturalism by remaining neutral, avoiding any appearance of promoting certain cultural groups or discouraging membership in others. Equality is therefore advanced by prohibiting any form of discrimination, whether on the basis of gender, race, religion or other characteristics. In this way, limitations on the exercise of certain rights arise not from identity but from actions, specifically those that endanger the freedoms of others.

Nothing could be farther from liberalism than the promotion of collective cultural rights advocated by communitarians, since it affects equality among individuals by differentiating on the basis of membership in a group. This differentiation does not necessarily mean eliminating or ignoring different cultural paradigms; the communitarian view is that cultural distinctiveness can be protected through the guarantee of civil and political rights. As long as freedom of association is guaranteed, cultural minorities will find sufficient space in which to express themselves. The preservation of cultures therefore rests with their members, independent of state assistance. Recognition by the state is both unnecessary and unjust: unnecessary because worthwhile cultures will attract interested
participants, and unjust because it subsidizes certain preferences at the expense of others.\textsuperscript{54} This path, when followed in Europe, resulted in religious conflicts that ceased only when the church separated itself from the state. Today, religious tolerance has allowed religious minorities to survive.\textsuperscript{55}

Once minorities have the freedom to express themselves with the state guaranteeing, through its neutral posture, their civil and political rights, and as long as their self-expression doesn’t interfere with the rights of others nothing else needs to be done. The problems arise when ineffective cultural practices fail to adequately transmit cultural values. In other words, when a culture is at risk of disappearing. As noted above, one of the very criticisms of the phenomenon of globalization is the tendency toward cultural homogenization and the predominance of Western European culture.

On this point, the liberal position is clear: the aim is the preservation of liberty, not diversity. In a free society, satisfying lifestyles tend to displace unsatisfying ones. The value of a lifestyle, in other words, can be measured by how it is practiced.\textsuperscript{56} For communitarians, however, these views do not adequately address modern social issues such as multiculturalism.\textsuperscript{57} In general terms (there are many different perspectives, of which this work will only examine those that deal with the protection of minorities), it can be affirmed that one of the principal critiques is that the liberal view seems not to allow for human association or recognition of the cultural context in which people live as if each man were an island, motivated entirely by his own interests.\textsuperscript{58}

Communitarians, on the other hand, believe that man finds his identity as he involves himself in mankind. As Taylor points out, \textit{perfection} is achieved through the development of language, not only in verbal form but also through self-expression with gestures and art. The human mind, in other words, is not developed \textit{monologically}, with each individual developing by him- or herself, but rather \textit{dialogically}.\textsuperscript{59} Liberals are criticized, therefore, not for ignoring cultural context, but for discounting its importance. Sandel adds that neutrality is impossible to achieve, since human beings cannot separate themselves from their environment; to expect neutrality is to “misunderstand the fundamentally ‘social’ nature of man.”\textsuperscript{60}

Communitarians maintain that neutrality is nothing more than a fantasy; all social policy is directed toward some ultimate goal. Since the state cannot possibly remain passive and neutral, it must therefore assume an active posture in promoting certain cultural expressions,\textsuperscript{61} thereby showing an interest in the pursuit of a common good.\textsuperscript{62} The communitarian view assumes a certain commitment to support cultural diversity and to protect minority cultures, especially weaker ones such as the American Indians, who for centuries have been subject to policies of assimilation. This is precisely the position taken by Walzer, who considers indigenous peoples to be unable, even in conditions of autonomy, to maintain their way of life in the face of liberal social policy.\textsuperscript{63}

Two approaches to understanding equality now emerge. On one hand is the liberals’ affirmation that people must be treated equally, without regard to differences, in order to avoid discrimination. On the other is the communitarians’ belief that uniqueness must be fostered (as the means whereby identity is developed) in order to avoid forcing individuals into an homogeneous mold they may not fit, that neutrality is but an illusion, and the equality it proclaims nothing more than what the majority culture allows.\textsuperscript{64} For Taylor, the
“equal dignity” of liberalism not only cruelly suppresses identity, but it is also subtly discriminatory. According to the communitarian view, fundamental constitutional rights cannot be understood as neutral and separate from any cultural considerations; on the contrary, a society is only multicultural to the extent that it can offer different interpretations of fundamental rights, not that all those interpretations are necessarily valid, any more than any one of them can be considered the only correct one. In order to preserve some cultural practices, it is necessary to adopt policies that express the recognition of collective rights which, in some cases, can supersede individual rights. The exercise of these cultural rights is built on the foundation of recognition of the differences that arise with respect to certain cultural identities.

That liberalism fails to address the question of minority protection is debatable, though liberalism does reject the establishment of collective rights because of the threat they represent to individual rights. It is for this reason that, without abandoning the principle of individual autonomy, liberals declare themselves in favor of the promotion of the autonomy of the “less autonomous,” that is, of members of minority cultures. This presupposes a recognition of individual cultural rights, both positive and negative, through affirmative action. This action demands the providing of parity, which in turn allows for a definition of the principle of equality that is no longer only formal, but material as well.

Consequently, liberals speak of cultural groups as deserving of rights only in a very vague sense, due both to the difficulty of providing objective criteria for defining a culture and, as has been mentioned, to the limiting effect of cultural rights on the rights of individuals. One has only to consider those individuals who are members of such cultures but may not wish to participate in them, such as the French in Quebec, to see that the guarantee of collective rights does not take into account the voice of dissent that may constitute a sort of “minority within a minority.” It is therefore a questionable claim that the guarantee of collective rights is based on the survival needs of minorities. If these cultures were of interest, particularly to their constituents, it would be sufficient to establish a forum for self-expression without discrimination or interference and from which any who did not feel represented by the group were free to abstain.

The foregoing makes clear the difficulties that arise in finding ways to recognize and protect cultural minorities. Of course, the discussion is not trivial and is certainly not ended, but one thing cannot be denied: which of the two theses one defends has a specific impact on his or her treatment of basic human rights. In effect, while liberals affirm categorically that those rights are universal and therefore materially immutable, communitarians believe that their universality remains subject to historical assessment and can therefore be accommodated to varying degrees according to certain circumstances.

Such problems and conflicts of multicultural societies have repercussions for criminal justice. The arguments laid out above reflect the complexity of the task of resolving cultural conflicts. In what way membership in a certain group can affect the resolution of these conflicts. In the following pages we will attempt to take on these problems, whose scope can be appreciated by asking the following question: can an exception to the principle of equality under criminal law be made for acts that are culturally conditioned?

2. Multicultural Issues and Criminal Law
2.1. Fundamental Concerns

While there has been some progress in recognizing and respecting cultural minorities, many important steps must be taken before the problems multiculturalism poses for criminal justice can be resolved. On this subject, the experience of the United States, as the quintessential example of multicultural society, is of particular interest. As we will see, important discussions have taken place regarding the reconciliation of respect for cultural diversity with the need for uniformity and credibility in the criminal justice system. The make-up of American society has allowed this country to deal with multicultural issues differently than Europe. The fact that the European discussion hinges on cultural offenses, or culturally motivated crimes, and the American discussion on cultural defenses reflects the fact that Europe is just beginning to approach the problem and is still focused on defining the limits that distinguish culturally motivated crimes from other crimes. In America, on the other hand, the question is no longer whether culturally motivated crimes exist—that is now accepted as a reality—but rather how to present defenses or extenuating circumstances based on cultural considerations.

It is admittedly ironic that penal laws are often enforced upon people who do not have the right to vote and therefore have no voice in their creation, people to whom the laws themselves are completely foreign. Nevertheless, we cannot forget that establishing exceptions in countries with dense immigrant populations could weaken the effectiveness of those laws, hence the danger in allowing defenses such as mistake of law. The specific question of whether it is appropriate to establish mitigating circumstances based on cultural motivations will be examined below. But the broader question remains: how far can a democratic society tolerate practices that conflict with its own established values?

The answer to this question is not simple one; it explores the boundaries of multiculturalism. Tolerance may be essential to a democratic society, but where does it end? Should a society tolerate groups whose culture threatens its own existence? This particular question is not as absurd as it may seem, since one of the most pressing threats faced by modern society is from fundamentalist Islamic terrorists whose stated goal is the destruction of Western society. Even Walzer himself admits that, in situations like these, prohibitions on cultural practices reflect basic common sense rather than intolerance. This example may be more extreme than is usually faced by a multicultural society, though it still serves to illustrate the conflicts involved. But what of those acts that are common and approved in the context of one culture but considered crimes in its host society, or that are considered crimes in both cultures, but with very different penalties?

The genital mutilations that some North African and other Arab countries admit to performing; the practice of polygamy by Muslims; the killing of relatives, including minors, to safeguard family honor; the tolerated child labor offenses and other mistreatment of family members by fathers; a Muslim woman who wears the veil as required by Islam and refuses to remove it when ordered to do so in order to verify her identity, these are but the most characteristic examples. Two cases, both of which have had an impact within the United States, should serve to better illustrate the kinds of clashes to which culturally-based defenses can give rise: People v. Kimura (tried in Los Angeles County Superior Court), which sparked a debate on the subject of cultural defenses, and
In November of 1984, Fumiko Kimura, a Japanese-born American citizen, learned that her husband was hiding an affair with a mistress he had been supporting for years. She decided to kill herself along with her four-year-old son and six-month old daughter. Two months later, she took her children to a beach in Santa Monica and attempted to commit *oya-ko shinju*, a Japanese rite of family suicide, by drowning the three of them in the bay. Onlookers were able to save the life of the mother, but the children died. Kimura bitterly resented the interference of her rescuers. In Japan, *oya-ko shinju* is considered a crime but not a heinous one. The Japanese consider the link between parent and child to be inseparable, to the point that the child is viewed as an extension of the parents. A mother therefore, having been dishonored by adultery and chosen suicide in response, cannot simply abandon her children in order to do so. They must join her; any other course of action on her part would be considered cruel. Kimura, it was explained during the trial, was alone, unemployed, abandoned by her husband, leading to her decision to carry out the *oya-ko shinju*; having failed to complete the act, she felt dishonored and shamed before her society. These cultural motivations led the courts to convict Kimura of manslaughter (rather than the murder charges that had initially been brought) and impose a substantially lighter sentence.

Mohammed Kargar, an Afghani refugee living in Maine with his family, was babysitting one of his neighbors’ young daughter in his home. During her visit, she saw him kiss the genitals of his eighteen-month-old son. The girl mentioned the kiss to her mother, who recalled seeing a similar display in the Kargars’ family photo album and reported it to the police. Kargar did not deny kissing his son as he had, explaining that, in his culture, to kiss one’s own son in this way was a show of paternal affection without any sexual connotation. Despite his protests of the absence of sexual overtones within the cultural context of his actions, he was charged with sexual abuse and convicted in Superior Court on the basis that the behavior itself was an offense. Nevertheless, the state supreme court agreed with the nonsexual cultural character of Kargar’s actions and overturned the verdict.

Latin America has also dealt with cultural clashes in its treatment of crimes. In some cases the question of whether a penalty is acceptable within a certain culture or should be considered torture becomes complicated, as it did in Colombia, where a member of the *U’wa* tribe was sentenced to sixty lashes for homicide. For the *U’wa*, the purpose of such a punishment is purification to reestablish the natural order and bring the offender back into harmony with his or her environment. In others the law may provide for lighter sentences for crimes committed by members of certain cultures, such as Article 13 of Chile’s Law 16.441, dealing with sex crimes and crimes against property committed by *Pascuenses* (residents of Easter Island). This law does not require the culture of the victim to be considered, which could weaken its effectiveness if respect for the culture of the offender conflicts with the rights of victims. Similar questions may arise when issues of family honor, a matter of vital importance in some cultures, are not considered mitigating factors in murders and other homicides.

### 2.2. Implications for Criminal Justice: How to Approach the Problem
Discussions of this nature often involve a search for a common base of values. The questions commonly asked are: first, whether there exists some kind of supra-cultural criminal law, or at least some common denominator in matters of penal policy, that could supersede culture-specific viewpoints; and second, if such a common foundation exists, how to define it. Some maintain that the answer to this search can be found in the principles of respect and tolerance for the rights and differences of others. Policies can be built on the mutual foundations of personal respect and dignity. Such policies could then prohibit practices that violated basic human rights, even for the sake of cultural diversity. Others find such a philosophy less tenable, since it can also be argued that the concept of “basic” human rights is actually a Western cultural tradition, and that an ideology based on their universality is therefore suspect. Any such rights must therefore be understood in the context in which it is applied.

The situations that give rise to this type of problem are not always as straightforward as we would like them to be, with the previously mentioned sentence imposed by the U’wa tribe providing an intriguing example. Can this type of corporal punishment, of itself, be condemned as an offense against human dignity? The specific case in question must be examined, and interpreted in light of Article 5 of the Inter-American Convention on Human Rights. The Colombian Constitutional Court ruled in this particular case that the punishment did not constitute torture, since the physical injury was minimal and because it restored the offender to his or her place in the community. The purpose of the lash, therefore, was not to cause excessive pain, but rather to purify the offender through punishment.

Other cases are not so easy to justify, cases that criminal law is bound to address, such as those of genital mutilation. Again the question arises: what are the limits that define culturally oriented or culturally motivated crimes? What defenses, if any, exist? Put another way, should all cultures’ values be considered equal, or if not, does one society have the right to judge the legitimacy of the cultural practices of minorities? An often-asked question related to this topic is whether, without recourse to criminal law, different cultures with different customs can exist within a society, without resulting in conflicts requiring (sometimes severe) punitive measures. Carrying cultural diversity to an extreme could have dangerous consequences in a society if, for example, it were to result in the setting up of different penal systems, each with its own institution, covering its own territory, for its own cultural group. Notwithstanding the opinions expressed below, the theses advanced by the communitarians, with respect to the idea of equal participation in democracy within the society in which different groups find themselves, appear debatable.

At this point it becomes pertinent to question whether the communitarians’ theories offer a better solution to culturally-based problems in the penal system than the liberals, that is, does the institution of collective cultural rights, as explained above, lead to a better resolution of culturally motivated crimes without clashing with the basic principles of criminal law? Certainly one of the great contributions of the communitarians has been to demonstrate the importance of the social and cultural context in which people live, highlighting the “social nature of man” and the consequent impossibility of state neutrality. Likewise, their mindfulness of the problems stemming from cultural diversity and the need for attention to minorities is commendable. What raises doubts are the means by which they propose to effect this protection of minorities. As explained above, communitarians claim
that what liberals call state neutrality is merely a fantasy, and that the state should therefore assume an active posture by establishing collective cultural rights. But the limits that the institution of such rights would impose on the freedoms of individuals seems to contradict the very foundations of criminal law. For the moment it will suffice to point out that a liberal philosophy in no way rejects the principle of consideration and respect for minority cultures, since it recognizes, as has already been stated, the existence of individual cultural rights.

One of the greatest dangers brought about by the institution of collective rights — such as the creation of judicial systems adapted to specific cultural groups— is the formation of ghettos within a society, leading to social breakdown. Indeed, from a crime-prevention standpoint, it is difficult to see how any criminal justice system with many different established standards of behavior could be effective. A society that recognizes cultural diversity as a collective right and allows members of minority cultures to establish their own rules for dealing with conflicts —in effect, splintering the criminal code into several individual systems— will find that it must eventually accept certain kinds of conduct that the rest of its members find unacceptable, such as sexual and family abuse. While it is true that every state should seek to guarantee the freedom to choose a way of life according to one’s cultural values, a state’s efforts to preserve the culture of a particular group may result in its granting that group the power to make value judgments on behalf of others without their consent. The danger, then, is that such groups may use coercive measures to enforce a particular moral standard. Moreover, in the long term, the institution of collective rights tends to cause alienation between cultural groups, with subsequent displays of intolerance. Integration becomes more difficult and social isolation increases as members of society turn more and more to their own communities for support, heightening their sense of identity.

Considering the problem from another point of view —that of the victim— raises an entirely different set of questions, no less difficult to avoid. As explained previously, one of the chief criticisms of the communitarian philosophy deals with the limiting of individual rights, especially through the suppression of dissenting voices and the risk of marginalization. These fears are particularly justified in victims, especially those who lack opportunities for self-expression. This is often the case with women and children; it is well-known that the social structures of many cultures place women at an automatic disadvantage. Such discrimination based solely on membership in a particular group denies the basic principle of equality in criminal law.

These considerations form the basis for objections to legislation such as Law 16.441, which offers significantly milder penalties for sex crimes and property crimes committed by Pascuenses regardless of the ethnicity of the victim. This particular law not only needlessly denies protection to the victim; it also makes the unqualified assumption that certain classes of crimes are always culturally motivated. The law is therefore designed from a pro reo perspective, but in a way that is counterproductive to deterring crime. If the purpose of drafting such a law is to deal with a culturally motivated behavior, the problem could be solved more simply by asserting a cultural defense, an argument that would call for a penalty to be either waived or reduced if the crime were found to be culturally motivated (as will be explained more fully below, including criticisms). Such motives would, of course, need to be demonstrated, as proposed in Article 54 of Law 19.253.
While there may be no clear and simple solution, it seems clear that the uniqueness of a culture is not enough to guarantee its equality, and may even prove entirely unacceptable. A society subjected to extreme moral relativism, to the belief that all cultures are equal, simply cannot survive. Restricting certain cultural practices is therefore not only justified, but may even be constitutionally sanctioned in matters such as maintaining order, public safety and common decency, where the exercise of freedoms is limited.

An intercultural system of criminal justice is not an impossible goal. But it must be founded on the principle of respect for human rights, not only in precept but in practice. A democratic system, respectful of fundamental rights and built on a foundation of tolerance, can easily accommodate diverse cultures and establish laws to resolve the conflicts that such diversity creates. There do, in fact, exist common basic values that no society can deny (as the universalists claim), and those values are based on fundamental human rights, which cultural claims cannot overcome.

2.3 Penal Treatment of Culturally Motivated Crimes

Up to this point, the phrase “culturally motivated crimes” has been used to refer to conduct which, while in violation of penal law, is accepted in the culture to which the perpetrator belongs. Considering the implications of such a classification, it now seems wise to pause and discuss this concept in greater detail.

The requirement for a crime of this type is that an act which is considered an offense under the penal law of the majority culture must be committed by a member of a minority culture which does not consider that act to be criminal, whether for absence of wrongdoing, justification or excuse; or, if the act is considered criminal in both cultures but different penalties are imposed. The values of the minority culture are thereby brought into conflict with those enforced by the penal law. The Kimura and Kargar cases cited above illustrate just such a clash of values. In order to determine the appropriate penal treatment for a crime that may be culturally motivated, it is necessary to identify the concurrence of certain elements that make up such a crime.

In essence, three separate categories of elements must occur successively. The first of these elements, the psychological factor, has to do with the motive for the act: in the mind of the perpetrator, the act must be culturally motivated. This psychological factor would control the perpetrator’s actions, he or she having been conditioned by cultural standards to act a certain way under certain circumstances. The act can therefore be explained through an understanding of these cultural standards. The presence of this subjective psychological factor alone is not sufficient, however, but must be supported objectively by the culture to which the perpetrator belongs. There must be some objective cultural link (though not necessarily an absolute one) between the criminal act and the minority culture in question. Finally, these two elements being present, it must be determined whether there is indeed a cultural incompatibility between the minority culture and that of the host society. If there are measurable differences in the way each culture interprets the same conduct from a penal standpoint, with one culture excusing or mitigating the act and the other condemning it, then the act can properly be called a
culturally motivated crime.

Having presented the essential elements that allow us to recognize this type of crime, the next step is to determine how to respond; that is, how should the justice system treat someone who is judged to have committed such a crime. The initial question, as we shall see, is whether the traditional criminal theory provides us with the necessary tools, or if it is necessary to devise new ones specifically, to account for the cultural context that surrounds an act.

It is interesting to consider the opinions on this subject in the literature and jurisprudence of the United States, since, as mentioned before, their status as the quintessential multicultural society has obligated them to pay special attention to the subject. There the discussion is one of cultural defenses. In general, when we speak of defenses, we refer essentially to the concurrence of certain factors or circumstances that allow for the removal or diminishing of criminal liability. If any of these factors has a cultural component, we are faced with a cultural defense. For such a defense to be invoked, however, the crime itself must be culturally driven. Fundamentally, the application of such a defense falls within the subjective sphere of mens rea; that is, the nature and depth of a defendant’s cultural experience required in order for it to have an effect on his/her motives in the eyes of the law. With respect to the defendant’s cultural conditioning, then, the question is, what influence that conditioning could have had on his or her actions whether it might have been sufficient to create an excuse.

In American law, cultural motives do not of themselves constitute an excuse. Rather, all the factors being considered, a defense is developed based in one of the traditional categories: mistake of fact, unconsciousness and heat of passion, provocation, insanity or diminished capacity. In Kimura, for example, the case for reduction of the sentence was based on the defense of diminished capacity, arguing that the defendant’s actions were conditioned substantially by her sense of cultural identity, which affected her capacity to behave in accordance with the law.

It can be stated that the debate over the proper penal treatment of crimes that express a contradiction between the law, which reflects the values of the dominant culture, and the culture of the perpetrator of the act that has created the conflict can focus on either justifications or excuses. The idea of establishing differentiated territories, a sort of juridical pluralism, seems impractical Not only is inequality created when a democratic society establishes ghettos or enclosed territories that prevent any sort of integration —disincentivizing any interest in familiarizing oneself with the laws of the dominant culture and risking dangerous repercussions from the perspective of crime-prevention—but, as noted above, such a strategy limits the freedoms of members of minority cultures who may have no wish to continue participating in those cultures (and having the corresponding penal systems imposed on them, which could be seen as violating protected human rights).

Failing that possibility, some propose the justifying of acts committed by minorities that conflict with the values of the majority culture. Such proposals have been aimed principally at resolving some of the problems cultural diversity has created in Latin America. The premise is that Eurocentric laws have been imposed independent of any consideration of the indigenous population, leading to the proposed remedy of
acknowledging constitutionally the multi-ethnic character of many Latin American nations. Certainly it can be admitted that, considering the importance currently placed on cultural identity, when faced with conflicting legal and cultural obligations, one should feel justified in choosing his or her own culture. The idea that focusing on culpability (excuses) implies recognizing the supremacy of one culture over another (since the former would be the one to decide whether a crime deserved to be punished) supports this thesis.

While it may seem reasonable to direct efforts toward recognizing cultural identity, respecting diversity to the point of justifying acts that threaten society’s values seems a dubious, even dangerous, policy. It would be difficult for a society to accept that certain acts ought to be tolerated and even justified solely on the basis of respecting the customs of other cultures; one need only think of the conflicts resulting from the justification of domestic abuse or violence. As stated previously, communitarian policies of this nature could give rise to social instability, counterproductive to the goal of crime prevention.

A more reasonable approach would be to examine the problem from the perspective of excuses, focusing, as do the theory and jurisprudence of the United States (and much of the rest of the world), on the framework of cultural defenses.

The problem is similar to that of mistakes of law, but with the difference that the error lies not in ignorance of the law, but in a lack of understanding of it—what Zaffaroni, Alagia and Slokar call “mistakes of comprehension” (error de comprensión), referring to situations in which the subject, while knowing the law, cannot comprehend it due to having internalized a different set of values, some of which may be incompatible with those shared by the dominant culture. This concept is clearly not intended to encompass cases in which a subject breaks a law through an act of conscience, that is, in which a subject knows he or she is breaking the law but feels that to do otherwise would violate his/her conscience. Its intent is to address those cases in which the process of internalizing the law is so hindered by the subject’s cultural conditioning that he or she cannot be blamed for failing to comprehend the law; the error is a culturally conditioned one. Article 15 of the Penal Code of Peru falls under this heading.

Nevertheless, the risks of such proposals cannot be ignored. A broad or consistent recourse to such measures in cases of cultural conflicts could undermine confidence in the penal system. Also, the legal complications inherent in establishing formal exceptions such as Peru’s Article 15 must be recognized. Such exceptions, once established, open the door to a series of problems that are difficult to resolve a priori. Membership alone in a given culture could be considered to condition one’s understanding of the law. It could be asked, how long a subject must remain in a certain territory before he or she could be assumed to understand a given law. Such a policy could create a sort of harmful incentive to avoid integrating oneself into a society or becoming familiar with its laws.

In summary, notwithstanding the relevance of error (as the concept has been discussed here), it seems unnecessary to create ex novo exceptions where the laws themselves are sufficient. Through careful consideration of the relevance of cultural conditioning, courts can adequately respect the principle of equality before the law.

Footnotes
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It is worth noting that concern for cultural minorities is not a recent development; there are examples of international treaties for the protection of minorities in the 19th century, such as the Treaty of Paris, signed March 30, 1856 to protect Christians in the Ottoman Empire. For more on this subject, see RAMÍREZ NAVALÓN, Rosa María. “Protección de las minorías religiosas en el Derecho internacional: la declaración de Naciones Unidas y el Convenio marco del Consejo de Europa”. In: JORDÁN VILLACAMPA, María Luisa (dir.). Multiculturalismo y movimientos migratorios. Valencia: Tirant lo Blanc. 2003, p. 82. For historical background see THORNBERRY, Patrick. International Law and the Rights of Minorities. Oxford: Clarendon Press, 1991, p. 25 et seq.


BERNARDI, “El derecho penal”, p. 41, suggests that the relationship between the values that make up a culture and the laws that make up a penal code could be salvaged by returning to the principle of ultima ratio, that tolerance of diversity should only be abandoned in situations that threaten the stability of a society. BECERRA, Nicolás. Derecho Penal y diversidad cultural. La cuestión indígena. Buenos Aires: Ediciones ciudad argentina, 1997, p. 15, argues that the values synthesized by a criminal code are founded in a prevailing cultural context that “permeates” the state’s entire penal policy, with the state “valuing” some cultural traditions more than others. BARATTA, Alessandro. Criminología crítica y crítica del Derecho Penal. Trans. BUNSTER, Álvaro. Buenos Aires: Siglo XXI Editores, 2002, p. 71, wonders whether it is possible to speak of a single system of values, suggesting that there have always a variety of systems and that several factors determine to which system a particular individual should be accountable.


DE MAGLIE, Cristina. “Multiculturalismo e Diritto Penale. Il caso americano”. Rivista Italiana di Diritto e Procedura Penale. 2005, p. 174, points out that the legal-political model of the nation-state has found itself in jeopardy for various reasons. The law has recently taken on an international dimension, leading to a globalization of criminal law. In addition, the breakup of some states has revealed their lack of viability as political models given the diversity prevalent in modern cultures.
While the International Criminal Court may be the most visible evidence of these global views, there are numerous international treaties among nations prosecuting various crimes of international consequence, from terrorism to prohibitions on obscene publications. See BASSIOUNI, Cherif (ed.). *Internacional Criminal Law*. 2ª ed., New York: Transnational Publishers, 1999, t. I.


IZARD, Miquel. “Éxodos, destierros y migraciones”. In: BERGALLI, Roberto (coord.). *Sistema Penal y problemas sociales*. Valencia: Tirant lo Blanch, 2003, p. 515 et seq., presents a particularly pessimistic view of this increase; p. 527 et seq. describe the role played by countries in the Northern Hemisphere and how it has contributed to the current problems of poorer nations.


As BERNARDI, “El derecho penal”, p. 23, explains, the danger Europe faces today is that of transformation into a Babel of different practices and ways of life, and the reluctance of cultural groups to integrate themselves into the majority cultures of the nations in which they reside.

DE MAGLIE, “Multiculturalismo”, p. 175, warns of the need to resolve these conflicts, pointing to the history of the United States, which she considers the most typical example of a multicultural society.

When the identity of the perpetrators of the London terrorist attacks of 2005 was discovered, one of the most disturbing aspects of the attacks was that the terrorists were English citizens of Pakistani origin who maintained their allegiance to Islamic fundamentalism.
15 LAMO DE ESPINOSA, “Fronteras”, p. 26, feels that we are all multicultural beings, products of a mix of various cultural traces. The balance among the various cultural identities is worked out from day to day, according to the situation in which each person finds himself.


19 WALZER, Tratado, p. 39-40. It is interesting to observe the thinking of Count Coudenhove-Kalergi, who foresaw the dangers of nationalism during the Interwar Years and proposed the formation of a United Europe. The Count was a strong defender of multiculturalism, probably due to his family origins. COUNDENHOVE-KALERGI, Richard. Una bandera llamada Europa. Barcelona: Editorial Argos, 1961.

20 As LIPKIN, Robert Justin. “Can Liberalism Justify Multiculturalism?”. Buffalo Law Review, Winter, 1997, 45, p. 1-2, points out, the end of the Cold War did not signify a rise in peace and prosperity; in fact, many conflicts became even sharper.


23 KYMLICKA, Ciudadanía, p. 13; VILLAR BORDA, Luis. Derechos humanos: responsabilidad y multiculturalismo. Bogotá: Universidad Externado de Colombia, Serie de Teoría y Filosofía del Derecho, nº 9, 1998, p. 30; LAMO DE ESPINOSA, “Fronteras”, p. 21-22, has a chart illustrating the distribution of ethnicities throughout the world, showing that 55% of the population is represented by only 12 ethnicities, while another 383 comprise only 3%.

24 LAMO DE ESPINOSA, “Fronteras”, p. 23.
VIOLA, Francesco. “Diritti fondamentali e multiculturalismo”. In: BERNARDI, Alessandro (coord.). Multiculturalismo, diritti umani, pena, Milano: Giuffrè, 2006, p. 37, warns against confusing multiculturalism with pluralism. While pluralism can be found in culturally homogeneous societies, the term “multiculturalism” supposes more than one culture within a society; GRANDI, Ciro. La responsabilità penale nella società multiculturale, Università di Ferrara, 2006, p. 14.

It is for this reason that this work does not address the theory of what are called “subcultures.” Such theories are aimed principally at examining the different values, behavior patterns and styles of communication that can occur within a single culture—such as the subcultures of lower-class juvenile delinquents, on which sociological studies have focused in an effort to understand the factors that drive their behavior. For more, see BERGALLI, Roberto. “Perspectiva sociológica: desarrollos ulteriores”. In: BERGALLI, Roberto; BUSTOS, Juan (dir.). El pensamiento criminológico I. Bogotá: Temis, 1983, p. 123 et seq.; BUSTOS RAMÍREZ, Juan. Control social y sistema penal. Barcelona: PPU, 1987, p. 284 et seq.; PAVARINI, Máximo. Control y dominación. Trans. MUÑAGORRI, Ignacio. Buenos Aires: Siglo XXI editores, 2002, p. 108 et seq.; BARATTA, Criminología crítica, p. 66 et seq.

See KYMLICKA, Ciudadanía, p. 36.


Regarding the development of the assimilation policy throughout history, see PRADO D., Maximiliano. La cuestión indígena y las exigencias de reconocimiento. Colección de Investigaciones Jurídicas. Universidad Alberto Hurtado. n° 3, 2003, p. 25 et seq.; GARCÍA VITOR, Enrique. “Culturas diversas y sistema Penal”. UNIVERSIDAD CATÓLICA DE TEMUCO. Problemas actuales de Derecho Penal. Temuco: Imprenta Austral, 2003, p. 81, considers such integration policies to have affected minority cultures at such a basic level that they resulted in “ethnicide.” On p. 84 the author notes that the anthropology of the Enlightenment sought to understand the American man from the European perspective. This approach is reflected in the 1924 Peruvian Penal Code, which distinguished between “savage,” “semi-civilized” and “civilized” peoples. On p. 95 the author cites the designations of the “jungle” natives as mentally inculpable and the “culturally disabled” as semi-culpable according to the 1973 Bolivian Penal Code. Regarding events in Peru, HURTADO POZO, José. “Derecho Penal y diferencias culturales: el caso peruano”. In: BORJA JIMÉNEZ, Emiliano (coord). Diversidad cultural: conflicto y derecho. Valencia: Tirant lo Blanch, 2006, p. 377-378. The work of VIÑAN, Ángel, “El problema de la responsabilidad Penal del indígena ecuatoriano”. Revista de Ciencias Penales. 1942, t. VI, p. 274 et seq.; 420 et seq.; illustrates well the thinking of the time (the beginning of the Twentieth Century), such as the assertion, on p. 275, that some people (such as the indigenous peoples of Ecuador) are humans in name only.


GARCÍA VITOR, “Culturas diversas”. p. 89.
The African-American philosopher Cornel West relates that when he went swimming as a child, white bathers got out of the water when he got in. At first he did not understand why, but later he realized that to them the water was now “dirty.” The bodies of African-Americans were considered unclean. Experiences such as this may have led West to dedicate himself to topics such as racism and cultural relations. WEST, Cornel. Prophetic thought in postmodern times. Beyond Eurocentrism and Multiculturalism. v. 1. Monroe (Maine): Common Courage Press, 1993, p. 77.

For example, in Bolivia, Colombia, Ecuador y Perú. VALENZUELA REYES, Mylene. “Derechos de los pueblos indígenas en el contexto internacional, especialmente en lo relativo a los aspectos penales”. Revista de Estudios Criminológicos y Penitenciarios. n° 6, 2003, p. 16, highlights the progress that has taken place in the last fifty years.

DE MAGLIE, “Multiculturalismo”, p. 184, lists the patterns that have been followed in the United States. Prior to the Twentieth Century the Melting Pot emphasized oneness of people, nation and culture. Between 1920 and 1960, this pattern evolved into a cultural pluralism that accepted diversity as long as it did not contradict American values. Only since the 1970s has the U.S. been truly multicultural, appreciating ethnic bonds and differences and even recognizing the privilege of certain groups. See also KYMLICKA, Ciudadanía, p. 30.

Art. 27 International Covenant on Civil and Political Rights: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” MORMANDO, Vito. “Religione, laicitá, tolleranza e diritto penale”. Rivista Italiana di Diritto e Procedura Penale, 2005, p. 652, highlights the importance of secularism, pluralism, multiculturalism and tolerance in European affairs. On the same note, see BERNARDI, “El derecho penal”, p. 29-30.

See at http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 (visited november 28, 2009). LILLO, “Los derechos”, p. 95, points out the progress achieved in both internal and international legislation and the genuine reforms that have taken place as a result of the Convention.

PRADO, La cuestión indígena, p. 39 et seq.


This point is also raised in BERNARDI, “El derecho penal”, p. 29.
MORMANDO, “Religione”, p. 653, warns that both Italy and the European Union encourage dialog rather than take a neutral position on the subject. It is interesting to note the sharp controversy that resulted when no references to Christianity—considered by many intellectuals to be the cornerstone of European culture—were adopted during the drafting of the European Constitution. Thus ELIOT, Thomas S. Notas para la definición de la cultura. Trans. DE ASÚA, Félix. Barcelona: Bruguera, 1984, p. 186, warns: “It is in Christianity that our arts have developed; it is in Christianity that the laws of Europe have—until recently—been rooted. It is against a background of Christianity that all our thought has significance. An individual European may not believe that the Christian Faith is true, and yet what he says, and makes, and does, will all spring out of his heritage of Christian culture and depend upon that culture for its meaning. Only a Christian could have reproduced a Voltaire or a Nietzsche. I do not believe that the culture of Europe could survive the complete disappearance of the Christian Faith. And I am convinced of that, not merely because I am a Christian myself, but as a student of social biology. If Christianity goes, the whole of our culture goes.”

VIOLA, “Diritti fondamentali”, p. 55, criticizes measures of this type, believing that the state cannot exclude religious practices and identifying symbols from public discourse.


GALEOTTI, “I diritti”, p. 32, considers a people’s right of self-determination to be a cultural right, occasionally exercised by the group at the expense of individual members.

Art. 27 International Covenant on Civil and Political Rights, cited in n. 35; GRANDI, La responsabilità, p. 27.

This is the position taken by GALEOTTI, “I diritti”, p. 40.

KYMLICKA, Ciudadanía, p. 117-119. As TAYLOR, El Multiculturalismo, p. 86, explains, liberalism has its roots in Kant’s belief that man’s dignity consists in his autonomy—his capacity to determine for himself what the good life is. For more on Kantian autonomy and other topics, see RAWLS, John. Teoría de la justicia. Trans. GONZÁLEZ, María Dolores. Madrid: Ediciones F.C.E. España, 1979, p. 287 y ss.

KYMLICKA, Ciudadanía, p. 119.

For a criticism of the policy of collective rights, see HABERMAS, Jürgen. La inclusión del otro. Estudios de teoría política. Trans. VELASCO ARROYO, Juan Carlos. Barcelona: Paidós, 1999, p. 189 et seq. On p. 194, He states: “But once we take this internal connection between democracy and the constitutional state seriously, it becomes clear that the system of rights is blind neither to unequal social conditions nor to cultural differences.”

According to KYMLICKA, Ciudadanía, p. 151-152, every individual is free to create or join any of the associations that make up the “cultural market-place.” The survival of minority cultures depends on their success in attracting members.

KYMLICKA, Ciudadanía, p. 151.


While liberalism, as mentioned in n. 50, is founded in the theories of Kant, communitarianism prefers those of Hegel. See TAYLOR, Charles. Hegel y la sociedad moderna. Trans. UTRILLA, Juan José. México DF: Fondo de cultura económica, 1983.

LIPKIN, “Can Liberalism”, p. 1 et seq., discusses the difficulties minority protection poses for liberalism.


62 The question becomes how to identify the “common” good. KYMLICKA, *Filosofía política*, p. 227-228. On p. 228, he notes: “A communitarian state can and should encourage people to adopt conceptions of the good that conform to the community’s way of life, while discouraging conceptions of the good that conflict with it.”


64 See GALEOTTI, “I diritti collettivi”, p. 34.


66 VIOLA, “Diritti fondamentali”, p. 50-51, takes this position. As an example she cites the African Charter, which fosters community development by emphasizing collective rather than individual rights.

67 Kymlicka believes that liberalism and communitarianism can be reconciled by a blending of their philosophies into a sort of “communitarian liberalism.” Without abandoning the essential theories of liberalism, especially its respect for individual autonomy, he admits that one cannot ignore cultural considerations, since they are what shape the autonomy of the individual. KYMLICKA, *Ciudadanía*, p. 151 et seq. Indeed, he submits, such cultural value judgments drive the decisions of the individual. To that effect, he proposes the establishment of “group-differentiated rights” to be exercised by the individual. KYMLICKA, *Ciudadanía*, p. 57 et seq. (according to LIPKIN, “Can Liberalism”, p. 3 et seq., distinguishing between deliberative and dedicated cultures helps one understand the place for tolerance in liberalism). He therefore distinguishes between polyethnic rights (comprising both positive and negative individual cultural rights), special representation rights and rights of self-government. One criticism of these proposals is that the exercise of these rights could easily require exemptions from general laws, resulting in powerful groups that could affect the rights of their members. And while Kymlicka may state that the choice to participate is an autonomous one, it may be so in name only; such regimes may seek to ensure their rights of self-government through measures designed to make leaving the group difficult. As the regime develops and its members begin to form social and economic networks, leaving could become even more complicated. See DOPPELT, Gerald. “Liberalism and illiberalism: Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum”. *Journal of Contemporary Legal Issues. University of San Diego School of Law*. 2002, 12, p. 661 et seq.


69 COMANDUCCI, “Quali minoranze?”, p. 60.
Regarding the importance of secularism and tolerance in Western democracies, see MORMANDO, “Religione”, p. 656.

GRANDI, La responsabilità, p. 38-40.


According to PAVARINI, “Criminalità”, p. 175, it is unlikely that Europe will ever become a multicultural society like the United States.

MONTICELLI, “Le ‘cultural defenses’”, p. 538-539. The author attributes this to the fact that Europeans are just beginning to address the issue and are more concerned with how immigrants deal with the laws of the dominant culture.


WALZER, Tratado, p. 24; MORMANDO, “Religione”, p. 656, classifies secularism (recognized in the Italian Constitution and in the European Union Treaty) as the essential instrument of tolerance for liberal democracies.

Such aggressions against women are difficult to eradicate, since they are driven by a mix of social and religious motives. These practices are meant to make a woman “clean,” keeping her sexual organs whole made her impure, supposedly an obstacle to marriage. They are also a rite of membership for the communities that practice them, making them difficult to root out. For more detail, see DI PIETRO, Francesco. “Le norme sul divieto delle pratiche di mutilazione genitale femminile”. At: Diritto &Diritti http://www.diritto.it/archivio/1/22492.pdf. (visited November 24, 2009); MONTICELLI, “Le ‘cultural defenses’”, p. 563 et seq. describe incidences of the practice in Italy, which, it is worth noting, added a statute to its penal code, §§ 583 bis y 583 ter, regarding female genital mutilation.

A Muslim woman has different ways of covering different parts of the body, including the *hiyab* (used in Morocco), a scarf that covers the head and neck; the *chador*, a longer garment the covers almost the entire body; the *haik* (used in Algeria), a garment to cover the neck and shoulders; and finally the *burka*, required by the Taliban, which covers the entire body and the face, allowing the wearer to see only through a type of fabric cell. The *burka*, without a doubt, is the most oppressive demand placed on her daily life, inhibiting almost any public activity. Regarding the implications of this type of cultural requirement, see GARCÍA PASCUAL, Cristina. “El velo y los derechos de las mujeres”. In: ANSUÁTEGUI ROIG, F. J.; LÓPEZ GARCÍA, J. A.; DEL REAL ALCALÁ, A.; RUIZ RUIZ, R. (eds). *Derechos fundamentales, valores y multiculturalismo*. Madrid: Dykinson, 2005, p. 87 et seq.

Article 85 of the Chilean Criminal Procedure Code relating to identity checks, the denial of which is an offense under Article 496 No. 5 of the Penal Code.


The author would like to acknowledge the fieldwork undertaken by BORJA, “Sobre la existencia”, p. 272 et seq., in the Amerindian communities, in which he relates his personal experiences regarding the various indigenous penal systems. He notes that in sentences are sometimes handed down directly from the Amerindian leaders with no state involvement whatsoever, p. 276.

VILLAR, *Derechos humanos*, p. 38. Likewise, GARCÍA VITOR, “Culturas diversas”, p. 92-93, lists several indigenous practices that demonstrate cultural diversity, such as the killing of deformed children who are believed to be cursed and the incident in Chile after the 1960 earthquake, in which the granddaughter of the local chief was slain to appease the wrath of the gods.

Article 13: “Crimes listed in Titles VII and IX of Volume 2 of the Penal Code, when committed on the territory of Easter Island by a native of that island, shall incur a penalty one grade lower than the minimum penalty allowed by law for the crime of which he or she is guilty.” The schedule for the execution of prison sentences is also more favorable for island natives than for the rest of the population, for example, Article 14 allows for up to 2/3 of the sentence to be served outside the prison facility.

Concerning the penal situation of indigenous peoples in Chile, see VALENZUELA REYES, “Derechos de los pueblos”, p. 24 et seq.
See, for example, a case in which citizens of Turkish origin who attempted to kill a Turkish student who left a member of their family pregnant—in which retaliation for such acts is part of the culture. Published in *Neue Juristische Wochenschrift*. 1980, p. 537. Likewise, a case in which family pressures drove one Turkish citizen to slay another to restore his honor. Published in *Neue Juristische Wochenschrift*. 1995, p. 602. In these cases, vengeance and the particular motives for the slayings were not found sufficient to mitigate acts of murder. See MONTICELLI, Luca. “Le ‘cultural defenses’”, p. 571-572.


VILLAR, *Derechos humanos*, p. 41.

BERNARDI, “El derecho penal”, p. 25.


BORJA, “Sobre la existencia”, p. 293, suggests separate coexisting systems.


Article 54: “Customs enforced in judgments between persons of the same indigenous culture shall have the force of law as far as it shall be compatible with the Constitution of the Republic. In matters of criminal law they shall be considered when they may constitute excuses or mitigating factors in sentencing. Any means provided by law may be used to ascertain the validity of such customs, including expert testimony to be procured by the Corporation (CONADI) when required by the court. The presiding judge in a case involving an indigenous person, when requested by the interested party and in any action or business requiring the personal presence of said indigenous person, shall permit the use of his or her native language, with appropriate interpretation to be provided by the Corporation.”


BERNARDI, “El derecho penal”, p. 32, cites the theory of implied limits—that constitutional rights may be limited by the judicial system as a whole or by the constitution itself. EL MISMO, *Modelli penali e società multiculturale*. Torino: G. Giappichelli Editore, 2006, p. 45.

SILVA SÁNCHEZ, “Reflexiones”, p. 196-197, gives this response to the question of whether certain acts must always be designated as punishable offenses under criminal law.

The use of the traditional categories of criminal theory to explain a minority culture’s reaction to a crime does not mean that the culture necessarily defines these categories in the same way.


BERNARDI, *Modelli penali*, p. 58 et seq., observes that United States law takes note of the problems of multiculturalism to a degree not seen in other countries—particularly European countries, though they are, on a smaller scale, also multicultural societies.


116 GARCÍA VITOR, “Culturas diversas”, p. 100.

117 For more on this subject, see GARCÍA VITOR, “Culturas diversas”, p. 100-101.

118 Such policies could even result in rejection and isolation with respect to the cultural community itself, further complicating its integration into society. It seems unreasonable that respect for cultural diversity should be a factor in decisions of this magnitude.


120 ZAFFARONI/ALAGIA/SLOKAR, Derecho Penal, p. 736.

121 ZAFFARONI/ALAGIA/SLOKAR, Derecho Penal, p. 737.

122 Article 15: “Culturally Conditioned Mistakes of Comprehension. One who commits a punishable offense but is unable to comprehend the criminal nature of the offense due to his or her culture or customs shall not be held responsible, or, if the capacity to comprehend is found to be diminished, the penalty shall be reduced.”

123 SILVA SÁNCHEZ, La expansión, p. 109.
This question is raised in MONTICELLI, “Le ‘cultural defenses’”, p. 557 et seq.

DE MAGLIE, “Multiculturalismo”, p. 199.

In the few Chilean cases in which cultural factors were considered at sentencing, mistake of law was the defense relied upon in order to absolve the defendant of guilt. For example, see the judgment of the Villarica Oral Court, 30 June 2005 rape trial, case no. 025/2005.