

## Multicultural Multilegalism – Definition and Challenges

Morten Ebbe Juul Nielsen

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### Résumé de l'article

Le multi-légalisme est une espèce de pluralisme légal qui dénote l'existence de « juridictions minoritaires » quasi-autonomes, au moins en ce qui concerne certains domaines légaux au sein d'une juridiction d'État « normale ». Dans son acception juridique, le multiculturalisme peut justifier la mise en place de telles juridictions minoritaires. Cet article vise à 1) fournir une idée détaillée de ce à quoi un arrangement multilégal pourrait ressembler et de quelle manière celui-ci diffère de certains concepts et modèles juridiques afférents, 2) évaluer la pertinence d'arguments multiculturels standards comme point de départ pour sérieusement considérer la pratique multilégale, 3) voir comment cette idée répond à certaines critiques libérales classiques, et 4) souligner trois problèmes importants pour le multilégalisme concernant a) les problèmes de choix de la loi, b) le dilemme de savoir si la suprématie de l'État doit être maintenue ou non, et c) les tensions avec les droits humains fondamentaux.



# MULTICULTURAL MULTILEGALISM - DEFINITION AND CHALLENGES

MORTEN EBBE JUUL NIELSEN  
COPENHAGEN UNIVERSITY

## ABSTRACT

Multilegalism is a species of legal pluralism denoting the existence of quasi-autonomous “minority jurisdictions” for at least some legal matters within a “normal” state jurisdiction. Multiculturalism in the advocacy sense might provide the justification for establishing such minority jurisdictions. This paper aims to provide 1) a detailed idea about what such a multicultural multilegal arrangement would amount to and how it differs from certain related concepts and legal frameworks, 2) in what sense some standard multicultural arguments could provide a starting point for seriously considering multicultural multilegalism in practice, 3) how the idea fares against some standard liberal criticisms, and finally 4), to point out three salient problems for multilegalism, concerning a) choice of law problems, b) a dilemma facing us as to whether state supremacy should be upheld or not, and c) clashes with basic human rights.

## RÉSUMÉ

Le multi-légalisme est une espèce de pluralisme légal qui dénote l'existence de « juridictions minoritaires » quasi-autonomes, au moins en ce qui concerne certains domaines légaux au sein d'une juridiction d'État « normale ». Dans son acception juridique, le multiculturalisme peut justifier la mise en place de telles juridictions minoritaires. Cet article vise à 1) fournir une idée détaillée de ce à quoi un arrangement multilégal pourrait ressembler et de quelle manière celui-ci diffère de certains concepts et modèles juridiques afférents, 2) évaluer la pertinence d'arguments multiculturels standards comme point de départ pour sérieusement considérer la pratique multilégale, 3) voir comment cette idée répond à certaines critiques libérales classiques, et 4) souligner trois problèmes importants pour le multilégalisme concernant a) les problèmes de choix de la loi, b) le dilemme de savoir si la suprématie de l'État doit être maintenue ou non, et c) les tensions avec les droits humains fondamentaux.

## INTRODUCTION

Multiculturalism is an empirical fact and a hotly contested political and theoretical issue. The focus in this paper concerns the relation between culture(s) and law(s) given the fact of (cultural) pluralism. At the opposing extremes of this debate we find some interesting similarities: one answer to the fact of pluralism is liberal neutrality and difference-blindness: one law and one uniform set of rights for all; the way to deal with cultural diversity is by way of benign neglect; we should all be considered as equals and hence, we allow primarily for exemptions and special rules when very heavy pragmatic considerations point to the necessity of such deviances from the norm. Brian Barry<sup>1</sup> and Jeremy Waldron<sup>2</sup> (*mutatis mutandi*, at least) count as proponents of such a view. At the other extreme, we find a position which says that we must accommodate and codify cultural differences to a degree where it becomes impossible, or at least highly undesirable, to keep the different cultures under the same roof: in other words, an advocacy of secession in cases of sufficiently salient cultural differences.<sup>3</sup> Without in any other way wanting to juxtapose these positions, it is noteworthy that they agree on a form of legal *monism*. The ideal is “one state/culture, one legal framework.” They draw radically different conclusions from the fact of pluralism, of course. One wants to strengthen universalism and equality before the same law, ignoring the variety of cultures; the other to create a multiplicity of smaller and distinct legal communities, but they agree on the central, monistic contention.

Between these positions lie various other replies to the fact of pluralism. Roughly, this is the logical spectrum of (theoretical, normative) *multiculturalism*. Some multiculturalists veer towards liberal neutrality and advocate a “rules and (potentially far-reaching) exemptions” approach *modus* Kymlicka which, in broad terms, advocates the view that, yes, we should have a general framework of rights much like what difference-blind universalists proposes, but, on the other hand, we should allow for exemptions and special group rights in order to fulfil the liberal egalitarian promise given the fact of cultural diversity. Other multiculturalist accounts are more sceptical about the desirability and/or feasibility of our entrenched kinds of universalist and uniform legal and political framework and are hence inclined towards advocating far-reaching culturally mandated legal and political autonomy, without necessarily taking it to the extreme of secession.<sup>4</sup> Still, common to these positions is the idea that we have (some form of) general, overarching legal and political framework within which minorities have certain group rights, exemptions from the general rules etc.

Here, I attempt to explore some facets of a question which has attracted some attention in recent years, at least in political discourse: should *cultural* minorities have their own systems of law, distinct from but still within the general justice system of liberal states? More precisely: should we allow special, (semi-)autonomous systems of justice or law concerning some issues for some minorities, *for cultural reasons*? There is an important difference here between how “mainstream” multicultural theories generally conceives law and the specific idea of *multicultural multilegalism* which is at centre stage in this paper: It is uncontroversial to claim that multiculturalism advances various ideas to the effect that law should make exemptions, exceptions, qualifications to existing laws and bestow special legal privileges to certain groups or members of certain

groups. That, however, does not necessarily amount to a departure from a belief in a classical, monistic law: “Laws have all sorts of exceptions, conditions, and qualifications. Provided they...are stated in general terms and administered impartially, their existence does not violate the principle of the rule of law...”<sup>5</sup> The characteristic feature of multicultural multilegalism is not exceptions etc. *per se*; rather, it is the state-condoned, *i.e.*, *de jure* granting of legal powers or autonomy (as concerns some definite part of law or pertaining to a definite part of the social reality which laws can seek to regulate, see below) to minorities for reasons of culture.

Two *prima facie* examples here is what some Muslim spokespersons have advocated (and to some extent established, e.g., in the UK) namely Sharia law courts dealing with matters of family law and other legal matters; and the various examples of indigenous/first nation/national minority peoples having considerable, if not complete legal autonomy.

However, interesting as these cases might be, they are not completely exemplary for the issues I want to pursue. First, there is nothing intrinsically peculiar or anomalous about the way Muslim family law courts work, if we see it as a way of working with, e.g., contract or private law between citizens. Sure, it might be a considerable deviation from the norm to establish permanent councils dealing with such matters, and of course we can foresee the possibility of clashes with other legal institutions and principles, but that is in the nature of private law and not exceptional to such Sharia courts. Second, if institutions of “elder’s councils” or self-proclaimed Sharia courts work by coercive force and without *formal legal recognition*, they are not different from, e.g., a bike gang or other criminal organization imposing their rule on their members and/or unwilling members of the public; they do not constitute a *legal* exception.

Now, we have become quite familiar with “multilegalism” as concerns national minorities, first-nation peoples etc., and we are also familiar and comfortable with various forms of federalism, where “minor” jurisdictions are embedded within “major” jurisdictions. Although relevant, this is not quite what I want to focus on. The focus is on *multicultural* multilegalism; forms of legal autonomy granted explicitly for “cultural” reasons, and not for claims of original residence, history or any of the other arguments that might typically lie behind granting legal autonomy – even full legal autonomy – to first nation tribes, national minorities etc.

Hence, a “prototypical” multicultural multilegal arrangement would be one that at least partially acknowledged the *nomos*<sup>6</sup> of a group for reasons that are recognisable multicultural (or reflected such reasons, at least), and gave that group (forms) of legal autonomy and/or powers, and did so irrespective of historical (e.g., a history of past injustices) or territorial matters.

Hence, if a western state gave forms of legal autonomy to the group of, e.g., Sikhs within its borders and for recognizable multicultural reasons, it could count as “multicultural multilegalism.” As far as I know, Sikhs have no special historical or cultural claim, based on (long term) past occupation of territory in the west to special recognition of their *nomos* (I here simply assume that Sikhs can

be said to have a certain *nomos* that differs, at least in certain aspects, from the “mainstream western *nomos*”, whatever that might be.) Moreover, let us assume (rather boldly, and again for reasons of the argument) that no past injustices could legitimize forms of legal autonomy for the Sikhs. In essence, the only (plausible) justification for this would be *multicultural* in form: it would be to enhance self-determination, or to promote respect or recognition, or to pursue an ideal of equality between (cultural) groups.

Naturally, instigating forms of multilegalism is fraught with potential dangers, at least as seen from a (broadly conceived) liberal point of view. As an illustration<sup>7</sup>, consider the case of *Santa Clara Pueblo v. Martinez*.<sup>8</sup> The *Pueblo* enjoyed certain limited forms of legal autonomy, notable among these some issues concerning family law. Yet, the formal overarching “canopy” of law is firmly that of the state (and federal law.) A brief summary of The *Martinez* case is illustrative, both of multilegalism and for many of its associated challenges, to be unfolded below: Julia Martinez, a “full-blooded” tribe member, married outside the tribe. The “membership rules” of the *Pueblo* was strictly patrilinear, *i.e.* men of the tribe could marry outsiders and their off-spring would be included in the tribe and its jurisdiction, and not so for women. The upshot of this arrangement was, among other things, that

...the Martinez children (and all similarly situated children) had no right to enjoy the rights, services, and benefits that were automatically granted to children of Pueblo fathers...The Martinez children were thus barred from access to federal services such as health care, education, and housing assistance, just as they were forced to forfeit their right to remain on the reservation in the event of their mother’s death...<sup>9</sup>

As concerns the cases of indigenous peoples and national minorities (ranging from, e.g., *Inuit* to Basques), these might be of tremendous importance as repositories for empirical knowledge about how (and how *not*) to handle the fact of pluralism, legally and politically, but they fall somewhat out of the scope of my particular interest here, partly because of their “independent” status, at least relatively speaking,<sup>10</sup> partly because of their (contingent) territorial status,<sup>11</sup> and partly because both seem to have reasons, backing the legitimacy of their claims to (various forms of relative) independence that differ somewhat from the kind of multicultural reasons that I want to focus on.<sup>12</sup> It might very well be the case that some such groups deserve their own nation or state, *simpliciter*, complete with legal system etc. However, this is not the focus here; it is rather the cases where justice could point in the direction of *certain* forms of legal autonomy *within* the general framework of a liberal state and legal system, for cultural reasons, and independently of territorial and historical claims,

As implied, the issues I want to raise take their outset in some theoretical lines of thought in contemporary multiculturalism and taking them to what *might* be their logical conclusion. In brief, multiculturalists argue for special group rights for (at least certain) minorities. They might do so for egalitarian reasons; or because they believe that it is the only or best way to recognize minorities; or because these rights are the proper way to show proper respect and concern for

minorities. Generally, with the case of indigenous and colonized peoples as (at least occasional) exceptions, it is *not* argued that this extension of rights includes special rights to establish parallel or separate formally recognized systems of justice. Special multicultural rights “take place” under the umbrella of the general law of the common polity, so to speak. But why? If equality, or recognition, or proper respect entail that we should grant special status in the form of special rights to minorities, why should minorities not have the right to make their own *legal* arrangements, at least within certain constraints? Call such legal arrangements *minority jurisdictions*. And call the state of affairs in which we have at least one such minority jurisdiction within or working in parallel with a majority jurisdiction an example of *multicultural multilegalism*. Let me stress here: we are talking about legal, *i.e. de jure* acknowledged structures and autonomy, not *de facto* autonomy. The fact that liberal regimes allow persons to pursue a host of different conceptions of the good is not directly relevant to the arguments discussed in the following.

In the present paper, I discuss only a fragment of the issues relevant here. My main aims are 1) to characterize when and how such legal arrangements would constitute something distinctly different from, e.g., the arrangements citizens in liberal regimes can make under private law and the like, and 2) sketch – by no means give a thorough examination of – some of the theoretical and normative problems such arrangements would encounter.

## OVERVIEW

First, multilegalism or legal pluralism is contrasted against a “naïve” or “realist” picture of state sovereignty and legal monism, in order better to understand the concept of multilegalism. Second, the broader notion of legal pluralism is sketched, and multilegalism is defined as a subspecies of legal pluralism, stressing, among other things, the specifically, and peculiar legal status (official, state acknowledgement of ways in which the state gives up or suspends some of its normal powers) of such an arrangement. Third, it is argued that the concept of multilegalism is in important ways different from legal arrangements such as we find them under the heading of “private law”. Fourth, we move to a sketch of why contemporary political-philosophical thoughts about multiculturalism might entail an endorsement of multilegalism. Fifth, some standard challenges relevant for multilegalism are considered and found less damaging than what might seem the case, *prima facie*. Sixth, some other challenges to multilegalism are presented and discussed: A) any decision involving parties or relevant legal material from more than one jurisdiction involves well-known problems, discussed in “choice of law”-theory. Here, it is argued that multilegalism will entail the same problems, and this might undermine the plausibility of multilegal arrangements. B) It is argued that “hard multilegalism” (where the majority jurisdiction gives up its supremacy, *i.e.*, its final right to make legal decisions) can be unpalatable, steering us towards “soft multilegalism”, where legal powers are “delegated” to minority jurisdictions conditionally. However, soft multilegalism might not fulfil its intended role. C: here, it is argued that (hard) multilegalism might engender conflicts with basic human rights, which again points in the direction of soft rather than hard multilegalism, reiterating the problem of soft multilegalism as discussed in B).<sup>13</sup>

## THE STATIST-MONIST PARADIGM OF LAW

What is law? “The man on the Clapham omnibus” would probably agree to the following picture: the state decides what the law is, and the state is well-defined in territorial terms. Final authority resides in the government/parliament. The state might delegate a large amount of discretion to courts, but courts are still bound (by statutes and precedents.) Moreover, the state decides, or *can* decide, on all matters. Its sovereignty is general.

Some legal scholars, philosophers, and political theorists might scoff at such a picture; nevertheless, it is still part and parcel of many theorists’ outlook, or so I will maintain. Caney<sup>14</sup> describes the “realist” picture of state sovereignty in a way that makes the terms very relevant for our discussion.<sup>15</sup> The standard assumptions concerning state and law consist in the following:

A sovereign state has (legitimate) authority. This refers to the state’s authority, not its capacity, to coerce. Hence, this is a juridical/legal idea, which does not refer to the state’s economic or political power. Caney calls this *legality*.

The state has “the final word”: there is no further entity to which the state must refer in upholding its legality. This is *supremacy*.

The state has legality and supremacy concerning the inhabitants or citizens of a given territory, at least *ceteris paribus*. Call this *territoriality*.

The state has legality and supremacy concerning *all* matters, not just some. Clearly, it is not necessarily so that the state *actually* claims legality and supremacy over all matters (that would be absurd), but in principle, the state has the authority to claim the right to decide concerning all issues (for which an agent can make meaningful decisions, one might add), and not just some. Call this *comprehensiveness*.

Clearly, any kind of minority jurisdiction that goes beyond the boundaries given by accepted possibilities as specified in private/civil law will constitute a violation of one or more of these features. Even though territoriality might be interesting in cases where minority jurisdictions are conceived of in terms of “legal powers concerning X...n in territory Y” (where Y is, e.g., a municipality), and legality is interesting because it must attached to any minority jurisdiction that is at least semi-autonomous (e.g., have legal powers to decide at least concerning issues X...n), focus will be on the features of *supremacy* and *comprehensiveness*.

## THE CONCEPT OF LEGAL PLURALISM

Legal pluralism is a state of affairs in which more than one legal authority claims sovereignty or jurisdiction over either the same person or the same territory or the same issue, and these authorities are not ordered in a hierarchical system that would give one authority precedence over another.<sup>16</sup> Using the vocabulary from the above, *supremacy* and/or *comprehensiveness* is suspended, or at least these features are somehow amended. Note that given this description, legal pluralism need not involve any actual conflicts. One authority (A1) might claim authority over some person (P1) concerning issue (I1), whilst another authority (A2) claims authority over P1 concerning I2. Since there is no necessary connection (ordering in a hierarchy) between A1 and A2, or between I1 and I2 (the issues need not have any causal or other connections to each other), it is possible to have a case of legal pluralism without having conflicts.<sup>17</sup>

It is our ingrained, indeed, in a way commonsensical picture of legal authority – the statist-monist picture from above – where everything legal is ordered in a perfect hierarchy with the sovereign, the rule of recognition, or whichever final authority one prefer on the top of the pyramid which creates the idea that any deviation from this norm *must* involve conflict.

Nevertheless, legal pluralism might very well engender conflicts. Legally speaking, this happens when two or more authorities claim *final* authority (supremacy) over some person or issue concerning the same case, or when two authorities claim authority regarding the same case, but none of them possess final authority. Moreover, legal pluralism might engender conflicts that are extra-legal. Even if there are no strict legal problems or conflicts involved in legal pluralism, it might create problems on the political or social arena. Imagine, for instance, a state of affairs where different persons inhabiting the same territory are under different final authorities concerning (some issue of) criminal law. When two persons under different authorities are party to the same conflict – say, P1 under jurisdiction A1 is accused of committing a crime against P2 who is under jurisdiction A2 – legal troubles are of course likely to surface (though not necessarily). But even if no legal complications arise, the situation is not unlikely to give rise to political and social tensions. Imagine, for instance, that A1 finds P1 guilty for a crime and sentences P1 to 2 weeks of community service where, if P1 was under jurisdiction A2 and had been found guilty, P1 would have served no less than 10 years prison. However, since –or insofar – one or the other authority can claim (legitimate) supremacy, no *legal* troubles arise. Surely, such a situation might (in a certain sense) be legally stable but could of course be a source of resentment and feelings of civil estrangement.

This is not a trivial conclusion. *Prima facie*, it might seem the case that only cases of legal pluralism involving potential *legal* conflicts are cases of potentially problematic legal pluralism. However, it should now be clear that it is not so: eventual social and political problems are as relevant for an evaluation as is legal controversies.

The sense of legal pluralism here is related to, but not equivalent to the issue of legal poly-centrism.<sup>18</sup> In general, “polycentric law” refers to the existence of various non-statist “quasi-legal” institutions as sources of law and authority (e.g., “native law”, families, clans, religious institutions etc.) that definitely exert their authority over individuals, but fail to be recognized in “black letter” codes of law as well as legitimate material in case law.<sup>19</sup> For our purposes, these non-statist institutions are excluded from consideration, and can gain interest only if *some* form of genuine legal recognition (whether as black letter law or as legitimate material for case law) is bestowed upon them.<sup>20</sup>

Multicultural Multilegalism involves: 1) *De jure* acknowledgement of plural and potentially overlapping or competing jurisdictions. Politics might *de facto* acknowledge competing sources of legality (as when they are empirically forced to do so, or when they acknowledge competing legal systems, e.g., the laws of a religious sect) tacitly. However, the crucial thing – even when the state *de facto* tolerates the set of rules of some powerful group, say, a large corporation or a criminal organization because the state is not in a position to do anything about

it – is the *de jure*, not the *de facto* acknowledgement, not mere toleration whether out of necessity or wish.<sup>21</sup> Hence, It does not concern itself with the (empirically given) existence of various non-state organizations, groups etc. that have their own, “extra-legal” rules, insofar these are not recognized officially and *de jure* as “true” legal material.

2) Using a somewhat different idiom, multilegalism constitutes a decisive departure from what Waldron calls “...the basic ethos of legal equality, of one law for all”<sup>22</sup> because it allows for “sortal-status” in the law as opposed to “condition-status” only. The latter denotes the variety of different legal statuses (e.g., “being eligible for”; “having the duty to”, “being liable for” etc. etc.) which the law generates or expresses, and which do not “...tell us anything about the underlying personhood of the individual who have them: these statuses arise out of conditions into which anyone might fall” whereas “[s]ortal-status categorizes legal subjects on the basis of the sort of person they are..”<sup>23</sup>

3) Multilegalism, then, is a specific subspecies of legal pluralism. Minimally, it consists in the suspension of the majority jurisdiction’s (the state’s) *comprehensiveness*: its claim to have the right to decide on *all* issues, at least in principle.<sup>24</sup> The majority jurisdiction hands over legal powers to a minority jurisdiction concerning some issues, e.g., those relating to family law, etc. In short: multilegalism arises when the state confers certain powers of *legal autonomy* to some minority group which then can be said to establish a minority jurisdiction (concerning at minimum one issue) “outside” or perhaps rather alongside the normal legal framework of the state. “Powers of legal autonomy” can be understood as concerning three different issues: *legislative* (powers to create law within some sphere/concerning a certain set of issues), *adjudicative* (powers of adjudicating legal cases within some sphere etc.) and concerning *legal status* (powers to decide whether or not someone belongs to a given jurisdiction.)<sup>25</sup> The central idea of multicultural multilegalism I have in mind includes the first two, i.e., the legal autonomy on question involves both legislative and adjudicative powers (“parliament and courts.”) However, as I believe that the most plausible form of multicultural multilegalism is built around consent (to membership of a minority jurisdiction), I am skeptical as to whether the third power is or should be a part of the “package.”<sup>26</sup> In any event, multicultural multilegalism would mean that a minority jurisdiction held certain *limited* forms of “sovereignty with respect to persons”, as opposed to “sovereignty with respect to territory”;<sup>27</sup> *how* this status (the status as subject to a minority jurisdiction) is decided is less crucial for understanding the idea of multicultural multilegalism.

4) *Multicultural* multilegalism is concerned only with forms of multilegalism instigated for reasons that are recognizable “multicultural”, e.g., for reasons of bringing about states of affairs that are more equal/just in terms of cultural majority/minority disparities, recognition of cultural minorities, or acknowledgment of minorities’ identities (see below), or cases where one of such arguments could plausibly be construed *post facto*.

Finally, a crucial distinction here is whether the majority jurisdiction gives up *supremacy*; its insistence on “finality.” It is probably useful here to distinguish between *hard* and *soft* multilegalism. Hard multilegalism is the case when the majority jurisdiction gives up supremacy concerning the same issues, or some subset of those, where it renounces comprehensiveness; in soft multilegalism, the

majority jurisdiction retains supremacy, at least in principle. Or: hard multilegalism entails that the majority jurisdiction gives up supremacy (concerning some matter(s)) *unconditionally* whereas soft multilegalism means that the majority jurisdiction hands over the right to make legal decisions (concerning some matter(s)) *conditionally*.<sup>28</sup>

## THE DIFFERENCE BETWEEN MULTILEGALISM AND PRIVATE LAW

Any plausible modern system of law will include branches that concerns disputes beyond those specified in public law, primarily conflicts between citizens themselves. Different legal systems and jurisdictions will define the boundaries (however fuzzy) between private and public law in somewhat different ways; however, that need not bother us here.

It might be claimed, and with some initial plausibility, that there is no deep legal or moral difference between the kind of multilegalism discussed here, and the state of affairs in legal systems which includes private law. Barring an imagined extreme cultural essentialist suggestion, it would seem evident that membership in minority jurisdictions should be voluntary;<sup>29</sup> hence, the individual enters freely into a set of contractual or quasi-contractual obligations, not very unlike what we enter into when we sign business- or marital contracts. Disputes arising on that background are normally dealt with in private law, so what's the difference between minority jurisdictions in multilegalism and private law arrangements in the present legal context?

There seems to be agreement that the state always backs up any legitimate decision reached in private/civil law suits (normally, if A agrees in court to pay compensation to B and A does not cough up the money, the state can resort to coercion to enforce the agreement in court, if the agreement is otherwise legally acceptable.) But, decisions or agreements reached in minority jurisdictions *need* not have any impact for the majority jurisdiction – they need not “carry over” into the majority jurisdiction.<sup>30</sup> Moreover, *publicum privatorum pactis mutari non potest* – private parties can't make up just any law they want; A cannot agree to compensate B by, e.g., voluntarily becoming the slave of B, and it is the standard, coercive power of the state which steps in and ensures against such agreements. Again, this need not be the case for decisions made in minority jurisdictions – indeed, it would seem to be part of the legal autonomy given to them that it needn't (of course, we cannot imagine that any minority jurisdiction would have a justifiable legal right to sanctify deals such as the one just described.)

Furthermore, private law is in legal practice distinguished from, e.g., criminal law (the proviso “in legal practice” here indicates that there is nothing *necessary* about the distinction between private law and criminal law.) This is not the place to go into details about what differentiates these two parts of the justice system. However, it is obvious that criminal law deals with *penal* issues where certain rights-infringements are at stake (e.g., property rights or the right to live.<sup>31</sup>) The *gravitas* of issues is, *ceteris paribus*, on a certain level. To cut a long story short, and being aware that there are many possible exceptions: it seems to be a part of the tacit understanding of the differences between the sub-systems of private and criminal law that criminal law deals with the heavier matters in terms both of the injustice done and the possible legal sanctions affixed, whereas the

Polity allows less grave matters to be resolved in civil law – matters that affect (first and foremost) interests of private parties, and not “society as a whole.”<sup>32</sup> The same seems, *mutatis mutandi*, to hold true for the whole of public law: it deals with matters of public interest and not “merely” with disputes that affect only the interests of the directly involved parties.

Now, the definition of multilegalism does not rely on, or mirror, these distinctions. Multilegalism, multicultural or not, is not the idea that “less grave matters” should be dealt with in semi-autonomous or fully autonomous courts; the idea is silent as concerns *which* matters should be dealt with in minority jurisdictions, which might include penal law issues. In short, multilegal arrangements do not mirror the distinction between private and criminal law, but cuts across that and related distinctions.

A related critique of the idea that multilegalism qualifies as something *distinct*, legally speaking can be expressed, roughly, in these terms: it is not a problem for complex systems of law that persons, in one sense, gets ascribed different statuses. That is more or less what law *does*. We can easily accommodate the idea of a “single-status [legal] community” even if quite radically different statuses exist and are generated by the legal system. *A* being paraplegic generates (or is) a special status for *A*; *B* being contractually obliged vis-à-vis *C* generates special obligations (or “obligation-status”) for *B* and special rights etc for *C*; but nothing in this undermines the coherence and universality of the legal system as such. However, there is surely a salient difference between formulae such as “All citizens who are or become severely disabled are entitled to *x*” or “Any citizen entering otherwise legal contracts are bound by law to uphold the specifics of those contracts” on one hand, and “Some citizens of a *special cultural status* have the opportunity to form their own legal communities regarding *x, y, ... n*.” (Recall the distinction between condition- and sortal status mentioned in the above.) And even if one believes that generality and universality can be stretched to accommodate such a formula, it could plausibly be said to be a decisive difference *in kind* to mark out certain citizens as having special rights to legal autonomy and powers as opposed to others, for cultural reasons.<sup>33</sup>

### WHY MULTILEGALISM? – SOME POSSIBLE MULTICULTURALIST ANSWERS

In current debate, there seems to be three main avenues for the conclusion that we ought to give minorities *legal* recognition in the sense that we ought to acknowledge their own (culturally, religiously, socially....) based set of rules – their *nomos* – for at least some part of their own affairs.<sup>34</sup> They are embedded in the (admittedly extremely diverse) current of theoretical multiculturalism,<sup>35</sup> and the following rides roughshod over many theoretical disputes, and over-emphasises subtle differences. Multiculturalists agree that ordinary, general, difference-blind rights<sup>36</sup> are not sufficient, or even downright inimical, to achieving fair treatment of at least some minorities. *Liberal* multiculturalists argue that certain minorities are worse off through no fault of their own because access to cultural goods are more expensive when you belong to a minority and because they bear the higher transaction costs of living in a culturally foreign polity. The “official” argument of the most influential liberal multiculturalist, Will Kymlicka, (and, in his vein, a host of other liberal theorists)<sup>37</sup> is somewhat more complex: he ar-

gues<sup>38</sup> that access to one's own "societal culture" is a constituent part of the ability to form and revise a conception of the good on equal terms with other citizens. Social justice, then, needs to be concerned with culture because the good of access to one's own culture might be distributed unequally. In short, liberal multiculturalists argue on *egalitarian* terms.<sup>39</sup> Secondly, another multiculturalist tradition is established by, or takes its cue from neo-Aristotelian (or perhaps, neo-Hegelian) philosophers like Charles Taylor or Axel Honneth and argues that we ought to *recognize* minorities and their claims because recognition is a basic normative notion of great importance. In short, they argue in terms of *recognition*.<sup>40</sup> Thirdly, a diverse cluster of theories argue that we owe each other respect which in turn means respect for person's or groups *identity*. The central notion here is *respect* for identity, or, perhaps rather, for difference.<sup>41</sup> Note that *equality* plays a role for all these kinds of multiculturalism; yet their normative emphasis and content varies along the lines of egalitarianism, recognition, and identity.

*Egalitarian* multicultural arguments take it as a given that (some) cultural minorities are worse off through no fault of their own,<sup>42</sup> and that it is sometimes necessary (or the most efficient route) to supplement standard, difference-blind liberal rights with various cultural rights (e.g., language rights; exemptions from regulations of holiday closing times etc.) All rights of this kind are political rights and hence legal rights (it is something "we" as a political community owe minorities, and not (just) something we as individuals owe each other) and hence, given a certain description, liberal multiculturalism is approaching multilegalism. However, it is not *multilegal* rights (e.g., the powers of legislation and adjudication as mentioned in the above) which are in the forefront of standard liberal multiculturalism.<sup>43</sup> But if language, customs, rites, traditions etc. are important to persons, and they can be "culturally worse off" through no fault of their own, it is not clear why liberal multiculturalists should not be prepared to extend multicultural rights to multilegal rights. After all, what reason can be given for the *intrinsic* difference between the right to exercise religion, traditions, language in accordance with one's cultural point of view etc. but not law? Taking her cue from Cover<sup>44</sup>, Shachar argues that some form of multilegal rights might be needed to protect minorities because "...the normative universe in which law and cultural narrative are inseparably related"<sup>45</sup> really is the right way to describe the things: norms, law and culture are intertwined to a degree where it becomes meaningless to distinguish between them. Hence, taking liberal multiculturalism to its logical conclusion might indeed entail forms of multilegalism.

As regard the strands of multiculturalism which emphasises identity, recognition and respect, the case is perhaps even clearer. We cannot ignore that views concerning law, just punishment etc. are important components of person's identity and to suppose that these views are somehow more "external" or less "culturally determined" than, e.g., views about religion or *mores*, is simply wrong. If we, as this kind of multiculturalism generally claims, must give political priority to "recognition of cultural differences" or "respect for identity", then it seems quite possible that we must extend this respect to legal arrangements of a multilegal kind. Naturally, this is relative to the more specific *kind* of respect which we owe *vis-à-vis* identities etc., and again glosses over important qualifications and theoretical differences.<sup>46</sup>

Against this, multiculturalists might evidently be sensitive to a host of reasons for *not* extending standard multicultural rights to the point of giving minorities (certain forms of) legal autonomy, i.e., multilegal rights. This is especially so for those who argue on strictly egalitarian terms: giving legal autonomy to, e.g. patriarchal communities might engender or solidify inequalities between the sexes, and hence not work in order to achieve equality, either inter- or intragroup (re: Kymlicka's distinction between "external protections and internal restrictions"; Shachar's discussion of "the paradox of multicultural vulnerability"). The claim is not that multilegal rights flow logically straightforward from multiculturalism; it is merely to point out that standard multicultural arguments might very well lead to the conclusion of multilegalism.

The distinction between hard and soft multilegalism is perhaps now clearer: liberal multiculturalist will probably veer towards soft multilegalism because such multiculturally based rights to (forms of) legal autonomy could serve an egalitarian purpose. Given that the deep justification of such liberal egalitarian multilegalism is equality (and not identity, recognition or difference), it would seem unnecessary, even dangerous, to argue that the (*ex hypothesis* liberal) state should renounce its supremacy. Rather, multilegal rights would be *instruments* to achieve equality, and the state should retain its "right of recall" if the minority jurisdiction uses its legal powers in a way which is counterproductive vis-à-vis equality.

On the other hand, multiculturalist arguing on the basis of identity etc. should *ceteris paribus* be more inclined towards hard multiculturalism. After all, if we ought to respect the culturally given identity of persons or groups, why insist on a (allegedly) "culturally neutral" legal system (which will reflect the particularities of the given majority's culture anyway, or so many multiculturalists of this kind will maintain) as the final arbiter of all things legal? Will it not be an act of condensation if the majority jurisdiction with one hand gives minorities multilegal rights, but with the other hand insist on a right of recall, as if the majority does not really trust these people to handle their own affairs? (We will return to this point below.)

We have now briefly seen some arguments for how multiculturalism might entail a defence of multilegalism, and we can proceed to more critical evaluation.

## THE PROBLEMS OF MULTILEGALISM

Worries about multicultural fragmentation of the legal system are of course not new. Too much emphasis on difference, Jeremy Waldron asserts, will undermine the rule of law and we will end up in a situation where "...we might have in effect a multiplicity of legal systems or subsystems in a given society."<sup>47</sup> Waldron's main worries about this "multiplicity" are that a) it will lead to an increase in social transaction costs, b) it will open a door for legal manipulation via the "cultural defence", c) it is in a certain sense self-defeating because salient cultural differences will reproduce themselves within minority jurisdictions, and d) it is in itself undesirable and rather than the "balkanization" of society, we should aim for genuine universalistic solidarity and equality.

Waldron's points are both informative and important. However, they are not all necessarily as damaging to the idea of multicultural multilegalism as they might seem *prima facie*.

First, the concern about increased transaction costs:

The mildest consequence of this nightmare [*i.e.*, the creation of a multiplicity of legal systems in a given society] would be a radical attenuation of people's ability to deal confidently and impersonally with strangers – which is one of the great contributions that uniform law makes to the detail of market and other social arrangements. Attention to difference means that we are no longer able to deal with another person under the simple category of *legal subject*.<sup>48</sup>

Waldron's concern is that too much emphasis on difference will lead to a situation where “[p]eople will carry their personal law with them, as a special set of privileges and obligations.” And naturally, if we as individuals should spend a lot of time investigating the cultural, social, religious etc. backgrounds of each and every person with whom we engage just to be sure we do not involve ourselves (or the other party) in some kind of legal kerfuffle, then we would indeed have a unpalatable increase in our social transaction costs. However, multilegalism need not add *very* much to the complexity of legal differences we already face in systems that are closer to the monist-statist picture of law.. Whereas the extreme individualization of law which Waldron seems to have in mind – where each and every person “carry their personal law with them” – might logically be a multilegal possibility, it is not a necessary or even a likely consequence. A more realistic picture is one where one to a small handful of rather large and rather distinct religiously, linguistically, or culturally different communities gets to establish minority jurisdictions concerning a rather circumscribed set of affairs. This is not terribly more complex than the situation in a globalized world where we have to engage with foreigners each and every day, and where we are all manoeuvring in and out of a multitude of different social and cultural settings, each with their own concomitant set of attitudes and expectations.

Secondly, Waldron is concerned that emphasis on difference will lead to a situation where criminal defendants via the “cultural defence” (“in *my* culture, it is OK to burn widows”) can get off the hook, and where the most privileged citizens can in fact immunize themselves against the application of law via clever manipulation of their own alleged cultural background (if you look hard enough, one will probably find a culture to defend each and every horrible crime possible for humankind.)<sup>49</sup> The first of these worries is genuine and relates to the crucial question of how we should weigh culturally based or borne values as against universal ones, as expressed for instance in human rights etc. We will return to that question below. The second worry is easily deflected: “membership” in a minority jurisdiction should, I reckon, be voluntary *ex ante*, and it would be absurd if one could come *ex post* and *claim* membership.<sup>50</sup>

Third, Waldron raises the objection that “decentralization” of the law/state and re-formation “organized on culturally homogeneous lines” is in a certain sense

self-defeating, because “the situation of plurality and difference will quickly reproduce itself” (Waldron (2007), p.143.) The contention is, in a nutshell, that if differentiation of legal communities is the remedy for the ailment of pluralism, then the cure will only make sure that the same problems of pluralism will repeat themselves, only within a smaller community. However, this does not seem to be very likely. It might be the case that liberal communities will tend to generate salient inter-societal cultural differences over time. But, all the fluidity and negotiability of cultures aside, it does not seem to be the case that all cultures *per se* generates important inner division lines, and even if they do, it is not necessarily the case that a newly created “culture within a culture” will lead to the creation of another minority jurisdiction – the new culture might plausibly be more sympathetic to the values and *nomos* of the majority jurisdiction. Think here of second or third generation immigrants who become more and more familiar with the surrounding majority culture (the so-called, and in some cases elusive “liberal expectation”).

Fourth, Waldron is worried that legal “decentralization” is undesirable in itself:

...in the circumstances of the modern world we have a general obligation to come to terms with those we happen to live near, and not to try to manipulate boundaries and populations so that we only live near those whom we like or those who are like ourselves.<sup>51</sup>

Waldron grounds this line of thought in Kant’s political theory, emphasising that political communities should try to solve the problems of difference through universal laws, not by changing (the boundaries of) the political communities themselves.

Against this, it could be claimed that we sometimes fulfil our obligation to come to terms with our fellow citizens precisely by allowing them to form their own legal communities (within one or the other more general framework of rights, for instance) rather than pressing each and every person into the exact same framework. Deciding when to go for the uniform option and when to go for the multilegal, or other models, must depend on the specifics of the situation and cannot be specified *a priori*.<sup>52</sup>

Having deflected, or at least alleviated the concerns Waldron voices, can we say that multicultural multilegalism is off the hook? Of course not. We will now go into three challenges that in different ways should make us wary to embrace multilegal arrangements as a part of the solution to the challenges of pluralism.

## FIRST CHALLENGE: WHICH LAW?

For any multilegal arrangement, there is the possibility that the law of the minority jurisdiction will clash with the law of the majority jurisdiction, or even, in more advanced cases, we can have clashes between two or more minority jurisdictions, and eventually cases involving two or more minority *and* the majority jurisdiction. Which law should take precedence? Choice of law, or choice of law theory, is the branch of legal theory and jurisprudence which concerns the “awkward fact” that we have distinct jurisdictions, specifically, the issue whether or when a foreign law is relevant to a case.<sup>53</sup> Hence, the problem of “choice of law” is evidently not particular to multilegal arrangements, but is already a well-known phenomenon. It would seem evident that some of the puzzles and challenges encountered in choice of law are illuminating of, if not entirely equivalent to, the puzzles and challenges one would or will encounter in multicultural multilegalism. It is quite easy to see how the fact of distinct jurisdictions might create difficulties:

...a New York driver takes a Turkish passenger on car trip in Ontario. The car crashes. The passenger sues the driver in a British court. In deciding whether the driver is immune from suit by the passenger, should the court look to the law of New York, Turkey, Ontario, or England?<sup>54</sup>

What is needed is obviously a clear cut theory which provides both a rationale and a plausible underpinning of that rationale in order to explain what legal material from which jurisdictions are relevant in which cases, and, preferably, a theory of their internal ranking. Unfortunately,

[choice of law theory] is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.<sup>55</sup>

Now, this quotation is from 1953, but if Dane’s account of more recent developments in the field is anything to go by (“...choice of law is a psychiatric ward *in* a swamp, a jurisprudential wilderness encounter group”) there is very little evidence to the effect that things have changed for the better.

In deciding which law(s) is (are) the relevant one(s) and/or making decisions based thereupon, it can be claimed that the court should not view themselves as embroiled in the process of *making* law: rather, their decisions should identify and reflect already existing *rights* which parties to a given dispute have. In other words, a party’s rights *do not* hinge on, or is altered by, the existence of the court deciding the case. Rights “vests” in pre-existing events and states of affairs, including the laws of foreign jurisdictions. (This is the so-called “classical view”.) Against this, it might be claimed that the court is, indeed, involved in the making of law. It is perhaps possible, and even prudent, to “mirror” laws of foreign jurisdictions in deciding a case involving choice of law; but it could be argued that what is and should be going on is not the application of laws of jurisdiction X in the jurisdiction of Y; rather, the court’s decision is indeed its own, and hence, it is engaged in the creation of legal rights (the so-called “modernist view.”)

This might seem a very theoretical dispute; however, it reflects a series of potentially difficult problems in a legally pluralistic situation. If we have a case involving parties from two different jurisdictions, we should first have to decide what court should decide on the question of choice of law. A plausible candidate is some “neutral” court, despite all the controversies regarding such neutrality one might foresee. Once established, the question then arises whether that court should base its decisions on “vested rights”, e.g., pre-existing rights created in the jurisdictions in question (in a “classical” vein), or whether it should think of itself as creating its own rights (as the modernists would have it.) The problem with the first alternative becomes clear if we imagine that the laws of the jurisdictions in question would lead to different and incompatible decisions. In the absence of some substantial reason to decide in favour of one over the other jurisdictional interpretation (remember, that the classical view insists that it is not engaged in the creation of rights), what is this neutral court to do? Flip a coin? The modernist view is less burdened by this problem, insofar it is not bound by the insistence on the *pre-existing* vestedness of rights. However, it could be said to undermine the idea multilegalism – that the legal system to which a party belongs expresses a certain kind of respect for the party, recognizes him or her, or helps towards a more equal status – no matter what decision such a court would reach whenever there is a conflict between the laws of one of the original jurisdictions. For, at least one of the parties to the conflict is not treated legally in accordance with the party’s original jurisdiction.<sup>56</sup>

At this junction, it becomes obvious that *any* kind of pluralistic arrangement must include second-order rules for “deciding how to decide” in cases like this in order to retain any claim to plausibility. If such rules are specified beforehand *as part of the distinct legal arrangements themselves*, the complaint that some party is not being treated in accordance with his or her original jurisdiction will disappear. And at least some of the more technical problems concerning how to decide in choice of law-problems will be alleviated.

However, it is equally clear that this will create another form of tension. Let us stick with a relatively simple form of conflict involving choice of law in a multilegal arrangement: a legal dispute involving person *P1* from minority jurisdiction A1 and person *P2* from majority jurisdiction A2. The laws of A1 and A2 covering the case do not match.<sup>57</sup> The second-order rules, being results of a democratic process, are necessary to ensure that neither party can raise the complaint that he or she has not had a fair opportunity to participate in the construction of laws that are binding for him or her as a citizen. However, if the second-order rules generally incline towards favouring A1 over A2, *P2* might reasonably claim that the results of the process treats members of A1 as democratically more important than members of A2, democratic decisions notwithstanding (conflicts between members competing minority jurisdictions can create the same problem.) The situation in reverse, where the rules tend to favour A2 over A1 is perhaps democratically less problematic as seen from a purely quantitative perspective (probably, the majority jurisdiction is larger in terms of number of citizens, albeit conceptually it need not be the case.)<sup>58</sup> This will indeed take out much of the sting – for better or worse – of the problem, but it might leave it somewhat unclear as to whether the goals of giving minorities more legal power is really achieved, both from an egalitarian and a recognition-based perspective.

However, not *all* legal situations will involve choice of law problems, so there might, on balance, still be a case for multicultural multilegalism.

Where does this leave multilegalism? There are two issues here, a legal and a somewhat broader cluster of moral theoretical questions. As concerns the legal, it becomes unclear to which extent we can speak of truly *distinct* jurisdictions or spheres of law if one jurisdiction acknowledges such second order rules. If the minority jurisdiction must acknowledge the rules of the majority jurisdiction in cases X, Y...n, it is at most a distinct jurisdiction in cases involving only intra-group disputes (that is not to say that this is not quite far-reaching autonomy, at least potentially.) If both minority and majority jurisdictions acknowledges second order rules specifying powers of adjudication etc. to a third, neutral court, it seems they are both part of the same legal “supra-system.” In short: there is a genuine question whether *supremacy* has really been suspended – but this is of course acceptable to those who would propose soft multilegalism. The question of distinctness is theoretically interesting, but I will not pursue that line of inquiry further.

The moral questions (which includes political ones) concerns 1) the highly controversial and complex question about which kinds of legal decisions for what areas should be regulated (entirely or predominantly) by the majority jurisdiction, and which should be so by the minority, given the plausibility of a multilegal arrangement. That question is far beyond the scope and ambitions of this paper; nevertheless, we will return to some general aspects that question towards the end of it. 2) The more specific question of the kind of respect which the legal system – or in the case of multilegalism, legal systems – owes to citizens. As we have seen, it seems to be the case that it can be very hard to accommodate the ideal of equal respect for citizens when the first-order rules of two legal systems collide, even if there are second-order rules for determining choice of law-style problems. *Ex hypothesis*, we owe it to members of both minority and majority jurisdictions, and there would be no need for minority jurisdictions if not the kind of respect we owe to members of the minority *differed* from that which we owe to the members of the majority.<sup>59</sup> However, it seems that there will be cases where we cannot fulfil the promise of owing each member equal respect when we have multilegal arrangements. That will for some be a cause of serious worry. It could be claimed that we should allow minority jurisdictions to have powers exclusively dealing with intra-group conflicts, thereby removing the source of the problem. My hunch is that there will still be important borderline cases here – imagine conflicts of divorcing and then marrying “outside” one’s jurisdiction, in the vein of the *Martinez* case – and that this kind of legal autonomy will not suffice for some of the more radical proponents of special minority legal rights.

## SECOND CHALLENGE: THE DILEMMA OF HARD AND SOFT MULTILEGALISM

Taking the cue from the various multicultural arguments, what reasons are there for preferring hard or soft multilegalism? Given the premises of recognition- or identity-based multiculturalism, it seems that hard multilegalism is mandated. If respect and identity play pivotal roles, why should we opt for political arrangements that give groups (forms of) autonomy vis-à-vis cultural, aesthetic, religious etc., but not *legal* frameworks, institutions and rules? And do these groups

really have legal autonomy if the majority jurisdiction insists on a “right of recall?” Of course, if the identity based theory in question is sensitive to the fact that cultural identity is a fluid and negotiable phenomenon, it might be sensitive to serious worries concerning locking person’s in some static prison of fixed identity: the person identifying him- or herself with culture X today might on introspection or due to experience identify him- or herself with culture Y tomorrow. Nevertheless, taking that into consideration, it can still be claimed (indeed, it need to be claimed by identity-theorists) that there is *something* non-transient and sufficiently static about the cultures themselves, rather than the persons identifying themselves with the cultures, that makes it meaningful to speak of “cultural groups” or “culture” to begin with.

The case is less clear for egalitarian multiculturalists. The egalitarian argument for multilegalism must be instrumental: it is not respect for or recognition of the cultural group *as such* which is in focus: rather, giving multilegal rights is but one instrument in order to rectify injustice in the form of (unchosen) inequality. Moreover, as already mentioned, liberal multiculturalists might be wary to give up the formal rights of the majority state to interfere in the legal matters of minority groups due to worries about the creation/solidifying of internal injustices.

The reasons to prefer soft multilegalism is straightforward: first given the premise that the majority jurisdiction is defined roughly in terms of a reasonably just society (following, e.g., Rawls’ definition of “reasonable Peoples”<sup>60</sup>) – *not* an insignificant or mundane premise, it must be readily admitted - with due respect for basic human rights etc., soft multilegalism seems the safest way to ensure against gross injustices happening within minority jurisdictions as an effect of multilegal arrangements. Naturally, there is no way to *guarantee* that the majority jurisdiction *is* more fair or morally correct than the minority, and there is definitely the possibility of cases where we can expect minority jurisdictions to be more in tune with, e.g., human rights than the majority. But given that we want legal systems to track (or even mirror) moral sound judgments, liberal multiculturalists ought in cases where the majority is illiberal to discuss and perhaps advocate secession and the establishment of an entirely separate legal system rather than multilegalism. Second, precisely because we are here *not* talking about secession but co-existence, soft multilegalism seems, *ceteris paribus*, to be more in line with a host of considerations of the stability and cohesion of a modern state. Only if there is some justification for keeping the minority within the legal confinements of the state (*i.e.*, the majority jurisdiction) can it be relevant to consider multilegal arrangements. Such considerations could be stability (giving up the right of recall might engender conflicts and secessionists movements); cohesion (marking a group as permanently “different” from the rest of society could tear up the fabric of society and undermine duties of civility etc.); solidarity (the willingness to make contributions and share duties and burdens might be undermined by giving permanent special legal status to a minority group); and even cultural affinity (the cultural groups of the majority and the minority jurisdiction probably share a “common horizon”, even though they are not exactly alike; instating multicultural multilegalism could fuel cultural estrangement.)

If one takes one’s cue from liberal multiculturalism, it seems to be the case that there are, or can be, rather robust reasons to prefer soft over hard multilegalism.

However, it is not clear that soft multilegalism can fulfill its intended role. The problem is most pressing for those arguing partly or wholly on the basis of identity and recognition or respect for culture. Succinctly put: There is something odd in the position that 1) we must respect or recognize persons' identity or their culture, 2) one form of this is to hand over certain legal powers and establish a multilegal arrangement, 3) but still insist on the right of recall or *de jure* supremacy on behalf of the majority. This would, at least in certain circumstances, seem to display either an attitude of mistrust or condescension, and it is perhaps an especially troubling aspect for those multiculturalists that stress the "symbolic" aspects of multicultural accommodation, a line of argument not necessarily relying on claims about identity or recognition. This problem might be less acute for those arguing on liberal egalitarian terms as this line of argument does not rely on any "intrinsicist" notions of respect for identity or culture, but stresses the instrumental justification for why we should have multilegal arrangements. But still, the instrument (the existence of a minority jurisdiction with their own legal powers) might not work very well if the whole arrangement is viewed with suspicion by either side.<sup>61</sup> Moreover, there is a definite risk involved in the somewhat unstable arrangement where the state actually overrules the decisions of a minority jurisdiction. Shachar presents us with one empirical example of this, which lead to widespread political turmoil and social and cultural confrontation.<sup>62</sup>

In short, multicultural multilegalism might impale itself on either of the horns of the following dilemma: hard multilegalism seems unpalatable if and when the minority jurisdiction misuses (as seen from the perspective of the liberal, at least) its powers, and because it can fortify or create differences between citizens that are counterproductive and/or morally indefensible (the idea that *all* differences are to "be celebrated" is, frankly, too silly to take into consideration here.) On the other hand, soft multilegalism seems to express the wrong attitude (one of mistrust and disrespect), especially as seen from the point of identity- or difference based multiculturalism. Maybe it is a bit coarse to describe this as a dilemma; the liberal multiculturalist can advocate soft multilegalism on the basis of a all things considered judgment that it provides the best solution in certain circumstances, taking the problems sketched here into consideration; and, *mutatis mutandi*, the same goes for recognition- or identity-based multiculturalists and hard multilegalism. What I have tried to show here is that multilegalism is in no way a panacea that will make problems concerning cultural pluralism and the *nomos* go away.

### THIRD CHALLENGE: MULTILEGALISM AND RIGHTS

Rights, legal or moral, can be in conflict. Granted, if rights are ultimately grounded in utility (or some other consequentialist notion), it might be the case that we always have a final theoretical criterion for deciding which right should prevail when two or more rights come in conflict, at least theoretically speaking. But even if this is the case, concrete interpretations of actual cases will involve controversies and conflicts.

In liberal democratic societies, the state is given a *de jure* monopoly of coercion, not because there is a widespread trust in the perfection and insight of actual states or governments, but because there is sufficient skepticism concerning

all other alternatives: the state is the least bad option, and democracy helps to ensure that really bad laws, decisions or governments will not survive indefinitely; and the liberal democratic state is seen as the best way of protecting basic rights.

As Shachar has shown rather persuasively, multicultural multilegalist rights can clash with such basic rights. Suppose, if only for the sake of argument, that we have a basic right to freedom of speech. Suppose, furthermore, that we have a right to be culturally recognized which extends into multilegal rights of legal autonomy in deciding how to interpret freedom of speech, or even suspend that right altogether. What are we to say if a cultural dissenter belonging to a minority jurisdiction commits “crimes of free speech”? Should we say of such a person that his or her cultural identity (which he or she *ex hypothesis* does not honor in the case) takes precedence – that the person’s *cultural right* to multilegal arrangements takes precedence, even in spite of the person’s actions? Or should we say that the person’s basic right to free speech is more fundamental and more important?

All possible answers to such and similar conflicts involve problems: 1) to insist that cultural rights takes precedence can involve the following contradiction: by going beyond or contravening cultural standards the active party is necessarily *not* accepting those standards (with the exception of cases of practical irrationality.) Hence, it flies in the face of common sense to insist that it is “more respectful” to treat persons in accordance with their cultural tradition than it is to treat them in accordance with their revealed preferences. Granted, not all cases need involve this contradiction. A person might, genuinely and without contradiction, break a standard and prefer to be sanctioned in accordance with the very source of the standard in question rather than some external source (I might prefer a booking for a nasty foul in accordance with the rules of football rather than face an indictment for GBH.) That might be so, but the question about fair treatment still lingers on if one believes that there is a larger gamut of rights and normative considerations beyond those specified by cultures and traditions. In short: How far should we go towards accommodating culturally based normative propositions and treat them as legally justified, when they, directly or in their likely consequences, violate or infringe basic rights? Multiculturalist multilegalism provides no answers to this question in itself. 2) Taking the other way out and insisting that basic rights always takes precedence removes this worry, but engenders another one. Namely, why should we have multilegal rights in the first place? We do have a system of handling private disputes, *i.e.*, private law; we have democratic rights of association, freedom of conscience etc. giving at least a quite broad range of possibilities for people to arrange the social world in accordance with their preferences;<sup>63</sup> and democracy ensures people’s proportional right to be heard. Where, then, one might ask, is the need for multilegal rights? After all, private law could be made (more) sensitive to the special needs of vulnerable minorities, including their cultural needs, without implying multilegalism.

My intuition is that the best way to maneuver in these waters involves a very careful, case-by-case approach rather than a definite, one model fits all judgment concerning the desirability of multicultural multilegalism: Note that a multiculturalist multilegal arrangement need not involve a clash between rights or

rights-interpretation. *All* rights call for specific interpretation according to the specific circumstances, and it might very well be the case that a specific cultural community is fully equipped to interpret a given right in a way which is both morally superior and (evidently) more sensitive to the empirical circumstances. It *need not* be the case that a minority must compromise human rights or the moral boundaries of what, e.g., a liberal or decent People can or should tolerate. Rights are subject to interpretation within a reasonable scope and both circumstances and moral theory might point in the direction of the plausibility and desirability of certain multilegal arrangements, where minorities are allowed to partake in the interpretation of rights within a (I would surmise) rather confined legal space. Waldron's example of the non-sexual character of an Afghani father kissing the penis of his baby son is illustrative:<sup>64</sup> without the "culturally informed" interpretation – the *knowledge* that in this cultural group, fathers kissing the penis of their baby sons is definitely not a sexual act – the majority jurisdiction could not reach a fair verdict (given the premise is true, of course.) But, and this is the important point, there is no establishment of any kind of *autonomous* legal institution or granting of legal powers involved here. A plausible legal arrangement, more sensitive to culturally embedded knowledge will not necessarily amount to giving minorities legal autonomy of the multilegal kind, and it would take careful consideration in drawing up the legal, political and moral boundaries within which legal interpretation and, if justifiable, rule-making is to take place. But such an arrangement is definitely not beyond the borders of the possible or morally desirable.

## CONCLUSION

We must distinguish between hard and soft multilegalism. Hard multilegalism means that the state has given up supremacy (regarding some issue(s), i.e., it has given up comprehensiveness) "for good" or unconditionally, which, *ceteris paribus*, entails that we should be extra careful when opting for such an arrangement: once initiated, the majority jurisdiction has no (legal) right to interfere with the decisions of the minority jurisdiction. Soft multilegalism does not entail this problem, at least not theoretically. However, it is not entirely clear that soft multilegalism can fulfill its intended role given certain multicultural premises. On the other hand, it is not necessarily the case that multilegalism is, for that reason alone, implausible or morally unpalatable.

If multilegal arrangements were instituted, they would potentially give rise to a score of moral and legal problems. One cluster of problems concerns the choice between hard and soft multilegalism mentioned in the above. Another concerns the potential clash between (multi-) culturally based and particularistic claims and rights on the one hand, and universalist, e.g., human rights, on the other.

Probably the least discussed and least understood set of problems relate to problems akin to the problems of choice of law theory: when parties to a conflict belong to different jurisdictions - which law should prevail? This points in the direction that we need clear second-order rules and adjudicative institutions in place to make plausible and legally justified decisions in such cases. Moreover, clear and fair rules of admission and exit, and in the latter case, possible compensation, are needed to avoid complications such as that shown by the *Martinez*-case. It is a mistake to believe this is a trivial matter. *Multicultural*

multilegalism is premised on the assumption of *differences* in the conceptions of law – in the *nomos*-conception – between groups, and on further assumptions concerning equal treatment, respect and possibilities (according to liberal multiculturalists), or due recognition or respect for identities. Hence, at least in some cases, respecting (following, giving precedence to etc...) the *nomos* of one party to a conflict precludes the possibility of respecting (etc.) the *nomos* of another, when we have choice of law-style conflicts. *Equality before the law* – as always a puzzling concept, with or without multicultural multiculturalism – is still held to be an attractive principle. Instigating multicultural multilegalism - if it is to have any real impact and make a real difference to already existing legal frameworks - will inevitably exacerbate the challenges of pursuing this ideal.

In practice, this calls for very close attention to the complexities surrounding choice of law-style problems, including those of admission/exit (or legal status) when we consider institutional designs for multicultural multilegalism. Academically, we need a better understanding of the theoretical difficulties involved in choice of law theory as applied to multiculturalism and law.

In sum: The conclusion that multicultural multilegal arrangements *per se* are not justifiable is wrong. In some cases, it might indeed be a plausible way of accommodating cultural differences in a way satisfying multicultural political goals. However, the various challenges and problems, legal or moral, presented here and the fact that multicultural multilegal arrangements could involve other problems, not addressed in the present paper (such as the problems of stability, cohesion, and solidarity between groups) calls to attention the necessity of close scrutiny and detailed analysis of any concrete suggestion of such a way of altering the legal framework of a liberal democratic state.

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## NOTES

- <sup>1</sup> See Barry, Brian, 2000
- <sup>2</sup> See Waldron, Jeremy, 2002; 2007
- <sup>3</sup> Perhaps a writer such as Alain de Benoist could be taken as an exponent of such a view.
- <sup>4</sup> Young (see e.g., Young, Iris Marion, 1990) could perhaps be an example of this view. Naturally, both kinds of multiculturalism might advocate secession for special cases; but the point of multiculturalism is to give answers to the question “how could and should different cultures, *living in the same political regime*, live and treat each other”.
- <sup>5</sup> Waldron, Jeremy, 2002, p. 4.
- <sup>6</sup> A “Nomos group” is roughly, a group whose collective identity is at least partially, but also crucially, dependent of or constituted by an outlook of how the *law* ought to be, see Shachar, Ayelet, 2001, p. 2.
- <sup>7</sup> All empirically given examples I can come up with misses the target I have in mind ever so slightly, but I have chosen to provide an empirical example to give the reader a firmer grasp of the idea of “multicultural multilegalism” I have in mind. The reasons why the *pueblo* example does not fit 100% are 1) that it is dubious whether the legal autonomy granted to the *Pueblo* was informed by any form of recognizable multicultural rationale, at least by today’s standard, and 2) the jurisdiction of the *Pueblo* is at least to some degree delineated in territorial terms (it is a census designated *place*, though it is true that “boundaries” are not legally recognized) and I want multicultural multilegalism to apply first and foremost to persons rather than territories, and 3) the Santa Clara Pueblo can plausibly be said to have forms of historical claims to their territory vis-à-vis a conquering nation (if one accepts those kinds of reasons), something I wish to set aside for the purposes of this article.
- <sup>8</sup> Santa Clara Pueblo v. Martinez, 438 US 49 (1978.) The case is explained in Shachar (2001), pp.18ff; Shachar refers to Resnik, Judith, 1989, “Dependent Sovereigns: Indian Tribes, States, and the Federal Courts”, pp. 671-679 in *Chicago Law Review* 56.
- <sup>9</sup> Shachar, Ayelet, 2001, p. 19
- <sup>10</sup> See Kymlicka, Will, 2001; cf.: Kymlicka, Will, 2002, pp. 349ff
- <sup>11</sup> It is not a necessary fact that national minorities and indigenous people are territorially defined or that their jurisdiction is territorially defined; however, both seem to be the default.
- <sup>12</sup> E.g., claims of “priority” or “originality” concerning occupation of a territory or claims of past injustices, redress etc.
- <sup>13</sup> A final word before proceeding: this paper is placed – uneasily, I am sure some would say – at a cross section between political, legal, and moral philosophy (throw in legal theory and applied philosophy, if you will.). However, this is, I believe, necessitated by the nature of the matter at hand. I hope to be forgiven for a certain degree of looseness in use of terms and concepts that might denote or connote differently when used squarely in the middle of either of these fields of inquiry.
- <sup>14</sup> Caney, Simon, 2005, pp. 148ff.
- <sup>15</sup> It is surely the case that Caney discusses state *sovereignty* and not law *per se*. Still, the idea of legal monism is so closely associated with the idea of state sovereignty, that it seems evident to this author that a presentation of the latter can serve as illumination of the former.
- <sup>16</sup> I try to unpack here what Arnaud says in this succinct way: “*Pluralism* means the simultaneous existence – within a single legal order– of different rules of law applying to identical situations.”, Arnaud, André-Jean, 1995, p. 149.
- <sup>17</sup> To illustrate: local authorities might claim authority vis-à-vis me concerning zoning laws whilst the UN might claim authority vis-à-vis me in matters concerning crimes against Humanity. As local authorities need not acknowledge the UN as authorities in matters of local infrastructure (*mutatis mutandi*, the same goes vice versa for UN – all things equal, local zoning regulation will not involve crimes against Humanity) we have a situation where two different authorities claim authority over one and same person but concerning different matters, and there is no inherent conflict.

- <sup>18</sup> See, e.g., *Polycentricity. The Multiple Scenes of Law* (ed. by Ari Hirvonen) by Pluto Press, cf.: Petersen and Zahle, 1995.
- <sup>19</sup> See the collection by Petersen and Zahle, 1995.
- <sup>20</sup> However, it must be admitted that the lines between statist and non-statist institutions are blurred. Especially because we must admit the existence of very real jurisdictions that work among, between or over the neat spheres of separate states, e.g., the EU and the UN. Nevertheless, one defining feature of such real institutions is that they are in at least some sense recognized by individual states, even though the extent and exact nature of such recognition is a matter of much controversy.
- <sup>21</sup> Compare Forsyth, Miranda, 2007. Forsyth suggests a typology of relations between the state and some non-state “justice system” going from “Repression of a non-state justice system by the state system” to “Complete incorporation [i.e., full acceptance] of the non-state justice system by the state.” The interesting point is where we should draw the line between the kinds of legal pluralism I want to discuss and those I find uninteresting in the present context, and using Forsyth’s typology, it lies between “no formal recognition but active encouragement of a non-state justice system by the state” on the “wrong side” and “limited formal recognition by the state of the exercise of jurisdiction by a non-state justice system” on the “right”. Hence, it is the *formal* recognition which is the *sine qua non*.
- <sup>22</sup> Waldron, Jeremy, 2007, p. 137.
- <sup>23</sup> Waldron, Jeremy, 2007, p. 140. On reflection, this distinction is quite unclear. A right to, say, post-caesarean recuperation at the expense of the public health system can only be available to women – men simply can’t fulfill the condition in question – so it seems that such a right must be connected to “sortal-status”. But that surely is not what Waldron intends. Nevertheless, it seems to me that there is *something* relevant – *pace* a lot of blurry cases at the edges – in the distinction between laws and rights that are not concerned with your *full* identity, be it as a man or woman, worker or aristocrat, believer or atheist, member of this or that culture or not, and those that *do* take in such identity markers as relevant.
- <sup>24</sup> Cf.: Shachar, Ayelet, 2001, p. 91, where the term “jurisdictional autonomy” denotes the idea that some minority (“a *nomos* group”) can be held responsible for certain legal matters without tying such powers to (territorial) self-government.
- <sup>25</sup> I am very grateful for this suggestion from an anonymous reviewer at *les atelier*. It is conceivable that we could have a version of multilegalism with completely different rules for different people, say, Jews and gentiles, within the same state but with the laws being passed from the same legislative body and being treated by the same courts. Further combinations (e.g., same parliament, different courts etc.) are also conceivable. I want to set such (unlikely, but theoretically interesting) cases aside and focus on a form of multilegalism where a minority has *autonomy*, albeit possibly quite limited autonomy, as concerns legislative and adjudicative matters.
- <sup>26</sup> This still leaves room for the possibility that minority jurisdictions should have certain forms of legal powers to decide in fringe cases. This could involve issues such as “gratuitous” claims of membership (in itself a complicated and blurry issue, of course) and cases of legally incompetent individuals (e.g., children.)
- <sup>27</sup> See Caney, Simon, 2005, pp. 150ff. It is not inconceivable that multicultural multilegalism could take a form that involved forms of territorial “scoping”, e.g., that some law applied only to a) members of the minority jurisdiction, b) *within* a certain territory. What I want to stress is that the territorial component is contingent.
- <sup>28</sup> Does this mean that soft multilegalism implies that the state/majority jurisdiction has not really given up supremacy? In a certain sense it does, because it is always conceivable that the state can overrule a given verdict in the minority jurisdiction under soft multilegalism. However, this is also the fact for hard multilegalism; the crucial difference between the two residing in the *de facto* of the latter kind of intervention as opposed to the *de jure* of the first. Nevertheless, soft multilegalism is *not* equivalent to the normal state of affairs with supremacy: surely, there is a difference between giving autonomy conditionally to a juris-

diction, and not acknowledging any jurisdiction at all. Compare with the way many states deal with religious communities that are given legal recognition and rights to make marriages. In a sense, the state can always withdraw that right; but there is a distinct difference between a religious community that is recognized as having the right to make marriages, and those that do not have this right.

- <sup>29</sup> The term “Private Law” has different connotations in different countries and in different academic fields. Private Law as I use the term here means, roughly, the part of modern legal systems concerning itself with disputes between private citizens or legal persons other than the state, but “in the shadow of the axe” (the state), and not “outside” the apparatus of the state and its legal framework.
- <sup>30</sup> Needless to say, it would undermine the point of multilegalism if parties to a case chose *ex facto* whether or not they belong to this or that minority jurisdiction or the majority jurisdiction: entry, however, should be voluntary.
- <sup>31</sup> This raises a complicated issue, namely, how one should envisage *enforcement* of decisions reached in minority jurisdiction courts: should minority jurisdictions be empowered to have bodies of enforcement (police forces, jails, bailiffs etc.) or should enforcement be the exclusive right of the majority jurisdiction? For reasons of space we will not pursue that line of inquiry here.
- <sup>32</sup> Clearly, private law deals with rights-infringements as well, at least indirectly. For example, tort law primarily deals with issues of whether persons have, or have not, been negligent of their duties of care or reasonable caution, thus infringing other parties right to be treated with sufficient care etc.
- <sup>33</sup> This is riddled with ambiguity, for just what counts as a public rather than a private interest depends of course on which broader normative theory one uses as yardstick.
- <sup>34</sup> See also the discussion in Waldron, Jeremy, 2007, pp. 135f, 199ff. As already mentioned in the above, there are reasons to be mildly skeptical about this distinction; but singling out *culture* as a means of dividing groups of persons into different forms of legal status or right-entitlement surely is different from focusing on life events such as disability or unemployment or old age, that, in principle, can befall us all.
- <sup>35</sup> I ignore here eventual pragmatic arguments based on power relations or issues concerning stability. Moreover, as mentioned before, I ignore the complexities surrounding the question regarding “indigenous peoples”, colonized peoples, etc., who seem in general to have a different and more far-reaching claim to self-rule, at least *prima facie*.
- <sup>36</sup> Much hinges on one’s exact understanding of “difference-blind” rights here. Arguably, many multicultural rights can be conceived in the same vein as difference-blind, *i.e.*, as universal, general and “non-sortal”, *e.g.*, as language-rights for *any* person with encounters in inequality based on language etc. What I have in mind is a stronger sense of multicultural rights, where the very fact of a “different” culture is taken as relevant for an assessment of which rights a given person ought to have as opposed to “difference-blind” where that kind of difference is taken to be irrelevant from the outset.
- <sup>37</sup> *E.g.*, Raz, Joseph, 1994; 1998, Spinner, Jeff, 1994, Tamir, Yael, 1993
- <sup>38</sup> See, *e.g.*, Kymlicka, Will, 1995. He also invokes the more straightforward egalitarian argument presented in the above.
- <sup>39</sup> Kymlicka, Will, 2002, pp. 135ff; cf. Festenstein, Matthew, 2005, pp. 70ff.
- <sup>40</sup> See Taylor, Charles, 1994; Honneth, Axel, 1995.
- <sup>41</sup> See, *e.g.*, Modood, Tariq, 2007; Parekh, Bhikhu, 2006; Young, Iris Marion, 1990. Of course, this map of multiculturalism could be drawn in a number of different yet plausible ways. For instance, as indicated, many if not all of the theories that stress recognition and identity also rely on egalitarian norms. Even Iris Marion Young who, from a post-modernist stance criticizes the notions of universality and equality with much aplomb implicitly affirms norms of equality (See Holtug, Nils, 2009.)
- <sup>42</sup> Will Kymlicka, the most influential proponent of liberal (egalitarian) multiculturalism is in some ways reluctant to advance this kind of egalitarian argument on behalf of *immigrants*

on the ground that they have themselves chosen to emigrate, and hence, following the standard luck egalitarian principle, they have no legitimate complaint concerning eventual inequalities. This is vulnerable to the objections that immigrants do not necessarily choose to emigrate (this objection can be made on empirical or metaphysical grounds) and that the *children* of immigrants obviously do not choose to be born in a majority culture which is foreign to their own.

<sup>43</sup> Again, we exclude cases of secession.

<sup>44</sup> Cover, Robert, 1982.

<sup>45</sup> Shachar, Ayelet, 2001, p. 2.

<sup>46</sup> To give an example: If one takes one's cue from Axel Honneth's theory of recognition, one might insist that whatever pertains to legal status belongs to his second sphere of recognition, which is inherently universal, anti-particularist in kind. On the other hand, one could also read Honneth in another way, namely, as advocating a view giving "ground", universal legal recognition to all (vis-à-vis the second sphere of recognition) supplemented by special rights to groups based on the specific forms of solidarity pertaining to the third, more particularistic sphere. Cf.: Honneth, Axel, 1995.

<sup>47</sup> Waldron, Jeremy, 2007, p. 130. For the following, see Waldron, Jeremy, 2002; 2007.

<sup>48</sup> Waldron, Jeremy 2007, p. 131.

<sup>49</sup> Waldron, Jeremy, 2007, pp. 131f, referring to Waldron, Jeremy, 2002, pp. 12f. See also Phillips, Ann, 2003, pp. 513f.

<sup>50</sup> Shachar is less concerned about the ex ante model. See Shachar, Ayelet, 2001, pp. 45f. However, it seems to me that she did not take into considerations the lessons learned from the debate over the "cultural defence", partly for the reason that much of the literature surfaced after 2001.

<sup>51</sup> Waldron, Jeremy, 2007, p. 143.

<sup>52</sup> Waldron's cosmopolitical point of view is not sufficiently exhibited here, and in any event there are many other universalist frameworks available; however, it needs much more detailed exposition in order to be philosophically water tight, and even then I believe that it can only work as a defence of a *pro tanto* reason for going for the universalist, uniform model.

<sup>53</sup> The following is partly built on Dane, Perry, 1996, pp. 209ff.

<sup>54</sup> Dane, Perry, 1996, p. 209.

<sup>55</sup> Prosser, William, 1953, *Michigan Law Review*, (51), p.916, quoted in Dane, Perry, 1996, p. 209.

<sup>56</sup> It is not a complaint that law cannot make us all win. As a party to a democratic process of lawmaking, the citizen has to accept (within reason, of course) that the law cannot mirror all of his or her interests, and this does not in itself undermine legitimacy. See Nielsen, Morten Ebbe Juul, 2010. However, it is an entirely different matter when the legal status of a citizen is completely set aside.

<sup>57</sup> It is irrelevant just what the divergence between the two laws is; the most dramatic situation would conceivably concern whether some act is criminalised to begin with.

<sup>58</sup> It is probably not conceptually impossible to come up with institutional designs that ensures, or helps towards, equal treatment of parties from different jurisdictions; yet, the question is both under-illuminated and extremely complicated. See, e.g., Shachar's suggestions concerning a form of "transformative accommodation" or "joint governance", Shachar, Ayelet, 2001, pp. 88ff. This author finds it very hard to envisage the exact institutional form that follows from Shachar's otherwise instructive thoughts of the matter, and I venture that citizens living under such a regime would be rather confused as concerns their precise legal status.

<sup>59</sup> Maybe not on a ground level; but in practice the kind of respect must differ.

<sup>60</sup> Rawls, John, 1999, pp. 35ff *et passim*.

- <sup>61</sup> This might be only a minor problem, and point only to the rather obvious fact that all political and legal arrangements are sensitive to the empirical circumstances. See Kymlicka, Will, 2010, pp. 43ff.
- <sup>62</sup> See Shachar, Ayelet, 2001, pp. 81ff.
- <sup>63</sup> Note that an egalitarian multiculturalism can maintain that members of unprivileged groups have a right to (substantive, not just formal) equal access to cultural goods giving at least a *prima facie* ground for compensation in order to promote equal access without getting embroiled in multilegalism, even if there is a case for saying that the logic of liberal multiculturalism heads in the direction of multicultural multilegalism.
- <sup>64</sup> See Waldron, Jeremy (2002), pp. 5ff (2002) and Waldron, Jeremy, 2007, pp. 150f, referring to *State vs. Kargar*.