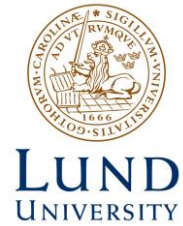


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“Taking Culture to Court”

- Considering the Use of the Concept of Culture in a Cultural Defence

“All trials involve culture. A trial is a cultural ritual, crime a cultural construct, and the court a cultural apparatus that represents and enforces the dominant culture’s values and perspectives” – John L Caughey

Abstract

This thesis is a result of an initial interest in multiculturalism – how states to deal with cultural plurality and the role of the concept of culture in this process – which led to a particular interest in the use of “culture” as a defence plea in courts; what is referred to as a “cultural defence”. With reference to two empirical cases it explores the legal, political and anthropological discussion on the cultural defence and how the concept of culture has been presented in the trials. The argument of the author is that there needs to be a focus on the very concept of culture itself before it can be decided if and how we should accommodate culture in court. In particular it is argued that an essentialist notion of culture cannot be at the base of a cultural defence as a cultural defence needs to adjust to the changing nature of culture and acknowledge the issues related to culture and authority. This argument is in part driven by alternative notions of culture and cultural representation such as those provided by Wikan, Barth, Ardener and Baumann.

Key words: cultural defence, cultural rights, culture, jurisprudence, social anthropology

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1. Introduction

The premise on which much academic and political discussion today takes form is that the world is currently in a phase of differentiation, pluralism, mobility, “mixing and meeting” (what is by many scholars referred to as part of the “globalisation process”) and that the democratic nation-states, mainly those in the West, are facing new challenges as a consequence of this process. The challenges arise, it is argued, as a consequence of flows of people moving across vast areas of the world, permanently or temporarily, but more than often keeping close ties with their country of origin or primary affiliation (Ballard et al. 2009b, p. 9). The challenges are often phrased as concerning integration and segregation, rights and duties, minority and majority, and concepts such as multiculturalism, transnationalism, hybridity and identity politics have been developed as tools to describe and sometimes even ideologically manage the current world order. Given a key role in the discussions pertaining to all the aforementioned phenomena is the concept of culture. Culture has become a central concept on the political and academic scene, or, in more illustrative terms, “culture is on the loose” (Wikan 2002, p. 79). To my mind this serves as an appropriate description of culture’s position in today’s discursive climate – pointing to how elusive yet disputed and powerful the concept is.

This thesis will investigate what happens when the concept of culture enters the court room as a defence insofar as it provides a justification for lessening the guilt or culpability of the defendant. It is not my aim in this thesis to take a stance for or against the cultural defence. I am interested in how the discussion regarding a cultural defence is framed and what notions of culture underlie, or even complicate, the discussion. Further, I am concerned with the issue of representation; who is given precedence over others to define and represent culture in court? In the analysis I will provide arguments and insights from anthropological debates on the concept of culture as well as the general debate concerning the cultural defence and I will present two empirical case studies that will be analysed and discussed in relation to the aforementioned debates.

Research question: What are some of the main issues surrounding the use of a cultural defence and is it at all possible for the concept of culture be a valid basis for a defence plea in a court of law?

1.1 Method and Material

This thesis is a literature study and therefore only secondary sources have been used. The discussion concerning a cultural defence belongs at once at a general level of discussion and analysis, as the world is indeed interconnected; states take after each other in law and governance, ideologies spread and cultural diversity is increasingly debated in most nation-states. However, it simultaneously belongs at a particular level of discussion and analysis, as all nation-states are, at least formally, sovereign and therefore control and sanction their citizens independently. This necessarily implies that there are a wide range of approaches one can take to this issue. Some approaches focus on a particular country and its history of multiculturalism and how culture is presented in court (such as Truffin and Arjona 2009). Other studies compare two countries that are in either similar or dissimilar situations (Kusters 2009) or present a legal-philosophical treatment of the issue (such as Woodman 2009b). My approach is closer to the general level of discussion and analysis, meaning that I am firstly and foremost interested in how culture can function as a legitimate defence in the legal systems of modern nation-states. The reason that I chose this level of analysis is because I found, as will be elaborated on later on in the paper, that the cultural defence is not only highly disputed but also a fairly new topic of discussion. This compelled me to take first things first; why is the cultural defence being discussed world-wide now? What is meant by “culture” in this context and how does it present itself in a court of law? What are the main issues that are discussed in relation to the cultural defence? Despite my empirical examples being particularly situated within the borders of each their own nation-state they are discussed and analysed not mainly in relation to each state’s political and legal characteristics, but to provide a further understanding of the general issues that will be presented.

Just like fieldwork requires the author to provide a background of the field or a study based on qualitative interviews requires the author to present the interview subject, it is necessary for a literature study to provide a presentation of the literature that actually make up the underpinning for the arguments and analysis one produces. As far as understanding what the cultural defence is all about and what the arguments surrounding it are, I found extensive use of two anthologies in particular; *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, edited by Foblets and Renteln (2009) and *Legal Practice and Cultural Diversity*, edited by Grillo et al. (2009). These both consist of studies from law, political science and anthropology and therefore provide a range of perspectives on the cultural defence. It is largely with help from these that I have been able to categorise the main

issues concerning the cultural defence. For a deeper understanding of the arguments for and against the cultural defence I made use of two books by different anthropologists that are dedicated to empirically demonstrating two vastly different stances towards the cultural defence; Unni Wikan's *Generous Betrayal* (2002) and Alison Dundes Renteln's *The Cultural Defense* (2004). The former seeks to demonstrate what is at stake for the weakest members of social groups, in particular women and children, if members of that social group should be allowed to invoke culture as a defence against criminal actions, and the latter provides a vast amount of cases to demonstrate how cultural misunderstandings in court can sometimes have tragic effects for the defendant and how a cultural defence would be a protective measure for groups who are already in a minority position.

For many of my arguments it was necessary to discuss the concept of culture as such and choosing which aspects of the culture-debate to bring into this thesis was difficult due to the complexity of the topic and the limitations of this thesis. I found that the majority of the literature on the cultural defence based their arguments on an essentialist understanding of culture. This led me to look to anthropologists whose understanding of culture goes explicitly against this conception of culture and I found that Barth, Wikan and Baumann criticises the essentialist conception of culture from different vantage points that together provide an wide-ranging critique of the approach. It is important, then, not to conflate the discussion on culture that is raised in this paper with a discussion of the concept of culture per se.

1.2 Limitations

My greatest obstacle while writing this paper has been my limited knowledge of law. Diving into the world of jurisprudence and court cases has been intriguing but time consuming and there is no doubt that this paper could have been written more efficiently and with more intricate arguments had I possessed any knowledge of law beforehand. This insight has if anything made me more convinced of the great scholarly value of using interdisciplinary approaches to studies such as mine.

As already mentioned I will not be taking a definite stance for or against the cultural defence and this has to do with the limitations of this thesis. This type of defence can cover a wide range of different cases – from hard criminal cases to land and language disputes – and may affect people in very different positions – from first to third generation immigrants to

indigenous people and other long-time minorities. Unfortunately, for this paper it means that I will not be able to do justice to all the levels at which the cultural defence can operate. Aspects of the cultural defence that deserves more attention are, for example, whether one should differentiate between long-term minorities and immigrants in relation to the cultural defence and the extent to which minorities are discriminated against under the system of law that we have operating today.

The last limitation relates directly to the general level approach that I chose for my study (see chapter 1.1) and concerns the empirical data. Given my general approach to the cultural defence, choosing only two case studies creates the risk of being labelled reductionist or determinist – to look into only two cases, no matter with how much depth, will necessarily limit my argument. There is the risk of too much speculation or creating hypothetical “if not, then...”-arguments. I was faced with an abundance of cases in my literature, so lack of data was not why I after much deliberation chose to go with primarily only two cases. To present a wide range of cases would have compromised the depth of my arguments, seeing as only limited information on each case would room in this paper. It would also be difficult for the reader to assess my arguments if they were based on cases that were only presented in part.

2. A Background for the Discussion of a Cultural Defence

In this chapter I seek to explain what scholars mean when they talk about a “cultural defence” through tracing the various definitions that I have encountered and emphasising the central aspects of these. I also try to contextualise the concept within the modern nation-state in order to understand why this concept has become a relevant point of discussion in recent years. Lastly, I will dedicate a subchapter to the concept of culture and some of the contesting views of its relevance, content, dynamics, location and function. I believe that in order to understand the ambivalence that exists among scholars towards the concept of a cultural defence we need to take a closer look at the concept of culture.

2.1 Defining the Concept

Defining the concepts through which we understand and organise life in a bureaucratically advanced information society such as our own is of paramount importance if we are to

develop anything to anywhere, but at the same time this seems to be one of the more difficult and halting tasks that scholars, politicians and policy makers get stuck on. In order to evaluate something one should ideally understand what it means, but who gets to decide the scope of, or the limits of, a concept? An incipient concept like the “cultural defence” is only at the beginning phase, or at the scholastic bargaining phase, of being mapped out as a functional concept.¹ Not even *Multicultural Jurisprudence*, a book that has the cultural defence as its main focus, provides a definition of it (Renteln and Foblets 2009, p. 1). The only definition that I have encountered that covers both *when* the cultural defence should be used and *how* it may be used is Woodman, who says that: “a culture defence is a rule of state law which constitutes a complete or partial defence to a crime or mitigation which reduces the punishment, and which takes effect where the defendant would not have committed the criminal act had they not belonged to a particular culture“ (Woodman 2009b, p. 13). Other scholars’ definitions, if they provide them at all, seem to be focusing greatly on *when* a cultural defence should be considered, but rarely on *how* the cultural defence should be applied (could it be grounds for acquittal, mediating circumstances etc.?). For instance, Renteln states that a cultural defence should be considered when “[...] an individual’s behaviour is influenced to such a large extent by his culture that either (1) the individual simply did not believe that his actions contravened any laws, or (2) the individual felt compelled to act the way he did. In both cases the individual’s culpability is lessened.” (Renteln 2004, p. 187)

I cannot provide a unison definition of the concept, as there seems to be none, but I can briefly outline the general idea that scholars seem to rest their arguments on: that defendants should be able to refer to certain aspects of their cultural background as motivating factors behind the circumstances that they are on trial for and that judges should be *required* to consider such information (see for instance Renteln 2004, p. 5). I have stressed “required” in the previous sentence because it is important to keep in mind that there are several cases from almost all over the world (Renteln & Foblets 2009, p. 1; Ballard et al 2009a, p. 2; Truffin & Arjona 2009, p. 91-92) where culture *has* been considered as relevant to the verdict, but that there is no state law (see Woodman’s definition above) that *requires* the court to

¹ Gordon Woodman (Woodman 2009, p. 7) actually insists that calling the defence for a “cultural” defence is grammatically erroneous on the ground that it should denote that the defence in itself is a part of the culture, not merely culturally motivated, and calls for a name change to “culture defence” (a feat which he pursues in his own texts at least and that is neither here nor there in this paper, but illustrative when demonstrating the indecision concerning the concept)

consider culture. In practice, then, there are cases that have considered culture as part of a defence, but they are rarely found from a search on “cultural defence” (Renteln 2004, p. 7; Truffin & Arjona 2009, p. 92) because it is not a by law established legal plea (Woodman 2009a, p. 144, Maier 2009, p. 240). This means that it is difficult to create statistics or clear overviews over when the cultural defence is used and how it is used. In fact, Woodman and Renteln have detected that, in English law and US law respectively, evidence that can be considered to be “cultural” in character is often dismissed as irrelevant (Woodman 2009b, p. 32; Renteln 2004, p. 5). One of the worries that follows from this current system is that it is in fact no system at all; there is no standardised method to deal with cultural evidence in court and this can have discriminatory effects. In chapter three I will deal more thoroughly with the discussions that surround the cultural defence and identify the key issues.

2.2 Contextualising the Debate

Now it is time to ask why the discussion about a cultural defence is even brought to the fore – why is it considered relevant and why now? In most introductory passages of articles and books on the cultural defence it is made clear that the author(s) assume that we are living in a multicultural, transnational world where the nation-states are entering an increasingly culturally heterogeneous reality and that this is why the issue of the cultural defence is relevant now. The crux is, in the words of Ballard et al., “how far should societies and especially legal systems and legal actors go to accommodate the plurality which is an inescapable characteristic of contemporary societies?” (Ballard et al., 2009b, p. 11).

The plurality that Ballard describes in the above passage is commonly referred to as “multiculturalism”. I find, along with other scholars, that a distinction between descriptive and ideological multiculturalism is helpful. The former denotes the cohabitation of many different ethnic and cultural groups in one geographical space which constitutes a society (or today, a state) (Wikan 2004, p. 194) and can also be described with terms like “multiethnicity” (Ekholm Friedman 2004, p. 227). The latter, ideological multiculturalism, refers to the belief that plurality is good for society and that state policies should promote and maintain the diversity (ibid., p. 228). Contrary to what for example nationalist discourses proclaim there is nothing new about multicultural societies in the descriptive sense (Wikan 2002, p. 32). For instance, Roth breaks down the illusion that there ever existed a homogenous Sweden into which immigrants came and “created” a multicultural society (Roth

2004, p. 214). Instead, he argues, Swedish societal structure has been multicultural for a very long time, but served under different ideologies (ibid., p. 217).

So if multiculturalism, in the sense of a culturally diverse society, is not new, merely an old structure operating under new ideologies, why has multicultural jurisprudence and the cultural defence not been self-evident components of states' juridical structures from the beginning? I do not claim to have a single answer to this question but believe that we can gain some understanding through the concept of "methodological nationalism". Wimmer and Glick Schiller argue that the concept of the nation-state with its concomitant nationalism has significantly shaped the way we understand and handle transnational migration (Wimmer and Glick Schiller 2002, p. 301). What they call methodological nationalism is "the assumption that the [nation-state] is the natural social and political form of the modern world" (ibid., p. 302). With the naturalisation of the nation-state there also emerged a notion of peoplehood that fitted this territorial, social, political and economic unit: people as a sovereign entity, people as citizens of a state holding equal rights before the law, people as a group of obligatory solidarity and people as an ethnic community (ibid., p. 307). This assumption creates the illusion that transnational communities and multiculturalism are new phenomena that have arisen in otherwise stable, homogenous social structures (i.e. nation-states) (ibid., p. 302). Anthropologists played a role in this development. When doing anthropology "at home" they tended to focus on groups that they considered "culturally different" due to a different origin and history from the majority. What they did not consider, however, was that this differentialisation came more from what Wimmer and Glick Schiller calls the "politicisation of nation-building" than from the minorities' de facto different historical origins (ibid., p. 305-306).

In this context migrants have received special attention because they obscure the "naturalness" of the relationship between the nation, citizenship and the people – they call into question the absolute loyalty one people supposedly has to one state, one system of law and one polity (ibid., p. 309). The system of law is intrinsically tied to this nation-state and has also been treated under the principles of methodological nationalism; we assume that our principles of law were established in order to serve a culturally homogenous population equally. Today multiculturalism, transnationalism and hybridity are receiving increasing attention, and even ideological support, and it is becoming clearer that the homogenous population that was assumed during the establishment of our legal system is based on an

empirically incorrect notion, a myth, of “one nation, one people”. The cultural defence and multicultural jurisprudence have emerged as topics of discussion in this discursive climate.

2.3 The Concept of Culture

It seems to me that it is in anthropologists’ position as “culture experts” (Wikan 2002, p. 79) that we can contribute the most to the discussion on a cultural defence. With a history of using, debating and redefining the term as long as the discipline itself, and having tons of empirical material which probes into the daily, experienced and constructed mechanisms of culture, whether they be contested positions or organized patterning, anthropology is well-equipped to raise their voices in the discussion on the cultural defence. If there is a fairly stable consensus around the fact that cultural identity, no matter how constructed and internally contested, is playing an increasingly central role in politics, there seems to be no such consensus on what this abstract concept of culture is, who it belongs to, how it is constructed or what meaning it has, and it would probably not be more than a tiny hyperbole to say that within anthropology there are as many opinions on “culture” as there are anthropologists.

Renteln, who argues persistently *for* a cultural defence, provides a definition of culture which maintains that individuals unconsciously internalise cultural categories from birth and that these come to manage how individuals act and think (Renteln 2009b, p. 62). In stating this she strongly underplays the hybrid, contested and power-related aspects of culture that have been central to the debate on culture since postmodernism made its mark. This is a conscious standpoint from Renteln’s side and she states elsewhere that “culture is not as malleable as postmodern critics maintain” (Renteln 2004, p. 11). Others, such as Woodman and Ballard et al., also use definitions of culture which emphasise cohesion and internalisation before conflict and agency (Woodman 2009b, p. 8; Ballard et al. 2009b, p. 15), but they are more sensitive to how the other aspects of culture problematise the debate on a cultural defence, e.g. the risk of stereotyping and undue generalisations or that cultural meaning is dependent on positioning (Woodman 2009b, p. 13).

The above provide essentialist models of understanding culture if we follow Baumann’s characterization; cultures are treated as “finished objects” that are passed down from one generation to the next in the form of tradition (Baumann 1999, p. 24-25). This

understanding of culture, which then is the foundation for many of the arguments around the cultural defence, has been widely criticised, not least from Baumann himself who sees it as ignoring human capacity for agency and restricting each person to having only one culture (ibid. p. 84). Wikan is also among those who criticise the essentialist approach to culture and fears that culture will become a new concept of race; “the other” will be constructed as a product of their culture and all their choices reduced to cultural standards (often lower ones) that are imposed on them and against which they are incapable of resisting, being “deprived of motivation and intention” (Wikan 2002, p. 81). She calls for a stronger focus on each person’s agency and argues that we have let a deep fallacy enter the debate when we start talking about the agency of *culture*, as in “culture clashes”; culture cannot act, it is an abstract concept, only humans have the capacity for agency and consequently, only humans can “clash” with one other (ibid., p. 83).

Another assumption behind the essentialist approach to culture is that of culture as cohesive and organised. To illustrate how this assumption can be criticised I will make use of Barth’s article “The Analysis of Culture in Complex Societies”. He argues that our understanding of culture is ineffective insofar as we see a society containing people, look for patterns in organisation and daily life and where we find it, collect this information, put it into a coherent scheme and call it “culture” (Barth 1989, p. 122, 132). According to Barth, empirical reality reveals that each person’s life is structured around different, and sometimes several, loci of authority and that no aspect of “culture” ever pertains to every individual that is associated with that culture (ibid., p. 130). Despite this critique, Barth does not advocate anarchy or argue that society is a disorganised mess. The solution is to see society as partially organised and contested and shift our analytical unit from “cohesive culture” to social processes, or streams, that display some degree of coherence over time but that exist with, and sometimes in contestation with, each other, overlapping in institutions and individuals (ibid., pp.130-133).

So we see that there are critiques against the sort of essentialist definition of culture that the cultural defence is mostly based on. However, it would be a mistake on my behalf to portray the essentialist conception of culture in solely inimical terms. Despite the constructed nature of culture as we know it and the versatile empirical reality that the culture concept tends to overshadow, it is equally an empirical reality that people *do* define not only others but also themselves according to an essentialist notion of culture. Baumann, who as mentioned is critical towards the essentialist approach to culture, still argues that we cannot

disregard this notion as false and be done with it – simply because people use this discourse to negotiate their own position in relation to others or in relation to institutions (Baumann 1997, pp. 212-213). Baumann thus distinguishes between two types of discourse on culture; one demotic, which sees culture as processual and negotiable (ibid., p. 215), and one dominant, which reifies culture and corresponds to the essentialist understanding described above (ibid., p. 209). It will be argued later on in the paper that the former discourse could hugely benefit our understanding, and subsequent management, of a cultural defence. First, however, we will take a closer look at the existing discussion concerning the cultural defence.

3. The Discussion Surrounding the Cultural Defence

In this chapter I explore how scholars have approached the possibility of raising a cultural defence. I identify a number of main issues around which the discussions often revolve. I have divided the chapter into subchapters which I hope cover the scope of the discussion that surrounds the cultural defence. The point here is for the reader to gain some insight into the debate concerning the cultural defence before I present the cases. The cases will later be discussed and analysed partly with reference to the discussions presented in this chapter.

3.1 Right to Culture versus Other Human Rights

The International Covenant of Civil and Political Rights is signed by most nations and according to article 27 of this covenant, people have a “right to culture”; “In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language” (quoted in Renteln 2004, p. 213). Renteln argues that this right in itself should entitle people to a cultural defence because states are obliged to protect the right to culture (Renteln 2009b, p. 63). Yet, there are some practices that are claimed to be “cultural”, for instance all forms of honour violence, that are also in direct violation of other human rights. According to Maier, honour killings in Germany have in the past often been reduced from “murder” to “manslaughter” due to the invocation of a cultural defence (Maier 2009, p. 241). Germany, like most other countries, does not have a cultural defence category in their criminal law so

when critique came of the mild sentences that honour crimes received it was possible for the courts to simply restrict or reject the cultural defence (ibid., p. 242). Had a cultural defence category existed in German criminal law then the jury would have had to consider it, and it could be argued that it would be more difficult for the jury to uphold the human rights of Muslim women due to the “cultural rights” of their closest kin² (ibid., p. 246).

Woodman suggests the exact opposite of Renteln: that accepting the cultural defence as a distinct general exemption defence could in fact be incompatible with human rights agreements, because a cultural defence could potentially make it easier to get away with violations of other human rights (Woodman 2009b, p. 33). The counterargument here is that cultural rights should be protected as long as they do not interfere with other human rights (Renteln 2009b, p. 78). Put in other words this should mean that cultural traditions that collide with human rights should not be entitled to protection. There seems, to my mind, that there are too many fuzzy and grey areas around this type of statement for it to be a valid point of reference in a discussion on a cultural defence. For instance, one can hardly say that cultural traditions are good or bad because they are not statically replicated, but are interpreted and motivated differently by each individual actor who subscribes to them and this malleability should seem particularly clear when a tradition is “transported” from one context to another (such as across continents). Further, the discussion around the cultural defence revolves around its usage in state courts, not human rights courts, and people are mainly sentenced according to that state’s national laws, not human rights violations, so it seems that one would be applying that wrong measuring tool if one concentrates one’s discussion on the cultural defence solely on its validity in relation to human rights.

3.2 Delineating the Extent of a Cultural Defence

This issue was touched upon already in chapter two when addressing the problem of defining the cultural defence. Most minds probably immediately think of criminal law when the concept of a cultural defence is brought to mind; could one be partially or wholly excused for beating one’s child or spouse, force one’s spouse to sexual intercourse, commit murder etc. in the name of culture? These scenarios are certainly not irrelevant to the discussion of a cultural

² I disagree with Maier in denoting “Muslims” in particular in this context. We know that the same type of honour violence exists among Christian groups from the MENA-region as well, and that honour killings are not an Islamic invention (see Wikan 2002, p. 100).

defence and there is all need to consider these cases when considering cultural defence as a whole, but a cultural defence could also be a possibility in cases concerning child welfare, asylum jurisprudence, housing codes (Renteln & Foblets 2009, p. 2) or even damage awards (Renteln 2009a, p. 199). According to Renteln & Foblets there is a distorted focus on “the gory cases” in both mainstream media and in academia (Renteln & Foblets 2009, p. 3).

Woodman and Amirthalingam, who both restrict their discussion of the cultural defence to the realm of criminal law, are sceptical to the acceptance of a distinct cultural defence (Woodman 2009b, p. 33; Amirthalingam 2009, p. 37) at all for reasons that will be discussed further in this chapter (practically difficult to judge what is cultural, the dynamic character of culture, the risk of stereotyping and enhancing the “us and them”-dichotomy etc.). Amirthalingam would rather see that the existing defences in criminal law be modified so as to be more “culturally inclusive” (Amirthalingam 2009, p. 37). Woodman suggests that a cultural defence should not be invoked in order to prevent conviction, but should be a possibility to use as a mitigating factor in sentencing (Woodman 2009b, p. 20).

3.3 Accommodating Equality before the Law and Cultural Variety

Equality before the law is a fundamental legal principle in Western democratic nation-states. It implies such things as the same set of laws applying to all, the right for everyone to a fair trial etc. What is becoming more and more clear is that this principle is not as self-evident as it may sound (Ballard et al. 2009b, p. 12). Both arguments for *and* against the cultural defence can cite the principle of “equality before the law” as an argument for their case. For the problem is one of how we treat people equally in a court of law who are discriminated against outside the courtroom because they are perceived as *unequal*, or different. Roughly put, and of course there will be middle-path arguments but to illustrate the scope of the debate, we can on the one side identify what Ballard et al. call the “when in Rome”-argument, meaning that all citizens, irrespective of background, have the same rights and obligations in relation to the law and that through the law the state should seek to uphold a level of “conformity with existing values and practices” (ibid., p. 11). This argument is usually held amongst people who are sceptical to an ideologically multicultural society (ibid.) and subsequently their

stance in relation to a cultural defence is one of scepticism. Unni Wikan, whose case study will be dealt with extensively further on in the thesis, takes a position close to this.

On the other side we find the argument that in order to treat people equally, we need to take into consideration and value their differences, i.e. legally accommodate diversity (ibid., p. 13). Here it is argued that our idea of having “one set of laws for all” is already a fallacy when we decide to accommodate differences among people such as mental capacity or state and it is pointed out that courts *do* take into consideration people’s backgrounds, there is just no systematised way of dealing with it (ibid., p. 13). Renteln constructs an argument congruent with this position; to take cultural background into account is as important in achieving equality before the law as is considering other things, such as mental health (Renteln 2009b, p. 62).

3.4 The Objective Reasonable Person

One of the most debated legal instruments used to determine culpability is the objective reasonable person test (Renteln 2004, p. 15) or the ordinary citizen test (Amirthalingam 2009, p. 37). Here, defendants’ actions are judged according to how an ordinary citizen could reasonably be expected to act in that particular situation (Woodman 2009b, p. 23). Through the test (or the standard), the defendant’s culpability is decided by comparison with “an ordinary person sharing the characteristics of the defendant”, but formally only characteristics such as age, sex, pregnancy, mental illness or physical disability are considered (ibid.). It is noteworthy that culture is omitted from this equation and that the reasonable person test relies on an archetype that is extracted from the majority. The implication of this is that not all citizens get the same support from this plea and that it might in many cases be discriminatory against minorities (Amirthalingam 2009, p. 37).

This test is controversial, but still stands in many countries and it seems to be difficult to develop an alternative strategy. Renteln, not surprisingly, argues that in order to circumvent the problems arising from the reasonable person test there should be a separate defence available to those who do not belong to the majority culture – namely the cultural defence (Renteln 2009b, p.66). If one follows Amirthalingam’s argument then the cultural defence would not solve the real problem with the reasonable person test – namely that there is too much focus on who the “person” in the equation is (what sex, age etc.) as opposed for focus

on the “reasonable”-element, and consequently there is too much bickering around a fictional archetype rather than the actual responsibility of the defendant (Amirthalingam 2009, p. 48-49). Instead of comparing the defendant to an archetype and letting the defendant’s level of correspondence with said archetype determine his culpability, Amirthalingam suggests that the defendant be evaluated individually, considering such things as personal background (ibid., p. 49). In this scenario there is no advocacy for a separate cultural defence, but rather that a call for the restructuring of other types of defence to incorporate a more individualised and culturally sensitive approach.

3.5 Cultural Defence for Whom? Who is “Cultural” Enough?

Most people tend to think of the cultural defence as being a measure available to minority cultures, and when looking at the entirety of the literature that I have encountered on the topic there seems to be little doubt that this is how most academics also see the cultural defence, or at least how they treat it empirically. There seems to be disagreement, however, as to whether the cultural defence will function as a safeguard or as a discriminatory measure for minorities. One can argue that a state’s legal system is designed by values intrinsic to the culture of the majority³ and that it is unfair that minorities should be subject to the same value hierarchy (Kusters 2009, p 199). The cultural defence then becomes a means to ensure the right to be equal before the law (see Ch. 3.3). Yet, one could also argue that the minorities are at risk of being perceived as cultural before they are human, leaving them in a discriminated position compared to the majority population, who are human before cultural beings and thus freer in their actions (Amirthalingam 2009, p. 36). In Amirthalingam’s terms, minorities are consequently reduced to an “inferior standard” (ibid.) and there is a risk of greater alienation between majority and minority (ibid., p. 43). This resonates with the discussion above about the risk of culture becoming a new term for race.

There is also the question of how long one is an immigrant; do second or even third generation immigrants share their parents’ or grandparents’ culture (see for instance Wikan 2002, p. 72)? If so, can we assume anything about how or to what extent? How would a cultural defence accommodate the changing of traditions and values over time in minority societies? The legal system at large is constantly changing to adjust to new values and needs

³ Majority is here used not necessarily to denote quantity, but rather to denote that group of people whose values have the greatest claim to hegemony in a given state

in society; would the cultural defence merely cement the minority in a time and a place and stall possibilities for the development and modernisation that the “cultureless” majority have gone through? Or, alternatively, would it privilege the minorities, making their voices heard and defend cultural traditions against unwanted assimilation?

The last issue under this heading is one that receives too little attention in this paper and concerns minorities who have resided in the country for a long time, such as indigenous people; should one differentiate between recent immigrants and the more long-term minorities in questions of rights and culture (such as the question of a cultural defence)? Kymlicka differentiates between these two groups and argues that immigrants have fewer rights to have their culture accommodated in the new society because they have chosen to uproot themselves and by that relinquished some of their right to live as they did in the homeland (Kymlicka 1995, p. 95-96). Renteln makes a convincing counterargument to Kymlicka’s, to my mind at least, when she states that a liberal democracy, if it is true to its liberal ideology, should regard birth place as arbitrary and thus consider the right to culture as equal to all members of society regardless of their birthplace (Renteln 2004, p. 214). Furthermore, if cultural rights are a human right then they should apply equally to immigrants and other minorities, seeing as human rights are available to everyone (ibid.). This is not an argument for or against cultural defence, but an argument as to who may exert a claim to such a defence should it become available.

3.6 The Problem of Authority

This issue was alluded to in the subchapter 2.3 and Wikan frames it succinctly: within each community (or culture) there are different views on cultural practices, but “not all persons will have an equal chance to gain credence for their views” (Wikan 2002, p. 84). So whose views are being held as normative at the expense of other people’s views? The scholars who present this argument often focus on women and children as the losers in this situation, having the least say in the formation of cultural norms and values (Amirthalingam 2009, p. 43; Wikan 2002, p. 156). The problem of culture and authority has a long history in anthropology and has been debated along both inter- and intra-cultural lines, i.e. both who has the authority to define a culture *within* a culture (i.e. the use of key informants) and *between* cultures (such as ethnographic authority; the translation of cultural meaning from one cultural context to another). Ardener (2006 [1975]) was one of the earlier anthropological scholars to discuss this

dynamic – he argued that anthropological knowledge about culture and societies was collected from talking to men and observing women, meaning that cultures are written down and defined in the words of men. To Ardener this problem is in part technical in that men to a larger degree occupy a public position that is more available (and perceived as more interesting) to anthropologists and that men tend to be trained to speak in a language more suited for academia (Ardener 2006 [1975], p. 48). The problems that are identified in Ardener’s paper, and other contributions to discussion of anthropology, culture and authority, are valid in the court room as well. Whose culture is being defended in a cultural defence and at whose expense? Who gets to represent culture in court? These questions bring us to the last subchapter; the issues surrounding how the cultural defence may be carried out in practice.

3.7 Practical Implementation

As has been demonstrated, there exists neither a clear definition of culture nor a straightforward understanding of the transmission of culture and this makes the implementation of a cultural defence a particularly tricky matter as one has to make decisions as to who belongs to a culture, whether a cultural praxis is as prevalent as claimed by the defendant and to what extent culture should reduce culpability. When discussing how a cultural defence should be presented and judged in court most people abide to an essentialist understanding of culture, or use what Baumann calls the dominant discourse on culture (Baumann 1997).

Even if we did decide on a clear definition of culture there would still be a crucial problem to solve; namely that of how to standardize the treatment of “culture” in court. Judges, juries, even lawyers and witnesses such as social workers should ideally be competent to evaluate a cultural argument when presented with one. It has been suggested that “culture”-knowledge should be incorporated into the curriculum at law school, so that future lawyers and judges are taught to evaluate cultural evidence and show cultural sensitivity where needed (Renteln 2009b, p. 81). This suggestion would be a measure both for standardizing the procedure and making sure that culture actually is given attention in a court of law. It also, however, requires that a solid definition of culture exists and can be justified, which complicates matters as we have seen that there is no such definition of culture.

The expert witness is the most commonly suggested additional constituent of a trial involving a cultural defence (see for instance Woodman 2009b, p. 32). Expert witnesses in cases involving a cultural defence would be persons with particular knowledge about the culture in question. Anthropologists are candidates here, but even leaders of communities or “elders” or someone from within the culture who is believed to have in-depth knowledge about the culture he or she belongs to are candidates. Renteln points out that it could be insulting to a cultural community to have an outsider expert (usually a white middle-class person with academic background) be granted authority to explain *their* culture (Renteln 2009b, p. 81). Yet, “native” expert witnesses are controversial for a number of reasons, as these people may have a stake in the outcome or be closely linked to the defendant. There is also the problem of having one person, no matter how high position this person occupies within his or her culture, represent an entire culture. Caughey argues that anthropologists generally might be better equipped to provide information that could be relevant to a case where the cultural defence is invoked (Caughey 2009, p. 326). Their academic background has trained them in collecting, interpreting and presenting knowledge about cultures in a manner that has scientific validity and holds authority in a courtroom (ibid.). Caughey also argues that anthropologists, despite the controversial aspects of using culture as an argument in court, have a responsibility to say yes to appearing in court *if* he or she sees that culture has played a role in the offense in order to make sure that cultural evidence is not being abused (ibid., p. 324). Caughey stands out in the debate on the cultural defence because he in practical terms manages to steer away from essentialism when arguing for the importance of incorporating cultural sensitivity in trials. His method is as follows: seeing as most criminal cases will concern an individual human being and his or her actions rather than a custom in and for itself (like the general banning of hijab for instance), it is not enough to merely state the existence and prevalence of a custom or tradition, one needs to consider this particular person’s circumstances; to “*locate* an individual within his or her cultural background” (ibid., p. 327). This requires research about the particular person the case concerns and the aim is to steer away from simplistic cultural reductions where people are constructed as unambiguous representatives of their cultures and rather base cultural evidence provided in court on “approaches such as those in life-history and person-centred ethnography” (ibid., p. 334).

In this chapter I have looked at the main issues around which the cultural defences is debated for or against. There are practical concerns relating to how to present culture in court, what

qualifies as “cultural evidence” and the need for a competent jury to evaluate the cultural arguments that are presented in a cultural defence. There are concerns relating to generalisations and stereotyping of cultural groups, rendering cultural differences more absolute than they in reality are. Furthermore, there are issues relating to power that raises questions as to who is actually being protected by the cultural defence and whether we are at risk of protecting one fraction of a cultural group at the expense of another fraction of that same group. These issues will be discussed further in chapter 5, where they are analysed and discussed in relation to particular cases where the cultural defence has been invoked.

4. Empirical Cases: Introducing Nadia and Kou

This chapter will present two cases where culture has been used as evidence in court and where an assessment of cultural evidence was included in the verdict. The first case will be referred to as the “Nadia Case” and the information on the case that is presented here comes from Unni Wikan’s book from 2002 *Generous Betrayal*. The second case will be referred to as the “Kou Case” and is collected from Renteln’s *The Cultural Defence* (2004) and an article she contributed to *The Human Rights of Persons with Intellectual Disabilities* (2003). The Nadia Case was available to me in much more detail than any of the other cases that I read, the Kou Case included. Wikan herself was present at the entire trial in the Nadia Case whereas Renteln’s examples are all her own retellings of cases that she has read rather than attended and much less participated in. This was in fact the case in nearly all texts I read about the cultural defence.

As mentioned in chapter 1.2, I have not chosen these cases with intent to represent the scope of the cultural defence; no two cases, let alone a single case, can account for the variety of situations where the cultural defences can be invoked or demonstrate the cultural defence. I have chosen cases that highlight many of the aspects of the debate presented until now in the thesis; for example both cases illustrate the necessity for a cultural defence to be able to account for cultural change as part of cultural reality. I will first present the facts from the two cases separately, not including the authors’ analysis and interpretation of data. I will then discuss how the concept of culture was presented and dealt with in each case.

4.1 The Nadia Case

Nadia was born in Norway and was by birth right a Norwegian citizen. Both her parents were born in Morocco, moved to Norway in the 70s and acquired Norwegian citizenship in the mid-1980s (Wikan 2002, p. 173). In her teenage years Nadia suffered from beatings and abuse from her father, on account of having become (in her parents' eyes) "too Norwegian", and at seventeen she was taken by child services to a youth institution where she would live until she was eighteen and returned to her parents under the circumstances that her father promised not to beat her (ibid., p. 182). In September 1997, when Nadia was 18, her parents kidnapped her with help from other close relatives, among them her brother – drugged, handcuffed and transported in a van from Oslo to Morocco. A month later, October 1998, the place where Nadia worked prior to her disappearance received a phone call from Nadia who reported that she had been kidnapped by her parents and was being kept against her will in Morocco (her parents had confiscated her passport) and that there were plans to have her married against her will (ibid., p. 173). Getting Nadia back to Norway proved difficult because the Moroccan government could do nothing to intervene in the situation; Morocco acknowledges what Wikan describes as "ethnic citizenship" which means that a person cannot relinquish his or her citizenship if s/he moves to a different state (Nadia fell under this jurisdiction due to her Moroccan descent), and despite the fact that a crime had been committed against Nadia on Norwegian soil, she was still a minor by Moroccan law and therefore completely under her father's authority (ibid, p. 174). Norwegian authorities had to resort to alternative measures to force the parents to send back Nadia; measures such as taking Nadia's brother in for interrogation and keeping him in custody for being an accomplice in the kidnapping of his sister and suspending, by the book, all welfare subsidies that the family was receiving from Norway (ibid, p. 175). They in the end succeeded and Nadia returned to Norway. The Norwegian state brought Nadia's parents to court for the kidnapping of Nadia (ibid., p. 177).

Wikan was an expert witness in the case. Witnesses for the defence included Nadia's grandfather, Nadia's brother, a social worker, two Norwegian-Moroccan girls and a leader from the Moroccan community. Witnesses for the prosecution included Nadia, the ambassador (who was the main communicator between Norwegian authorities and Nadia's family while she was being held captive) and a psychologist whom Nadia had been seeing for a year (ibid.).

Nadia's parents, argued that Nadia had gone by free will to Morocco to visit her sick grandmother and that she was telling lies to the police and the court because she had been under influence of bad Norwegian friends. The lies also came from, according to her father, Nadia knowing that her honour was destroyed due to her not being a virgin anymore (ibid., 181). They believed that Nadia had to be saved from the Norwegian influence and that it had been in their right to keep Nadia in Morocco because they believed that they had been under Moroccan authority. They argued that they were acting as any parent trying to protect their children would (ibid., p. 178-179).

Nadia's testimony told another story, one of kidnapping and abuse. She also claimed that her parents believed her to be possessed by jinns and that she had been exposed to several cleansing rituals (ibid., p. 178). Nadia said that her mother had shown her a picture of a boy in Morocco to whom she would be married and subsequently "become Moroccan" (ibid., p. 182). The ambassador who had been in contact with Nadia's parents while she was kept hostage offered the same story as Nadia (ibid., p. 184).

The jury decided that both parents were guilty; her father was given a suspended sentence of one year and three months and her mother one year. The legal minimum for the crime for which they were convicted ("*frihetsberøvelse*", or "having forcibly held someone against her will" (ibid., p. 177) is higher than the sentence that each parent received (ibid., p. 187).

Now I will present a few excerpts from the jury's written verdict:

"The defence attorneys have argued for acquittal on the grounds that Nadia, according to Moroccan law, becomes legally adult only at twenty years of age [...] The court does not agree."

"Ignorance of the law [...] is likewise not applicable."

"...applying for Norwegian citizenship [...] implies both rights and duties"

"The case arises from culture conflicts. But it is the parents who have chosen to live in Norway. [...] maintain customs of their country of birth is unobjectionable as long as these customs do not come into conflict with Norwegian law."

"The parents have made a choice as to which country their children will be moulded by."

(ibid., p. 190-191)

4.1.2 Culture in the Nadia Case

Now I wish to trace the concept of culture and the part it played in the Nadia case – how it was integrated in the defence’s plea for acquittal, how it compelled the choice of witnesses for both sides and how culture was presented in the actual sentencing of Nadia’s parents.

It is at first glance not obvious that the Nadia case is illustrative for understanding the use of culture as a defence in court. The main plea of the defendants was not that they had (Moroccan) “cultural motives” (see Renteln in Ch. 2.1) for keeping Nadia in Morocco against her will nor that they committed the act because of their cultural background (see Woodman in Ch. 2.2). In fact, in Wikan’s analysis of this case the defendants chose to omit cultural evidence where it could have been presented – recall Nadia’s claim that her parents believed that she was possessed by jinns and that they put her through several cleansing rituals, some of which were appeared shocking to most Norwegian minds (and quite possibly by Moroccan standards, one should add) (Wikan 2002, p. 178). Theoretically, the parents could have used this information as “cultural evidence”, attempting to prove that their culturally held beliefs motivated them to keep Nadia in Morocco so that she could undergo treatment of what they believed to be a real threat to their daughter’s well-being. What Nadia’s parents did, on the other hand, was to reject the allegations altogether. According to Wikan, this was in order to present themselves as reasonable people by modern standards as opposed to cultural “primitive” standards and appealing to a universal parental need to protect their child who is in trouble (Wikan 2002, p.179).

So why is this case worthy of our attention if we wish to discuss the culture as a concept available as a defence? Because the verdict by discussing culture at length, and even though it was decided that culture was not valid as grounds for acquittal in this case, shows that culture was indeed appealed to by the defence. Despite the parents’ appeal to a universal parental need to protect their children as the motivating factor for detaining their daughter in Morocco, both the peril that they perceived Nadia to be in and their method of responding to their parental need to protect Nadia were in the name of culture, or “culturally motivated”. The “problem” with Nadia was that she was becoming “too Norwegian” and the parents argued time and again that Nadia was not really at fault but that she had been misled by her Norwegian friends (Wikan 2002, p.178). So, conceptions of culture were at the root of this case from the beginning or, as the verdict states: “the case arises from culture conflicts”

(Wikan 2002, p. 191). Furthermore, their method for dealing with the problem of Nadia was also legitimised within a cultural framework when they claimed ignorance of the law – they were within the Moroccan legal boundaries when they detained their daughter who was still a minor (in Morocco). This act was conceived of as being in Nadia’s own interest and they argued that they did not know that they were breaching Norwegian laws. As we see then, this defence plea has its roots in “cultural misunderstandings” and generally a large portion of the defence was articulated in terms of culture.

Culture was evident other places in the trial as well and now we come to the practical aspect of calling a cultural defence. The witnesses for each side were clearly divided into a “Norwegian side” and a “Moroccan side”. The defence had, as we remember, a couple of Nadia’s Moroccan friends, Nadia’s grandfather and a Moroccan community leader. Wikan was also originally called in as a witness for the defence, but had on her own request changed her status to expert witness (Wikan 2002, p. 186). The Norwegian state had, other than Nadia herself, the ambassador and a psychologist. So it would seem as though the very structure of the trial was constructed along cultural lines; Morocco versus Norway, minority versus majority. The public reactions (the Nadia case was a highly publicised case in Norway) to the verdict seem to indicate this as well; some accused the Norwegian state of using the Nadia case as an opportunity to oppose Muslims in general and devalue their religion and culture (Wikan 2002, p. 192). Yet others argued that this was a step taken in the right direction and that Norway needed to be clear about just how much “culture” they were ready to tolerate (*ibid.*). Regardless of which of these positions one aligns oneself with, it is clear from the public discourse in the media following the case that it was presented as a culture conflict, one between Norwegian majority culture and Muslim minority culture and that the latter had had to give way to the former; the court had established that the cultural justifications for behaviour would not hold up in court.

Wikan is among those who applaud the Norwegian court for disregarding culture as a defence in this case because it meant looking past the cultural straightjacket that she argues many Norwegian second generation immigrants are born into and seeing instead an autonomous person who has had her rights infringed upon (Wikan 2002, p. 214). Renteln would agree that cultural defence was dismissed in this case, yet not share Wikan’s congratulatory attitude to this outcome. The following quote from Renteln has already been referred to, but suggests that she would have considered the cultural defence as valid in the Nadia case: “[...] an individual’s behaviour is influenced to such a large extent by his culture

that either (1) the individual simply did not believe that his actions contravened any laws, or (2) the individual felt compelled to act the way he did. In both cases the individual's culpability is lessened." (Renteln 2004, p. 187) If these were criteria against which we should evaluate a cultural defence then indeed the verdict in the Nadia case would have sounded very different. Yet, there is reason to believe that even though culture was not accepted as a defence in the written verdict, it *did* play a part in the sentence that each parent received, which was, as we remember, below the legal minimum for the crime they were on trial for. Renteln has, in the articles and book that I have read by her, accounted for numerous cases where this has happened – that the judge rejects the cultural defence, but still gives a relatively mild punishment (Renteln 2004; Renteln 2009a; Renteln 2009b).

Ultimately, I do not agree that culture was ignored or devalued in this case. If one bases one's argument on the presumption that culture equals tradition and heritage and assign culture to "the other" as a measurement of difference, then one might very well say that culture lost and that the jury undermined the cultural arguments and explanations that were provided. But if we instead assume that culture is a dynamic on-going process (Wikan 2002, p. 77) that pertains to majority as well as minority and that is equally represented by children, women and men, (ibid, p.78) then we see that culture was very central to the verdict, but not treated as an artefact that had been passed down to Nadia through her parents. It was showed that Nadia's lived reality, including her culture, was equally valid to that of her parents. It is only because of the pervasiveness of the dominant discourse of culture, which anthropologists have helped establish and maintain well to note, that the public media picked up this case as a dramatic example of a culture clash.

4.2 The Kou Case

The Kou case took place in California during the early 90s. Kou Xiong was born to Hmong parents whose country of origin is unclear from Renteln's accounts of the case. It is clear that some if not all of the Xiong's children were born abroad and that they for a while resided in a Thai refugee camp (Renteln 2004, p. 62). Kou was born with a congenital deformity called club foot and a dislocated right hip and when Kou was 6 a paediatrician made an evaluation that Kou would become wheelchair bound at an early age if he did not undergo surgery to correct his condition. When Kou's parents refused to let him have the surgery the doctor contacted child services who sought temporary custody of Kou on the grounds that the parents

had failed to correct Kou's congenital condition. With temporary custody they would be able to consent to the surgery on Kou's behalf (Renteln 2003, p. 67). The case went to court and Kou's parents fought for their right to decide against surgery for Kou based on their cultural and religious beliefs. Kou's parents believed that Kou had been born with his defects for a reason; to redeem the sins of his ancestors. If Kou underwent the surgery then Kou and those around him would at some time be subject to "divine retribution" (ibid., p. 68). Kou's parents also feared that he would be ostracised as a consequence of the surgery and would spend the rest of his life as a social outcast (Renteln 2004, p. 62) As Kou's condition was not life-threatening and the surgery was not risk free nor guaranteed to succeed, and would have to be undertaken more than once, the parents argued that their cultural and religious beliefs should be respected (ibid.).

That Kou was between six and eight from the doctor first sought custody to the trial ended after a number of appeals made it difficult to base the verdict on the child's own wishes, especially since Kou himself said both that "he did not want surgery and that he did not want to be in a wheelchair" (ibid.). Kou's parents had, on the other hand, support from representatives of Hmong community. They agreed with Kou's parents' beliefs that Kou was atoning for his ancestors' sins and that horror might befall the family if Kou's parents tried to have his condition fixed. A total of twenty⁴ leaders from various Hmong communities signed a petition to try to convince the Director of the child services department in question to change his mind on insisting on medical treatment (Renteln 2003, p. 68).

Kou's parents lost the case on all appeals all the way to the Supreme Court and the surgery was ordered to take place, but as of 1992 there was no doctor who was willing to perform the surgery without the parents' cooperation (Renteln 2004, p. 62). Ultimately, the judge who had had the case the first time around decided to vacate his ruling after learning from a psychiatric report that the prospect of ostracism and the responsibility that he would feel should something happen to his siblings after surgery put Kou at "grave psychological risk" (ibid.).

⁴ In Renteln (2004) it is stated that there were eighteen clan leaders, not twenty, but as this no difference for my argument later I have chosen to ignore this discrepancy.

4.2.1 Culture in the Kou Case

Renteln uses the exact term to describe the Kou case as the jury did to describe the Nadia case: as a culture clash (Renteln 2003, p. 67). In this case, according to Renteln, the clash was brought about by “divergent interpretations of a particular disability” (ibid.). Renteln is worried by the fact that the verdicts from every appeal agreed that a child’s ability to walk was seen as such an important matter in our society that it could override parents’ culturally and religiously motivated wishes to not put their child through extensive surgery (ibid., p. 69). What I must point out is that the “divergent interpretations” that Renteln refers to are mainly about the *cause* of the disability, not about whether or not Kou will live the rest of his life with a disability. To be wheelchair bound might be, as far as any information presented by Renteln is concerned, considered as much a disability among the Hmong as it is in the US and imply a decrease in life quality and possibilities even in the eyes of the Hmong. The only way in which we know that the opinions of the Hmong and the US legal system truly diverged is that the Hmong community believed that he deserved his by birth given disability due to the sins of his ancestors and that US legal system would not speculate as to why Kou was dealt the unfortunate genetic cards of being born with a club foot and a dislocated right hip.

As mentioned, twenty leaders from different Hmong communities went together and signed a petition as a plea for the director of the child services department to retract the law suit. Renteln derives from this that there was a unified support in the Hmong community for Kou’s parents’ decision not to operate him (Renteln 2003, p. 68). However, in doing so Renteln conflates having support from leaders of the communities with having support from the entire community. The consensus that Renteln argues existed in the community is actually derived from only twenty Hmong people, albeit their high position in the community. Courts must be careful when considering evidence that is supposed to show a prevalence or a uniform position taken by a community so as to not make judgements based on generalisations such as the one made by Renteln here.

It is clear from the verdicts that the cultural arguments in themselves, as sincerely held as these beliefs might have been, were not enough to convince the jury against surgery. What in the end was enough to convince one judge to relinquish his decision was the prospect of the child becoming a social outcast because of the operation putting him – despite the physical improvement – at “grave psychological risk”.

5. Some Final Questions Regarding the Cultural Defence

In this last chapter of the thesis my aim is to further discuss and problematise the prospect of using the concept of culture as a defence plea in a court of law. I will do so by raising four questions surrounding the cultural defence that I believe deserve particular attention. These questions are presented as subchapters that should reflect some of the most pressing matters concerning the cultural defence – who is allowed to speak for culture in a courtroom? Whose rights are being protected? What kind of cultural expertise is available and what are some of the issues pertaining to these? Can the cultural defence exist in a form that adjusts to the changing nature of culture over time?

5.1 How Is Cultural Evidence Provided in a Cultural Defence?

Witnessing on Behalf of Culture

Witnessing on behalf of culture raises necessary questions about the person giving the testimony and his or her own cultural affiliation, about representation and authority, and about the nature of what is being defended; namely culture. The problem is practical in that for a cultural defence to at all be possible the defendant must be able to provide material or statements that somehow verify the cultural arguments. Calling in an expert witness can give strength to a cultural defence and as mentioned in chapter 3.7, these witnesses can be representatives from the cultural community that the defendant belongs to or they can be outsiders with particular knowledge about the culture in question. Seeing as both types of witnesses are often accepted in court the cultural information they can relay must be considered pertinent to cases where culture is part of the defence. Why is this? What cultural knowledge is available to people in these positions and how do they present this knowledge in a courtroom? These questions can be answered differently by looking to different theories concerning culture, authority and representation. I will first discuss the legitimacy of the different types of expert witnesses from the various perspectives on culture, authority and representation that have been dealt with so far in the paper. Then I will investigate the topic further with help from the empirical data from the Nadia case and the Kou case.

Renteln bases her analyses on the concept of enculturation (Renteln 2004, p. 12). She relies on anthropologist Ralph Linton's explanation of enculturation: "no matter what the method by which the individual receives the elements of culture characteristics of his society, he is sure to internalize most of them" (Linton in Renteln 2004, p. 12). If we employ this understanding of how individuals acquire culture it follows that a native expert witness is indeed in possession of highly precise knowledge of the cultural motivations that the defendant claims were decisive in committing the crime. This is because the native expert witness, as he or she is part of the same culture as the defendant, will have internalised most of the same culture. This understanding of the individual and culture does not, of course, remove the risk that the native expert witness has interests relating to the case that in turn significantly shape the testimony, but it renders the native expert witness a very reliable source insofar as he or she possesses knowledge that is consistent with the culture of the defendant due to the process of "enculturation".

The idea that individuals internalise most of the values and knowledge that constitute "their culture" has been, and is still, assumed by many anthropologists and has in part legitimised the use of "key informants" as a source of information about a culture. Barth's theory on culture which we encountered in chapter 2.3 dismisses this assumption entirely. There are no key informants because no culture can be seen a template of knowledge, norms and values that is sketched into each individual's mind and available for them to act upon (Barth 1989, p. 139), as is suggested by the theory of enculturation. Culture is distributive, according to Barth (*ibid.*, p. 134). Every person has what he calls a limited horizon: "...people – each of us – live our lives with a consciousness and a horizon that encompasses much less than the sum of the society, institutions and forces that impinges on us" (*ibid.*, p. 140). If we accept *this* relationship between individual and culture then the use of a native expert witness becomes even further problematised in that the knowledge he or she possesses in itself has much less explanatory value than first assumed. Following Barth's theory, if the native expert witness is to the jury in a court of law what the key informant is to the anthropologist in the field, then the native expert witness should be redundant because one does not, according to Barth, become an "expert" on one's own culture simply by living in it.

Expert witnesses in cases of cultural defence will often be anthropologists for the obvious reason that anthropologists traditionally have had "culture" as their unit of analysis. Just as with the native expert witnesses, the role of anthropologists and the nature of the knowledge that they collect can be discussed from different vantage points. Even though

Caughey argues, as was seen in Ch. 3.7, that the anthropologist's academic training helps them with presenting cultural knowledge in a scientific and professional manner it is not obvious that an anthropologist, or any other professional, will necessarily be more objective or devoid of personal interests in relation to a case than would a native expert witness. Anthropologists align themselves with different approaches to anthropology as a subject, subscribe to different theoretical schools, and might have their own agendas with their anthropological work. All this will shape what information is presented in court and how it is transmitted. For example, Caughey described the importance of not reducing the defendant to a cultural clone and how he underscored the importance of positioning – to investigate the defendant's *personal* cultural background (Caughey 2009, p. 327). Thus he would collect and present knowledge in a manner that is consistent with person-centred ethnography. There is by no means unitary agreement amongst anthropologists about the supremacy of person-centred ethnography or the value of life histories, and it is very likely that anthropologists, when asked to “bring up any matter that [they judge] to be of significance to the case” (Wikan 2002, p. 188) will answer very differently depending on what type of anthropology they subscribe to.

In the Nadia case, both a Moroccan community leader and Unni Wikan were initially called in as witnesses for the defence (but Wikan changed her status from witness for the defence to *amicus curie* and expert witness, as we remember). If it was not for the fact that Wikan had originally been called in by the defence party, she would perhaps have been a controversial choice for an expert witness. She has been prominently featured in several Norwegian newspapers defending the plight of young immigrants, especially Muslims, to lead a life free from culturally imposed constraints and arguing against the use of culture as a defence against anti-liberal and oppressive practices (Wikan 2002, p. 13). The expert witness in the Nadia case was hardly neutral towards the type of cultural conflict that the trial was seen as a result of. Indeed, Wikan herself says that she was, exactly for these reasons, surprised when Nadia's parents and their lawyers contacted her (*ibid.*, p. 186). Wikan's testimony (which is retold by Wikan herself, for better or worse) described how Nadia would, in the eyes of many in the Moroccan community, be guilty of a heinous crime, namely that of putting one's mother in jail. She described the social ramifications for Nadia should her parents be thrown in jail (total ostracism from her family and the Moroccan community) and the “law of obedience” that Nadia's mother was subject to as a Muslim wife (*ibid.*, p. 188). According to Wikan, her testimony probably helped reduce the sentence to below minimum

level so as to keep the options for family reunification open (ibid., p. 187). As I argued above the testimony of an anthropologist expert witness will inescapably resonate with that particular anthropologist's academic and non-academic convictions and beliefs, and Wikan must be no exception. I cannot, of course, know what another anthropologist would say in the witness box, but Wikan's view on male-female relationships and patriarchy in many Muslim communities is not shared by everyone. Wikan argument is that family structures among immigrants from the MENA-region often are patriarchal, which means that all power rests with a male head and daughters rank the lowest in the hierarchy (ibid., p. 99). Ballard criticises this type of conception of "patriarchy" that is often ascribed to Muslim communities and that places power with the men and constitute women as powerless victims (Ballard 2009, p. 314). He argues that many ignore the "emotional power that women exercise over their husbands and [...] their offspring" and that "mothers frequently operate as the real power behind the patriarchal throne no matter how much they may be content to allow public appearances to suggest the reverse" (ibid.). It is highly unlikely that someone with this view on patriarchy and the woman's position within it would argue explicitly for a mother being less culpable due to being subject to a "law of obedience", such as Wikan argued. We also know that Nadia's mother *did* receive a milder sentence than Nadia's father, so it is worth taking these differences in opinion seriously as they can have very real effects for people involved in a trial with a cultural defence.

5.2 Is the Cultural Defence Compatible with Cultural Change?

The question now turns to how the cultural defence can be applicable over time. I have already, in chapter 3.5, asked whether a cultural defence would be able to adapt to the changing character of culture over time or whether it would become a reactionary measure in that it confines minorities to a time and a place and impedes development. In this subchapter I will further discuss this matter with reference to the case studies and highlight that we need to get past the essentialist understanding of culture and its synchronic character if we are to use the cultural defence in a diachronic, changing reality.

Where this issue becomes the most salient is in cases concerning children. A child's culture will be constructed as a response to several sources, of which the parents are only one among many, and it is with this in mind that Wikan claims that every child has a right to be considered a non-immigrant in their country of birth (Wikan 2002, p. 36). To Wikan's mind

this frees the child from having to represent a culture and heritage that they might not identify with. However, to the same extent that a child has a right to differ from his or her “cultural heritage”, he or she will have an equally strong right to differ from the *majority* culture (Ballard 2009, p. 302) and have their cultural background respected as a valid constituent of their identity. Is it possible for legislation and law, and in particular the cultural defence, to accommodate both?

Both the Kou case and the Nadia case are illustrative here. Nadia was not a child, as she was over 18, but a concern in the case was how much Nadia’s parents had the right to protect Nadia against Norwegian cultural influence and compel Moroccan culture to take its place. As the case turned out, the jury decided to value Nadia’s right to create her own identity independent of her parents’ cultural belonging: “children can develop in ways that are different from what the parents hope for [...] The parents have made a choice as to which country their children will be moulded by” (excerpt from the verdict in Wikan 2002, p. 191). During the trial, however, the defence tried to present Nadia as a child whose behaviour had caused great stress and anxiety for the parents. To support this position we remember that they called in a Moroccan community leader to testify in favour of their position: that Nadia’s behaviour was by Moroccan standards highly inappropriate and that the parents’ response was understandable from a Moroccan vantage point. Beyond the criticisms that can be raised against native expert witnesses that were dealt with in the previous chapter, the Nadia case brings in yet another dimension: that of representing generations. A native witness will often be a prominent figure in the community in question and will consequently be a mature adult if not an elder. When a native expert witness is used in a trial involving children or young adults there is an implicit assumption that the witness has authoritative knowledge of the appropriate conduct in the culture that he or she is representing. Wikan argues that this view of culture as transmitted through generations is particularly imbued in the majority’s understanding of other cultures than their own (Wikan 2002, p. 26). If we turn the scenario around and ask ourselves who we would give authority to define the culturally accepted parameters of our conduct, the answer would probably not be a person from our parents’ or even grandparents’ generation or a religious leader. Yet this is what the Moroccan community leader was allowed to do for Nadia, albeit that his testimony did not affect the verdict to Nadia’s disadvantage in the end.

As mentioned, Nadia was 18 and thus legally an adult in Norway and this was according to Wikan decisive for the verdict (Wikan 2002, p. 211). Persons who are children in

the legal sense are under their parents' jurisdiction and they have a right to raise their children in any way they see fit that does not conflict with the law. Parents make choices on behalf of their children in all societies and in all cultures and it is always a sensitive issue to define how much states should be able to intervene in family matters. Schiratzki asks a pertinent question in the introduction of her book on children's best interests in a multicultural Sweden: to what extent should a child's heritage be considered in deciding what is in the child's best interest? (Schiratzki 2005, p. 8). In the Kou case the parents made a decision on Kou's behalf which did not resonate with the medical or juridical conception of what was in the child's best interests. What complicates this case in relation to the Nadia case is that Kou was only six years old when the case began and therefore not considered to be able to fully comprehend the consequences of the decisions that were being made for him. Kou stated that he did not want to become wheelchair bound any more than he wanted to be a social outcast in his community. What was said in Nadia's verdict about it being impossible to know how a child's cultural afflictions turn out, especially if the child is raised in another cultural context than the parents, is true indeed. Kou might grow up to share his parents' convictions that he is atoning for his ancestors' sins and that his being in a wheelchair prevents misfortune to befall his closest family, which means that he will carry his disability for the sake of the wellbeing of his family and this he might be content with. On the other hand, he might grow up to believe that this is nothing more than superstition and that his parents' unfounded beliefs put him in a wheelchair when he did not have to be, and possibly even blame the system that made this decision for him.

With the cultural defence in this case, Kou's parents argued that their culturally held beliefs concerning their son's condition ought to have primacy over Western doctors' evaluation of the boy's best medical interests. The sword is double-edged in that culture could potentially be used as a tool for sentencing a six year old boy to a life in a wheelchair, yet there is no arguing that what constitutes a disability is culturally negotiable, as is indeed the very idea that where prevention of disability is possible it should always be sought. Ballard states that there is a tendency in Western society since the Enlightenment to promote progress from an unenlightened past and "towards a rosier, but necessarily singular, future" (Ballard 2009, p. 302). Kou's parents conscious decision to *not* have Kou function at full physical capacity is then at clear variance with the vision that Ballard describes and a clear expression of a legacy from "the unenlightened past". Yet, it is in Western society that Kou will grow up. It is important to keep in mind that where children are involved, it is never simply a conflict

between two cultures, between a minority culture and the dominant culture that dictates the legal system. The child is probably not best represented by any of these cultures alone. Kou's wish shows both that he wished to be a part of the Hmong community and live in harmony with his parents and that he disliked the prospect of being wheelchair bound. To construct this option as impossible is to my mind to render the two cultures as having differences more irreconcilable than might in fact be the case. This could even be a fault line incorporated into the cultural defence as such; that it invariably emphasises the *differences* between the minority culture and the majority culture and sets the two up against each other. It would be premature to decide that just because the cultural defence is invoked, the differences at hand are irreconcilable and the trial must lead to a decision in favour of one "culture" or the other. It is not strange that Kou, along with other children who are caught up in what we call "culture conflicts", should want to live a full life in terms of physical and mental health and a sense of freedom of choice, but be weary to do so at the expense of their family and community. It is sadly the case that when the cultural defence is invoked there seems to suddenly be a focus on "our way" or "their way", when in reality "both ways" needs not be an unviable wish. Let me motivate this statement with a couple of examples.

As I see it, neither of Kou's requests are unreasonable nor mutually exclusive. Kou should not be put in a position where he has to "choose sides" if it can be helped. Nor should court have to choose sides for him. There are viable options that include mediation between the two parties. Renteln describes a case similar to the Kou case, where the parents of an infant child refused to operate on the child who had cancer in both eyes on grounds founded in their Hmong cultural background (Renteln 2004, p. 63). This child's life was at risk so the state's case was stronger than in the Kou case and the parents ran away with the child in order to escape the authorities. Instead of removing the child from its parents and incarcerating the parents for abduction, a Hmong representative was willing to cooperate with the authorities and functioned as a mediating instance, urging the parents to accept the surgery, which they eventually did (ibid, p. 64). Through mediation it should be possible to avoid situations where children are subjects of court cases between their parents, who as a rule in all cultures intend no harm and love their children, and the state. Wikan has herself been asked to mediate in conflicts where culture has been considered to be central to the dispute (Wikan 2002, p. 148-155). For instance, a Muslim leader asked if Wikan could talk to a family who were in a dispute with the administration at their daughter's school because she was required to take swimming lessons and the parents would not let her. As the Muslim leader saw it, he could

not talk to the girl's family because it could compromise his authority as a devout Muslim, but wanted the family to not let the dispute go any further and allow their daughter to take the swimming classes (ibid., p. 148).

In cases where the cultural defence has been invoked and where children are involved it becomes clear that the cultural defence needs to be a legal tool that is constantly revised and developed so as to best be able represent cultural minorities in court in a manner that is not oversimplified, generalising nor outdated. We are confronted with the fact that culture does change over time, from generation to generation, and the cultural defence needs to operate with a concept of culture that accounts for this. An essentialist understanding of culture, where people are believed to incorporate most of the cultural knowledge available to them and act according to it, does not reflect the changing reality of people's lived experience.

5.3 Protection of the Weakest? Revisiting Culture and Authority

One of the functions of the law is to protect the members of society and in particular the weakest members should be protected (Schiratzki 2008, p. 18). Renteln and Ballard, both arguing in favour of culture having greater bearing in court, argue that minority cultures are collectively weaker in relation to the majority culture, whose values and norms the system of law is founded upon and that this should require the legal system to incorporate tools that support minority cultures (Renteln 2009b, p. 61, Ballard 2009, p. 25). The problem here is the assumption that one culture equals one voice and one identity (Wikan 2002, p. 63). It has been argued in this thesis that this notion of culture, which falls under the essentialist approach, is inadequate for using in a cultural defence. This is partly because of the problem of authority, i.e. who gets to speak for whom (Ardener, see Ch. 3.6 in this paper). Baumann states that the dividing lines between cultures are established by the elites (Baumann 1999, p. 87), and thus supports those who argue that the people of a culture have unequal opportunities to define their culture, as was argued by Ardener and discussed in chapter 3.6. This does not mean that culture in itself is necessarily a power tool, nor that power only goes in one direction and is vested to certain degrees in certain people. In my opinion, the most helpful way to understand culture and authority is to view culture and cultural behaviour as always imbued with intentions and interests (Barth 1989, p. 124, 134). I believe that in order for a concept of culture to be adequate and defensible in a court of law it needs to contain an understanding of this dynamic; the issue of authority *within* a culture is as important as that

between culture if we are to operate with culture as a defence in court. A concept of culture that does not involve this aspect will not be sufficient to use in a cultural defence as it will not be able to protect the weakest members of society.

If we return to the Kou case, it was made clear in the parents' defence that Kou was at risk of being ostracised if he underwent the surgery, and it is expressed that he was concerned about being excluded both from the community at large and from his family (Renteln 2004, p. 63). It is quite possible, however, that the prospect of being ostracised was as real for Kou's parents if they let Kou have the surgery as it was for Kou. Seeing as Kou was six years old it is hard to imagine a scenario where a community was able to exclude only Kou and not his family. This is not to say that being socially excluded would be any easier on Kou if his entire family was excluded because of something that was done to him; it is only to suggest that there were more interests than only Kou's at stake if Kou would have to undergo the surgery even though the defence made it seem that it all was largely in Kou's own interest.

5.4 Is Culture too Elusive to Take to Court?

Up until now there has been a very critical view on the cultural defence and its possible ramifications. There has been particular emphasis on *how* we view culture as central to the defences' legitimacy. Wikan, who is very sceptical towards using culture as a defence, argues that the concept of culture that we encounter in public discourse and which is often used as a basis to legitimise criminal behaviour is based on an "outmoded model of culture that [is] being discarded by anthropologists" (Wikan 2002, p. 77). That anthropologists have replaced essentialist understandings of culture with more processual, discursive and dynamic approaches to understand and analyse culture is true. This does not mean that we can ignore culture, though, regardless of how elusively constructed we might believe it to be. For as Baumann suggests, one cannot simply disregard the dominant discourse on culture, the one that resonates with essentialism, because we believe it to be an erroneous belief about human relations (Baumann 1999, p. 90). The dominant discourse on culture constitutes people's conceptual reality as much as the demotic does and this in itself is reason to take the matter seriously. The pervasiveness of the dominant discourse on culture should be understood and taken into account when deliberating about the cultural defence. It is the dominant discourse on culture that Amirthalingam is afraid will fuel stereotyping and generalisations to a cultural defence should one be adopted (Amirthalingam 2009, p. 43). For instance, there is the

controversial use of the “ordinary reasonable person” as a standard against which the defendant is evaluated. This legal tool is clearly more accessible and beneficial to people who fall closer to what the court decides is an “ordinary person” – a definition which will inevitably be derived from a conceptual framework that is more prevalent among citizens who belong to the majority culture. As long as legal tools such as this are operating it is clear that minorities are in some regards discriminated against and culture as an alternative form of defence is a topic worthy of consideration. Lastly, culture cannot be entirely dismissed because culture can never be completely removed; as the quote by Caughey that introduces this thesis suggests; the very structure of our juridical system *is* cultural (Caughey 2009, p. 323). The fact that culture does not pertain only to “the other” needs to be treated with more sensitivity lest we risk to reduce minorities to an “inferior standard that has to be accommodated by the grace of the majority” (Amirthalingam 2009, p. 34).

The abstract and dynamic nature of culture should not alone lead us to discard the prospect of a cultural defence. What we have seen in this paper is that the cultural defence needs to operate with a concept of culture that can account for cultural change, agency and the distributive nature of culture (as discussed by Barth 1989). If it is possible to develop a cultural defence that rests on these assumptions, then I believe that the discussion concerning whether or not to establish the cultural defence as a rule of state law would benefit hugely (see Woodman Ch. 2.1 in this thesis). In this thesis there has been mention of scholars who have attempted to approach the problem this way – avoiding to throw the legal baby out with the cultural cradle, so to speak. Caughey, for instance, argued for using anthropologists as expert witnesses in a cultural defence but emphasised the importance of the anthropologist to consider the *individual* cultural background of the defendant. Amirthalingam in turn argued that a more inclusive criminal law should allow for cultural differences to be considered, but that focus should be on subjective experiences and not archetypes and hence avoid rendering cultural differences as absolute, which will only fuel already existing cultural stereotypes.

6. Conclusion

This thesis has investigated the use of culture as a legal defence in a court of law. Cultural diversity has increasingly become a challenge facing legal practice and jurisprudence. We saw, with the help from methodological nationalism, how our system of law is developed

around an idea of “one people, one nation” – an idea whose reflection of reality is becoming less and less evident. The cultural defence is one response to the challenges concerning cultural diversity and jurisprudence. Surrounding the cultural defence there are discussions going about the extent of a cultural defence (for instance whether it should be a complete or partial defence), about the effects that a cultural defence could have for minority groups, the principle of equality and how cultural evidence could be presented and hold bearing in a courtroom. Absent in many articles and books on the cultural defence, multicultural jurisprudence and law and cultural diversity was a comprehensive discussion and clarification on what is meant by culture. To my mind this should be an obvious starting point for a discussion on a cultural defence because the fact of the matter is that only when we are on the clear about *what* we are talking (or arguing) about can we start developing the means through which to accommodate it.

Renteln, who was the staunchest defender of the cultural defence, used an essentialist understanding of culture, leaning on the concept of “enculturation”. Other scholars, who were more ambivalent, though not wholly negative, to the idea of using culture as a defence, often voiced concerns about generalisation and stereotyping, the problem of authority and representation and making minorities less morally capable than the majority population. It seemed to me that many of the problems concerning the cultural defence were rooted in how we perceived of culture to begin with. As we saw in chapter 5, many of the issues are an effect of operating with an essentialist model of culture in the courtroom, partly because of this model’s propensity to grossly underestimate the capacity for agency among people, to overestimate consensus and its inability to account for change. I have presented alternative theories on culture, mainly with help from Barth, Wikan and Baumann, which directly challenge the essentialist understanding of culture. These theories were used to discuss the issues surrounding the cultural defence in a new light and in relation to two empirical examples, the Kou case and the Nadia case.

The title of this thesis alludes to the two aims that were phrased as research questions at the beginning of this paper: to provide a discussion on the main issues around the cultural defence, i.e. literally “taking culture to court”, and to scrutinize the viability of very concept of culture in a court of law, i.e. taking *the concept* of culture to (a metaphorical) court. The conclusion of this paper that is that the latter is a *prerequisite* for the former. We cannot develop a model of a cultural defence that is viable and provides justice to all individuals in

society before we settle on an understanding of culture that truly reflects its dynamic and distributive nature yet is practically feasible to operate with in a court of law.

6.1 Suggestions for Further Research

This topic deserves to be investigated within a broader framework so as to cover the scope of the cultural defence (including civil cases, indigenous rights etc., see Ch. 1.2). More attention should also be brought to, as was briefly mentioned in the last chapter, how minorities are disadvantaged within the current legal structure. Most importantly, though, and this goes for the two aforementioned suggestions as well as my own research in this thesis, I think that extensive empirical research on how culture plays out in court is needed if we are to really understand the use of a cultural defence with its advantages and disadvantages. Not all trials are open to the public so to some degree fieldwork will not always be a viable option, but to the extent that it is an option I think it is the best way to collect information (and rather have the written cases as supplements) on the cultural defence and what its ramifications are.

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