

# Blaming Culture?

*An analysis of British and Norwegian criminal cases involving 'the cultural defence'*

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# Abstract

**Title:** Blaming culture? – An analysis of British and Norwegian criminal cases involving ‘the cultural defence’.

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When a defendant hailing from a minority background charged with a criminal offence states that his actions were reasonable in light of his culture, what implications does this have on the legal reasoning of the judges?

When culture and cultural background is blamed for criminal acts, theorists use the expression ‘the cultural defence’. This thesis seeks to study the phenomenon and find an answer to the thesis question; what implications does culture have for legal reasoning when introduced as a mitigating circumstance in criminal court cases?

I have studied and discussed six criminal cases in this thesis; three cases from the United Kingdom and three from Norway. In all six cases, the courts have been faced with the cultural defence and asked to consider the cultural background of the defendant when making their decision. The cases have covered the offences of murder, attempted murder, rape and causing a minor to engage in sexual activities, and in each case the defence has introduced the cultural background of the defendant as a possible mitigating circumstance.

The thesis explores theories of multiculturalism with regards to the cases, as well as general theories on the cultural defence. Advocates of the cultural defence claim that it should be introduced as a valid, legal defence for criminal offences, which seems to be approved by multicultural theorists who argue that group-differentiated rights should be given to persons with minority backgrounds. This is contrasted by the critics of multicultural theories, who state that minorities should be held responsible for the disadvantages they face as a result of their own cultural ideals.

Based on this theoretical backdrop the thesis explores the six cases one by one, aiming to find an answer to whether culture is reflected in legal reasoning or not. The most influential pieces

of literature on the topic of the cultural defence cover the case law where culture has seemingly coloured the legal arguments and the outcome of the cases. The case law in this thesis has not been selected on the grounds of how successful the cultural defence has when introduced as a mitigating circumstance, but rather on the basis of whether the cultural background of the defendant has been introduced as a possible defence at all. Based on the six cases from Norway and the United Kingdom, we will be able to get a general impression of the tendencies amongst the courts to accept culture as a mitigating circumstance, and how this reflects in the legal reasoning of the judges.

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# 1 Introduction to the thesis

California, 1985. Fumiko Kimura learned that her husband had been unfaithful to her over the course of three years. The Japanese American couple had lived with their two children in California for almost twelve years, and the news of the affair came as a shock to Kimura. In her outrage she attempted to commit *oyako-shinju* – parent-child suicide, by walking into the Pacific Ocean while carrying the couple’s children (aged six months and four years). Within fifteen minutes they were pulled out of the water, but the children did not survive. Kimura stated during her deposition that she resented her rescuers.<sup>1</sup>

In Japan it is considered as somewhat shameful to commit suicide and leave your children alone in the world, and the notion of *oyako-shinju* is frowned upon but rarely punished there, says Doctor Mamoru Iga, Sociologist at California State University Northridge.<sup>2</sup> The act is still a serious problem in Japan today, all though numbers have declined since the 1950s.<sup>3</sup> In California, on the other hand, it seemed natural to most that Kimura was charged with first-degree murder following the death of her children. And she was, in spite of the prosecutor having received over 25,000 signatures in a petition from the Japanese American Community pleading for the district attorney not to file for prosecution.<sup>4</sup>

Ultimately, Kimura’s homicide charge was reduced to voluntary manslaughter, and she was sentenced to serve a county jail time of one year, in addition to five years’ probation and psychiatric counselling. She had already served her one year of imprisonment while waiting for the trial to start. Her attorney stated that it was the psychiatric testimony that was the main reason behind her mild final sentence; however it is still worth taking notice of this quote from the Case Sentencing Report:

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<sup>1</sup> Maura Dolan, 'Two Cultures Collide Over Act of Despair : Mother Facing Charges in Ceremonial Drowning' *Los Angeles Times* (Los Angeles February 24th)

<sup>2</sup> Ibid

<sup>3</sup> Douglas and Takahashi Berger, Yoshitomo, 'Cultural Dynamics and the Unconscious Suicide in Japan' in Leenaars A. and Lester D. (ed), *Suicide and the Unconscious* (Suicide and the Unconscious, Jason Aronson 1996)

<sup>4</sup> Alison Dundes Renteln, *The Cultural defense* (Oxford University Press 2004)page 25

Her severe mental and emotional illness prevented her from thinking or acting rationally... Because of her mental condition and **her cultural background**, the defendant did not perceive her parent-child suicide as an illegal act.<sup>5</sup> [Emphasis added]

It seems that Kimura's cultural background played a rather large part in the litigation process, and ultimately in the outcome of her case.

## 1.1 Thesis question

Cases like *People v Kimura* seem far from unheard of in multicultural societies today. Cultural factors and backgrounds often show up in the courtroom and is something judges and litigators have to deal with on an increasing scale. Situations like Kimura's, where her cultural background has affected her (criminal) actions and possibly the outcome of her trial, are potentially happening all over the world. This notion of using someone's cultural background as a mitigating factor in the courtroom is being referred to as 'the cultural defence'.

This thesis centres on the concept of *the cultural defence*; situations where culture may have played a part in a criminal or civil case. I wish to review and discuss such cases in order to get a closer look at the phenomenon. My intention with this thesis is to consider published case law from two different jurisdictions in order to be able to answer the thesis questions. The thesis question that I will be focusing on in this project is –

- What implications does culture have for legal reasoning when introduced as a mitigating circumstance in criminal court cases?

I hope to be able to answer this question through an examination of the case law collected (an explanation of the analysis and the process will be covered later in the thesis). It will be particularly relevant to look at how a judge proceeds when he does or does not accept culture as a defence or mitigating circumstance. I will try to compare the cases where possible, in order to see if there are any apparent tendencies across the judgments. Most legal systems follow a strict precedence system when it comes to case law, so it is highly likely that this may be a reason for finding any trends or tendencies.

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<sup>5</sup> Ibid, Page 228 (Quoting *People v Kimura*, Defense Sentencing Report, 13-14)

## 1.2 Background – ‘The cultural defence’

The background for this thesis is rooted in a phenomenon called *the cultural defence*. The term is used in reference to case law where a defendant’s culture proves to be (or is assumed to be) relevant to the outcome of the case. Increasing numbers of immigration and the globalisation of modern societies are highly relevant developments for most judicial systems, and judges are on a larger scale than before facing cultural issues when deciding the outcome of a case.<sup>6</sup>

In order to understand and answer the thesis question at hand, an understanding of the term ‘cultural defence’ is necessary. It is worth noting that the cultural defence may also be referred to as a ‘culture defence’, as it has been argued that the use of the term ‘cultural’ in this context is grammatically incorrect.<sup>7</sup> The term ‘cultural defence’ implies the description of a defence that is already a part of a culture, which becomes clear if you compare it to expressions such as ‘cultural robe’ or the ‘insanity defence’. The robe in question is an intrinsic part of a culture, while the cultural defence is not. The insanity defence, on the other hand, is a legally effective defence based on the psychological condition of insanity, while the ‘cultural defence’ is not a recognised legal defence based on culture per se. Thus, referring to a defence as being ‘cultural’ strongly implies that it is an existing defence used in a particular culture.

On the contrary, the more correct ‘culture defence’ describes the phenomenon discussed in this thesis – namely a situation where a person’s cultural background is used as an excuse or justification in a courtroom. However, the former (slightly erroneous) ‘cultural defence’ will be used throughout this thesis, as it is the term most used by other scholars discussing the topic and will thus encourage consistency in the field of study. One example is that the term is used as the title of a rather influential book on the subject by Alison Dundes Renteln.<sup>8</sup>

The word ‘defence’ is used within the law as a common denominator for circumstances that may prove to function as either a justification or an excuse for a crime. In criminal cases these two terms have different effects on the outcome of a case, but as the cultural defence is not officially linked to either, going into the depths of it will not be necessary for the purposes of

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<sup>6</sup> Alison Dundes and Foblets Renteln, Marie-Claire (ed), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009), Introduction

<sup>7</sup> Ibid, Chapter 1

<sup>8</sup> Renteln, *The Cultural defense*

this thesis. The term defence in the context of the cultural defence is loosely used to cover both interchangeably, and can also be said to include mere explanations of how and why the defendant acted in the way he or she did. This seems to be because the topic is often covered by sociologists and social anthropologists rather than scholars with a background in legal study. Thus, the technical definition of the term defence has not been a focal point in previous research, nor will it be of massive importance in this thesis. I still believe it is worth being aware of what the expression may or may not cover.

It will also be useful to give an explanation of the notion of mitigating and aggravating circumstances. Mitigating circumstances are events, facts and qualities about the defendant that may reduce their liability in the eyes of the law. Mitigating circumstances are usually suggested and put forward by the defence, and it is then for the judge and jury to consider whether these should be taken into account during the sentencing. A person's cultural background could be considered a mitigating circumstance, and ultimately lead to a reduced sentence. Aggravating circumstances are what's considered the opposite of this; namely facts surrounding the offence committed resulting in the defendant being perceived as more liable, such as offences to the person (i.e. battery, assault) where there has been an unnecessary amount of force and brutality used.<sup>9</sup>

Once any confusion regarding the grammar is put aside, the cultural defence may be considered a rather self-explanatory term. It was coined with regards to situations where a person's cultural background may have affected his or her reasoning when committing the crime or civil wrong he or she is charged with. In a courtroom this cultural influence may be raised by the defendant as a justification, explanation or excuse for the acts, in an attempt to contribute to a complete or partial defence. Cultural factors may also be introduced by the prosecution as a way of proving motive or natural cause. A wide and rather helpful definition of the phenomenon is when

[...] ethnic minorities and indigenous groups sometimes ask the legal system to take their cultural background into account in criminal and civil cases.<sup>10</sup>

It will become clear throughout this thesis that the expression is generally relevant when the defendant is from a different cultural background than that of the (dominant) legal system.

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<sup>9</sup> , *Osborn's Concise Law Dictionary* (Sweet & Maxwell 2009)

<sup>10</sup> Renteln, *The Cultural defense*, Page 5

A working definition of culture should also be laid down. There are an infinite number of definitions to choose from, and defining culture seems to be something all anthropologists have tried to do at some point during their career.<sup>11</sup> This shows that there is no clear cut and universal understanding of the term and it has even been said that culture is the most problematic term within anthropology.<sup>12</sup> Thus, I have been required to find a definition that fits the thesis questions and an understanding of culture with regards to a cultural defence best according to my own understanding. The definition most appropriate for the purposes of this thesis was laid down by William A. Haviland – namely that culture is

[a] set of rules or standards shared by members of a society which, when acted upon by the members, produce behaviour that falls within a range of variance the members consider proper and acceptable.<sup>13</sup>

It is when such behaviour intersects with the norms of the dominant culture that a cultural defence may be relevant in a court of law.

### 1.3 Legal sources

One of the main legal sources in most jurisdictions are the direct case citations published by judicial bodies and the precedence they form. The primary sources of reference for a judge when deciding a case (and for a student searching for relevant law) are the written pieces of legislation and statutes of a jurisdiction. Case law comes in secondary in most jurisdictions, and is the legal source this thesis will focus on.<sup>14</sup> In order to answer the thesis question, an analysis of relevant judgments will be necessary. At certain points throughout the thesis you may also find some reference to legislation where it is necessary in order to explain or clarify a point made in a case cited in the thesis.

I will in this thesis focus on published case law from Norway and the United Kingdom, and there are several reasons for this. Since this thesis is handed in at the University of Oslo, Norway feels like an obvious choice. Cases from the United Kingdom are also added to the mix as I already have experience with analysing British case law, and it is a jurisdiction I feel I possess a higher level of knowledge of. The two countries are very different with regards to

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<sup>11</sup> John R. Baldwin (ed), *Redefining Culture: Perspectives Across the Disciplines* (Routledge 2006)

<sup>12</sup> Thomas H. Eriksen, *Hva er Sosialantropologi?* (Universitetsforlaget 2003), Page 34

<sup>13</sup> William A. Haviland, *Anthropology* (Wadsworth Publishing 2010), Page 278

<sup>14</sup> Mads Henry Andenæs, *Rettskildelære* (2009)

immigration numbers and the proportion of the population hailing from minority groups, and I believe this will give the thesis a more interesting context. This may help shed some light on how culture may be introduced in the courtroom across the jurisdictions.

I will be using different online databases to find relevant cases for my project. Using the different databases (mainly CaseTrack for UK cases and LovData for Norwegian cases) I will search for cases using different keywords and a combination of them. The selected keywords include 'culture', 'cultural', 'background' (and the combination 'cultural background'). I have also used keywords surrounding crimes that may be culture related, such as 'honour' and 'shame'.

I have also discovered several cases by reading previous research and literature on the topic, as current articles often cite a case or two in order to explain the cultural defence best. For example, this is how I was introduced to the case of Kimura. Since the legal systems of Norway and the United Kingdom both rely heavily on precedence and case law, judges must cite clearly which cases they have taken precedence from when deciding the case in front of them. Thus, I have been able to use the snow ball method by looking up the cases mentioned in previous articles and writings, and from there looking up the cases that have been cited, referred to and differentiated by the judges in each case. I will be analysing cases I have found using this method, as well as cases I have discovered through key word searching in the legal databases.

I believe that a discussion of these cases and judgments will help illustrate how the meeting of cultural norms and legal practice in the courtroom is interpreted by the respective jurisdictions and how the legal system reacts to it. When deciding a case, the judges may elect to provide a detailed summary of their line of reasoning behind each decision, and I will aim to collect cases that are as detailed as possible. I believe that a systematic discussion of several cases will make it possible to interpret how culture may be reflected in the legal reasoning, particularly with regards to whether the judges seem to be accepting of cultural influences in the courtroom. In Chapter 3 I will cover in detail what the analysis will focus on, and explain the main points I will be taking notice of when analysing each judgment.



## 1.4 Possible (ethical) issues

It is important to protect the individuals who are mentioned in a published document and in any sensitive texts the project may have relied upon. This thesis will be using and analysing texts from cases published by the judicial bodies on the United Kingdom and Norway. All such cases published within the jurisdictions will have been anonymised in order to protect the individual witnesses and parties to the case. Thus, it is not necessary to make any changes to the data and texts used for ethical reasons, and this possible ethical issue is not relevant for this project.

In Norwegian published cases, names are usually replaced by A, B and C (and so on), while places are commonly published as X and Y, unless the location is relevant to the case. The type of location (for example cinema, street corner, dance hall) is not omitted in Norwegian cases. In British cases, last names are published unless this puts the person at risk of injury, slander or persecution. Where a person is underage or not legally mature for any reason, a letter or an alternative name is used. See for example the British case of *Re A (Conjoined Twins)*, where the names Mary and Jodie were chosen by the Court in order to protect the children involved in a highly media-covered case.<sup>15</sup>

A minor issue that may come up during this project is the fact that it will be necessary to translate judgments originally published in Norwegian into English. Ideally, I will try to translate the judgments as literally as possible, but this may not always be ideal in order to keep the relevant law intact. All though some wording may result in a less literal translation, it will be most important for the purposes of this thesis to keep the legal key points and references made by the judges. Some cases will have to be analysed in Norwegian first, then translated, while others will be translated into English, then analysed. This will depend on the structure and wording of the individual cases. Wherever relevant I will include a tag with [my translation].

I also believe it is worth noting the difficulty in finding cases where the person's cultural background is the influence behind an acquittal or a change in punishment, and not simply characteristics referring to the person's background, such as his or her native language or place of birth. For example, when searching for cases in LovData (and also when reading other articles on the topic of the cultural defence) I have come across a Norwegian case

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<sup>15</sup> *Re A (Conjoined Twins)* 2 WLR 480 (Court of Appeal)

regarding sexual assault of a mentally disabled person.<sup>16</sup> In this case, the defendant was born in the Middle East and after 12 years in Norway still did not speak Norwegian very well. The Court pointed out that this could influence his (mis-)understanding of the victim's disability, as it was not apparent to him by listening to her way of speaking. However, I wish to distinguish this case from other cases involving the cultural defence as it was not the man's culture per se that were put to the judges' attention, but his language skills alone.<sup>17</sup> This shows that I may spend a large amount of time finding and reading cases that prove not to have any cultural influences at all, all though they may (and probably will) show up when I am searching for key words.

In order to streamline the case discussions later in the thesis, I have decided to use legal terminology based in Norwegian legal practice. This is in order to avoid confusion for the reader, and make it easier to draw connections and comparisons between the Norwegian and British cases. One example of where I have done this is with regards to the cases that are in the second instance (appeal cases). In Norway, one simply appeals a case based on either conviction (where you appeal the guilty/not guilty verdict) or sentence (where you appeal the measure of punishment). In the United Kingdom it is similar, but first the defendant (or the prosecutor) seeks a 'leave to appeal', which can be dismissed or approved by a sitting judge. The terminology 'he seeks leave to appeal' has for the purposes of this thesis been replaced with a simple 'case appealed'.<sup>18</sup> As all the cases appealed have made it to the second instance, it will not be necessary to go through the reasons why the judge allowed the appeal to go forth.

## 1.5 Structure of thesis

In the next chapter I will explain the background of the thesis more detailed. I will include the previous research and related literature that has been relevant for this thesis. There are several publications that have given me a broad knowledge and understanding of the topic. Chapter 2 will also cover the relevant theories to the thesis, as well as the theoretical focus that will aid me in answering the thesis question.

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<sup>16</sup> Na-Ji Grytbakk, 'Kulturelle forholds betydning i norsk rett belyst gjennom rettspraksis i saker som gjelder æresdrap: Hvordan norske domstoler har vurdert kulturargumentet over tid.', University of Oslo 2003)

<sup>17</sup> *Misbruk av psykisk utviklingshemmet person* LE-00503

<sup>18</sup> Section 1(1) Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995

In Chapter 3 I will provide a summary of the method used, and include a detailed report of how I actually carried out the research and selection of cases. I will also give an overview of how and why I chose to categorise the selected cases as I did.

The following chapters will cover the studies of the chosen Norwegian and British cases and I will be linking them with the theories from chapter 2 where possible. In each chapter I will discuss how the cases relate to the theories, and I will use them to shed some light on my findings.

Finally I will conclude the thesis by trying to answer the thesis question. I will also assess whether I would do anything differently had I had more time and advise on possible further research on the topic.



## 2 Literary and theoretical background

### 2.1 Literary background – Previous research

Over the past decades there have been several prominent cases where some aspects have seemingly been affected by culture. The topic has been showing up on legal theorists' radars to a greater extent than previously, and the notion of the cultural defence has inspired several books and articles. Still, there has not been a massive amount of writings that have analysed the subject at any great depth. The most notable publication to have covered the topic is *The Cultural Defense* by Alison Dundes Renteln, first published in the US in 2004.<sup>19</sup>

Renteln is worth noting as one of the rather influential academics on the topic. She has covered the issue of the cultural defence in several of her works and publications, and is an advocate for an official legal defence based on culture. She is a Professor of Political Science and Anthropology at the University of Southern California, and her published material on the subject includes *The Cultural Defense*, as well as *Multicultural jurisprudence: Comparative perspectives on the Cultural Defense* (co-edited with Marie-Claire Foblets)<sup>20</sup> and *Making Room for Culture in the Courts*.<sup>21</sup>

*Multicultural Jurisprudence* (Foblets and Renteln) has also been influential in my research on the topic. It provides a comparative overview on the cultural defence across several countries and jurisdictions, and starting from this book I have used the 'snow ball method' in finding other articles and cases that may prove to be relevant for my thesis.

Amongst the academics discussing the topic there seems to be two sides taking an approach to the issue – those who wish to establish an official legal defence (such as Renteln) and those who argue that culture does not, nor should it, have any effect in a courtroom. Renteln argues for a valid legal defence based on culture, which would enable defendants to introduce cultural evidence relevant to their case. She goes as far as stating that “[a] defendant whose criminal act is culturally motivated is less blameworthy”.<sup>22</sup>

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<sup>19</sup> Renteln, *The Cultural defense*

<sup>20</sup> Renteln (ed), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*

<sup>21</sup> Alison Dundes Renteln, 'Making Room for Culture in the Court' (2010) 49 *The Judges' Journal*

<sup>22</sup> Renteln, *The Cultural defense*, Page 187

It seems that ideally, Renteln would like the cultural defence to work as a partial excuse or mitigating circumstance for criminal acts.<sup>23</sup> This would alter the criminal charges to a lesser offence, such as the drop we saw in *People v Kimura* from homicide to manslaughter. Others, such as Elaine Chiu, also endorse the argument for an official cultural defence. However, Chiu wishes for the cultural defence to stand as a complete justification of a crime, instead of 'merely' a mitigating circumstance.<sup>24</sup>

Those opposed to the idea of a cultural defence include Doriane Coleman, who claims that the notion violates the principle of equal protection in the eyes of the law.<sup>25</sup> Also, Leti Volpp argues that a defence of culture implies that the majority society (in her specific case; the US) is without a culture, and thus does not agree with the notion of the cultural defence.<sup>26</sup>

In contrast to the cultural defence, some scholars point out the existence of Western (and most specifically American) 'cultural defences', such as the "reasonable belief in consent" defence against forcible rape.<sup>27</sup> These defences have been said to mirror 'pure' American cultural norms and values, and can be said to support the cultural convergence theory, for example with regards to Hmong men and the 'marriage by capture' defence.<sup>28</sup> This is because American men charged with forcible rape also have access to such a subjective defence and thus, acquitting a Hmong man claiming 'marriage by capture' converges with American practice. The cultural convergence theory and the specifics around this example will be explained in more detail below.

Most literature on the topic is from a point of view where it is either defending the cultural defence as a legal tool, or denying its validity. However, I have not yet come across any research on the judgments themselves, in the sense of what the judges have said when accepting or not accepting the cultural defence. I do not wish to conclude this thesis with an answer to whether or not we need an official cultural defence, and thus, this is not a normative project. What I wish to do is analyse and discuss the implications of culture on legal reasoning in order to discover any possible trend or tendency amongst the judgments. I am

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<sup>23</sup> Ibid, Page 191

<sup>24</sup> Elaine M. Chiu, 'Culture as Justification, Not Excuse' (2006) 43 American Criminal Law Review

<sup>25</sup> Doriane Coleman, 'Individualizing Justice through Multiculturalism: The Liberal's Dilemma' (1996) 96 Columbia Law Review

Leti Volpp, '(Mis)Identifying Culture: Asian Women and the "Cultural Defence"' (1994) 17 Harvard Women's Law Journal, Page 62

<sup>27</sup> Ibid, Pages 62, 68

<sup>28</sup> Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (NYU Press 2003)

interested in finding out how a judge resonates and justifies the use of culture in the courtroom, the reasons he/she gives for allowing it, or the language used when refusing to allow it.

To my knowledge there is no legal cultural defence existing in any jurisdiction today. Because of this it is ultimately the judges themselves who decide when to allow it and let it affect their judgment or not. Thus, I believe it is important to analyse this aspect of the cultural defence, and that it will fill a gap in the research material in existence so far.

## **2.2 Theoretical background**

In my opinion, an overview of certain multiculturalist theories and criticisms is necessary as a backdrop for this project. The two schools of thought regarding whether minority groups should be entitled to additional rights in order to protect their culture is the main part of the debate, and relatable to this thesis. If a defendant is to receive a more lenient punishment on the basis of his cultural background, this may very well equate to the ‘group-differentiated rights’ that I will explain in the following sections.

In addition, within the literature covered above, there are some general theories on the cultural defence and whether it should be given legal validity as a defence or not. Below I would mostly like to point out the cultural convergence theory, which in my opinion, may prove to be highly relevant throughout the process of writing this project.

Finally I will briefly cover some thoughts on honour cultures. The cases I will analyse all include defendant’s hailing from what many refer to as honour cultures, while the majority jurisdictions are considered non-honour cultures. This is why I feel it is necessary to give a short background on the topic and the perceived separation between the two.

### **2.2.1 Multiculturalism**

Multiculturalism is a term used to refer to theories and ideas regarding the ideal and suitable way for society to react to the current increase in diversity, particularly religious and cultural diversity. A great deal of the discussions around multiculturalism are concerned with the idea that persons from cultural minorities are in need of (and whether they have rights to) certain remedies to the disadvantages they allegedly suffer as a consequence of their minority status.

These disadvantages are considered to cover economic, political, social, and most importantly for the purpose of this thesis, judicial aspects of society. The idea is that it is necessary and fundamental for all states and judiciaries to enforce what is known as ‘group-differentiated rights’ in order to remedy the difficulties and disadvantages that minorities face.<sup>29</sup>

Multicultural theorists argue that separate and different rights for minority cultural groups are justifiable.<sup>30</sup> For the purpose of this thesis, the approach to multiculturalism most relevant is the liberal egalitarian theory, also known as ‘luck’ egalitarianism. This theory mainly views minority groups as disadvantaged with regards to access to their own cultures and as being entitled to special protections. These protections are the ‘group-differentiated rights’ mentioned above. The theory is rooted in the notion of equality as a moral, societal ideal. A main point is that it is not fair for someone to suffer a disadvantage due to conditions beyond their control.<sup>31</sup>

Elizabeth Anderson sums egalitarianism up by saying that

[The aim] of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. [It] is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others.<sup>32</sup>

She call this ‘luck egalitarianism’; a body of thought claiming that individuals should be held responsible for disadvantages that result from their own choices, but not when the disadvantage can be said to be deriving from unchosen circumstances.

Will Kymlicka, a defender of and the creator of the ‘group-differentiated rights’ theory, says that the rights mentioned above are justified “[...] within a liberal egalitarian theory [...] which emphasizes the importance of rectifying unchosen inequalities.”<sup>33</sup> He considers belonging to a cultural minority to be such an unchosen circumstance, for which we cannot be held responsible. His point is that since a government cannot get rid of culture, nor be completely unbiased towards one or another; it is a state’s duty to ensure that citizens that are

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<sup>29</sup> Jeremy Waldron, 'Minority Rights and the Cosmopolitan Alternative' (1995) 25 University of Michigan Journal of Law Reform, Page 752

<sup>30</sup> Will Kymlicka, *Multicultural Citizenship* (Oxford University Press 1995), Page 26

<sup>31</sup> Richard J. Arneson, 'Equality and equal opportunity for welfare' (1989) 56 Philosophical Studies 77, Page 85

<sup>32</sup> Elizabeth S. Anderson, 'What is the point of equality?' (1999) 109 Ethics 287, Page 288

<sup>33</sup> Kymlicka, *Multicultural Citizenship*, Page 109



considered minorities with regards to language, race, religion and so on are protected. A Norwegian example of these group-differentiated rights is that the indigenous Sami people have been granted their own Parliament in order to continue to preserve and grow their cultural background and presence.<sup>34</sup> Other examples are the rights of certain religious groups to wear headpieces specific to their religion in spite of strict uniform rules in their workplace, and the rights of certain native people to hunt on an area of land in spite of general hunting bans on specific animals.<sup>35</sup>

## 2.2.2 Criticism of Multicultural Theories

Amongst the different criticisms of multicultural theories the cosmopolitan cultural view is one of the most influential. Jeremy Waldron refers to 'cosmopolitan' as "the chaotic coexistence of projects, pursuits, ideas, images, and snatches of culture within an individual,"<sup>36</sup> and he points out that the term does not necessarily have to describe an immigrant or a traveller.

Waldron denies that a person has an internal need for a particular culture, claiming that people might be equally happy without necessarily belonging to a group of minorities and comparing it to how we used to believe it was necessary to eat red meat, but now know otherwise.<sup>37</sup> He stresses the fact that his theory does not argue that we must, or should, quash all culture, but compares it to religious beliefs and institutions. A valid point he makes is that we know and accept today that not everyone must belong to a religious faith, why can it not be the same for culture? Simply put, this theory is claiming that the world is too intertwined to separate and distinguish cultures and to divide them into majorities and minorities.

In response to this critique, multiculturalists admit that today's cultures are indeed overlapping, but they still claim that as individuals we feel more 'at home' in certain societal cultures and that it is a natural urge to wish to preserve this. Kymlicka argues that just because it is true that many things are available to us across and between cultures, this does not imply that we do not belong to our distinct cultural groups still.<sup>38</sup>

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<sup>34</sup> Lov om Sametinget og andre samiske rettsforhold

<sup>35</sup> Eric J. Mitnick, 'Three Models of Group-Differentiated Rights' (2004) 35 Colum Hum Rts L Rev

<sup>36</sup> Waldron, 'Minority Rights and the Cosmopolitan Alternative', Pages 754

<sup>37</sup> Ibid, Page 762

<sup>38</sup> Kymlicka, *Multicultural Citizenship*, Page 103

Brian Barry on the other hand, argues that minorities should be held responsible for the disadvantageous consequences they face due to their own religious and cultural ideals. His point is that the main focus of justice is to ensure a reasonable range of identical opportunities, not ensuring that everyone has equal access to specific results or choices.<sup>39</sup> In Chapter 7 of *Culture & Equality*: “The Abuse of ‘Culture’” he claims that when you rely on a cultural explanation of your actions you are ceasing to engage in moral discourse, and you have thus switched to the perspective of the anthropologist.<sup>40</sup> He argues that a custom or a tradition cannot function as a justification in itself, and that in order to justify an action you must simply rely on reasons why it was right in the circumstances. He uses as an example an incident from New Zealand in 1835, when a Maori tribe attacked a Moriori tribe, brutally murdering (or enslaving) all of the members, as was in accordance with “their custom”.

Barry distinguishes a defence from a mere statement of fact with regards to these cultural declarations (such as, “it was our custom”). He also draws examples from the Chukchi people (of Northern Russia) and how they were exempt from the international ban on whaling because it was a “traditional part of their culture.” This has been widely disapproved of by animal rights activist groups, and is contrasted with a quote from zoologist Masha Vorontsova, stating that “it’s ridiculous to talk about a cultural need to kill [whales].”<sup>41</sup>

Barry also highlights that a mere change in culture and cultural identity is not considered to destroy the culture, or at least it shouldn’t be. Barry points out that

[...] if there are sound reasons against doing something, these cannot be trumped by saying – even if it is true – that doing it is part of your culture. The fact that you (or your ancestors) have been doing something for a long time does nothing in itself to justify you continuing to do it.<sup>42</sup>

On the other hand, liberal multiculturalists say that in a lot of cases where rights and the law dissimilarly affects a religious or cultural practice, this might constitute injustice. Kymlicka

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<sup>39</sup> Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001), Page 37

<sup>40</sup> Ibid, Page 252-291

<sup>41</sup> Ibid, Page 255

<sup>42</sup> Ibid, Page 258

gives religious cases regarding clothing items and claims to language rights as examples,<sup>43</sup> and states that

Government decisions on languages, internal boundaries, public holidays, and state symbols unavoidably involve recognizing, accommodating and supporting the needs and identities of particular ethnic and national groups.<sup>44</sup>

Kymlicka refers to the inequalities faced by national minorities as a ‘serious injustice’, in particular with regards to resources and policies. In order to rectify these disadvantages he is of the opinion that we are in need of these group-differentiated rights. He claims that the sacrifices the majority of a nation must make in order to accommodate these rights are smaller than those of the minorities if there were no such rights. He also stresses the point that he only wishes to endorse these rights where there is an actual disadvantage with regards to cultural membership, and where the rights might directly affect this disadvantage.<sup>45</sup> In short, Kymlicka believes that all nations should aim to ensure that any national groups who wish to can and may preserve their distinctive culture.<sup>46</sup>

Another issue with multicultural theories that has been pointed out by the critics is the problem with ‘internal minorities’. This criticism has received attention in recent debates. These critics claim that when a state attempts to protect minority groups, this could be to the disadvantage of vulnerable members of certain minorities, so-called ‘internal minorities’.<sup>47</sup> The main claim is that the more autonomy a minority group has over their own practices, the larger the risk of individuals being subjected to violations of their rights.<sup>48</sup> What easily happens is that a state may start ignoring these members of minorities as they are so set on preserving the culture of the minority group as a whole. This is being referred to as a “paradox of multicultural vulnerability”.<sup>49</sup>

Distinct fears among these critics are that women, children, religious dissenters and sexual minorities are being undermined and oppressed within their minority group. Especially

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<sup>43</sup> Kymlicka, *Multicultural Citizenship*, Page 108-115

<sup>44</sup> Ibid, Page 108

<sup>45</sup> Ibid, Page 110

<sup>46</sup> Ibid, Page 113

<sup>47</sup> Leslie Green, 'Internal Minorities and their Rights' in J. Baker (ed), *Group Rights* (Group Rights, University of Toronto Press 1994)

<sup>48</sup> Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oup Oxford 2006), Page 2

<sup>49</sup> Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001), Page 3

feminist critics of multicultural theories argue that through ‘group-differentiated rights’, vulnerable women in certain minority cultures lose their citizenship rights,<sup>50</sup> and even claim that “nowhere is the tension between policies of multicultural accommodation and liberal principles [...] more apparent than in the area of women’s rights [...]”<sup>51</sup>

If a minority group seeking group-differentiating rights also support patriarchal norms, it is difficult for a feminist to accept the egalitarian theory of multiculturalism. Ayelet Shachar, amongst others, criticises Kymlicka in that although he offers a comprehensive view of how the multicultural state might exist; he gives very little thought to exploring the legal-institutional dimension of the theory.<sup>52</sup>

It is also worth noting the political backlash to multiculturalism. Due to higher immigration in recent years, there seems to be a retreat in willingness to recognise minority rights. This is especially seen in media, political blogs and in comment sections with regards to integration, and seems to show an expression of anxiety towards foreign groups and people. Central to the debates on multiculturalism today are Muslim immigrants, as a result of failure to integrate minority groups properly.<sup>53</sup> This backlash is creating new and current challenges for defenders of multiculturalism, and might be an explanation as to why there is little literature on the subject of my thesis.

### 2.2.3 The Cultural Convergence Theory

The following theory sheds interesting light on the cases I am about to cover in the later chapters of this thesis. It aims to give a direct answer as to why certain cases involving cultural evidence succeeds and others don’t.

The cultural convergence theory is based on Derrick Bell’s interest convergence theory, formed in the aftermath of the case *Brown v Board of Education*.<sup>54</sup> This was an historic American case where the Supreme Court judges declared state law not allowing students of colour into what was considered ‘white’ universities to be unconstitutional. In Bell’s commentary on the case he clarifies the basis of the theory, namely that “the interests of

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<sup>50</sup> Ibid, Page 6

<sup>51</sup> Deveaux, *Gender and Justice in Multicultural Liberal States*, Page 3

<sup>52</sup> Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Page 9

<sup>53</sup> Stanford Encyclopedia of Philosophy, 'Multiculturalism' 2010)

<<http://plato.stanford.edu/entries/multiculturalism> > accessed 05/03

<sup>54</sup> *Brown v Board of Education of Topeka* US

blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”<sup>55</sup>

He later elaborated on his theory, and pointed out how the interest of coloured people to attain racial equality was only recognised by the court in *Brown* because it converged with the interest of white America to be portrayed as a credible nation with positive goals.<sup>56</sup> Portraying an image of a country that welcomes all shed positive light on the US during the Cold War. It was also important to elite whites that African-Americans would fight in the case of another war, something that was unlikely after many of them returned home as heroes from World War II to widespread discrimination. Other scholars have also acknowledged the Cold War as a driving force behind the decision in *Brown*.<sup>57</sup>

The *cultural* convergence theory draws from this, and mainly claims that when a minority defendant introduces some sort of cultural evidence successfully in the courtroom, it is essentially because the norms behind their defence either are similar to or ‘converge’ with those of the dominant majority.<sup>58</sup> According to Cynthia Lee, the cultural convergence theory may assist us in analysing cases where some sort of cultural defence has been used, and allow us to understand why and how certain cases and defences are successful and others are not.<sup>59</sup> In contrast to the interest convergence theory, the cultural convergence theory looks at the *norms* of the minority defendant and the majority society. Lee claims that cultural convergence is a way to explain why some cases including cultural factors are successful.

Lee presents three notable examples where the cultural convergence theory can be applied to successful cases that include a cultural defence; Asian immigrant men who have murdered their unfaithful (Asian) wives, Asian immigrant women who have tried to commit parent-child suicide, and immigrant Hmong men charged with rape relying on their cultural practice of ‘marriage by capture’. I will briefly present these three instances below.

There have been some cases where Asian men have murdered their wife after learning about their infidelity and then claimed that they were reasonably provoked in accordance with their

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<sup>55</sup> Derrick Jr. Bell, 'Brown v Board of Education and the Interest-Convergence Dilemma' (1980) 93 Harvard Law Review 518, Page 523

<sup>56</sup> Derrick Jr. Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992)

<sup>57</sup> Richard Delgado, 'Explaining the Rise and Fall of African American Fortunes - Interest Convergence and Civil Rights Gains' (2002) 37 Harvard CR-CL Law Review, Page 373

<sup>58</sup> Cynthia Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?' (2007) 49 Arizona Law Review, Page 914

<sup>59</sup> *Ibid*, Page 939

specific cultural background. Lee tries to show a convergence of norms in pointing out that there are also cases where Western (most often American) men have successfully been excused of killing their unfaithful wives.<sup>60</sup> In the American case *People v Chen*, a Chinese man was acquitted of second-degree murder and found guilty of manslaughter instead after expert testimony was given by a cultural anthropologist.<sup>61</sup> Chen had beaten his wife to death after learning about her infidelity. The expert witness said that adultery is in China considered a “stain on the husband”, and that a Chinese man could be expected to react “in a much more [...] violent way” than a man born and raised in the United States.<sup>62</sup>

Lee states that cultural convergence may have been a strong influence on this decision, and points out that Chen and similar cases are not culturally unique.<sup>63</sup> She points out a long-standing cultural norm in the US that empathises with men who kill their spouses in a jealous rage, or in the ‘heat of passion’, and it seems that the expert testimony as to what is the norm in China allowed the judge to show leniency towards this already familiar American bias.<sup>64</sup>

Another who insinuates a tendency towards this reasoning behind successful cultural claims is Sarah Song, who points out that patriarchal majority norms often help shape the frameworks within which minority claims and factors are considered.<sup>65</sup> Anne Phillips also seem to agree on this, stating that it is also the case in English claims of cultural defences, namely that “cultural arguments raised by minority defendants in English cases are most effective when they resonate with mainstream patriarchal English conventions.”<sup>66</sup>

Lee argues that these successful claims also reinforce stereotypes where Asian men are viewed as barbaric foreigners who do not value women as much as we do in Western societies, and who cannot control their rage as well as the men of the dominant culture.<sup>67</sup> One could say that this is a convergence between the negative image painted of foreigners and the

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<sup>60</sup> Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*, Chapter 1

<sup>61</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?', Page 942

<sup>62</sup> Volpp, '(Mis)Identifying Culture: Asian Women and the "Cultural Defence"', Page 66

<sup>63</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?', Page 942

<sup>64</sup> *Ibid*, Part III-A

<sup>65</sup> Sarah Song, 'Majority Norms, Multiculturalism and Gender Equality' (2005) 99 *American Political Science Review*, Page 480

<sup>66</sup> Anne Phillips, 'When Culture Meets Gender: Issues of Cultural Defence in the English Courts' (2003) 4 *Model Law Review*

<sup>67</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?', Page 940

actual act of the minority defendant, and so the dominant society can continue assuming their stereotypes.<sup>68</sup>

With regards to the US specifically, she points out that we do not find an American man who beats his wife to be reflective of an American culture, because we portray and see the US as a progressive, equality-focused and modern country. The Chinese citizen who beats and murders his wife, however, is more plausible because China is seen as a patriarchal, unequal society with barbaric social norms and subordinate women.<sup>69</sup> This is in spite of domestic abuse being a real and current issue in the US, and of China actually being a modern and progressive country as well.

Cases such as *People v Kimura* (Chapter 1) are also explained by Lee through the use of the cultural convergence theory. Asian immigrant women who try to commit *oyaku-shinju*, she says, are seemingly given a more lenient punishment as a result of culture, but that it can also be explained using the theory. Apparently there have been cases where American women have been convicted of manslaughter and not murder for killing under similar circumstances.<sup>70</sup>

Others also note this tendency, and blame it on the Western cultural view that women are naturally nurturing, caring and tolerant creatures.<sup>71</sup> Thus, a woman who kills her own child goes against what is natural for and expected of a mother, and is the exception to this rule. She is a victim “in need of sympathy, support, and psychiatric treatment,” as opposed to a cold-blooded murderer who needs to be locked away and punished.<sup>72</sup>

A third instance pointed out by Lee are episodes where men of Hmong origin are charged with kidnapping and/or rape, but claim they were participating in a tribal ritual called ‘marriage by capture’. There have been several cases where the defendants have been allowed to plead guilty to a lesser defence, and Lee believes this could be a reflection of American norms. She points out the ‘reasonable belief in consent’ excuse often used in date rape

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<sup>68</sup> Ibid, Page 939

<sup>69</sup> Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*, page 99

<sup>70</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?'

<sup>71</sup> Michelle Oberman, 'Mothers Who Kill: Coming to Terms with Modern American Infanticide' (1996) 34 *American Criminal Law Review*, Page 7

<sup>72</sup> Daina C Chiu, 'The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism' (1994) 82 *California Law Review*, Page 1117

cases.<sup>73</sup> It is true that in most American and Western jurisdictions, a reasonable and honest belief in consent is a valid defence to a forcible rape charge.<sup>74</sup> In such cases where culture has also played a part, it seems that the cultural background of the defendant only makes this existing cultural norm more plausible. Thus, Lee points out, it is not a cultural defence per se that is the mitigating factor.<sup>75</sup>

This theory proves very interesting and quite relevant to my thesis as it opposes the idea of culture being the reason behind a successful (cultural) defence, and instead argues that it is the convergence of norms between the majority society (and thus the judges) and those of the minority defendant that stands behind the outcome of the case. Lee points out that there is a miniscule amount of successful cultural defences, and claims that it is this cultural convergence that is the reason behind the legal victory of the very few. This, in her opinion, underlines her theory that when a cultural defence is successful, it reinforces negative stereotypes about certain immigrant groups, thus 'allowing' society to keep assuming them.

The cultural convergence theory seems to me directly relevant to my thesis as it may serve as an explanation as to why some judges choose to accept cultural defences. When analysing a judgment I will keep the cultural convergence theory in mind, in order to find out if there seems to be any other reason for their justifications than simply an acceptance of multiculturalism.

I wish to point out the distinction between the cultural convergence theory and the theories of multiculturalism. The former are descriptive and explanatory, and will aid my project by helping to explain how and why these cases are decided in the way they are. The latter are regarded as normative theories, and relying on one of the theories of multiculturalism may help push my project towards a more normative approach (as opposed to a mainly descriptive one).

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<sup>73</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?', Page 940

<sup>74</sup> Joshua Dressler, *Understanding Criminal Law* (4 edn, LexisNexis 2006), Pages 637-638

<sup>75</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?', page 955



## 2.2.4 Theories on Honour culture

It is better that one person dies than the whole family of shame and disgrace. Death is the only solution to end disgrace [...] They only stopped talking when she was dead.

– Sarhan, who murdered his sister after she was raped by a brother-in-law, in an interview with Rana Hussein.<sup>76</sup>

There have been published several studies on the different honour cultures of the world, and it seems that many sociologists believe honour can be subdivided into four concerns; masculine honour, feminine honour, social interdependence and family honour.<sup>77</sup> Different cultures are described as either ‘honour cultures’ or ‘non-honour cultures’ and it seems generally accepted that the West is part of the latter.<sup>78</sup> A seemingly foundational trait of honour cultures is that when a person’s honour has been insulted, this must and should be retaliated against swiftly and forcefully.<sup>79</sup>

In a study published in the *Group Processes & Intergroup Relations Journal* in 2013 it was found that in honour cultures where family honour is highly valued, a person is more likely to react in an aggressive manner when this honour is insulted. This is contrasted with reactions to insults to masculine honour, which was held to be cross-cultural and not specific to one group of people.<sup>80</sup> The study thus concluded that when explaining cross-cultural differences in aggression, family honour is the most important.

In Western cultures, where there is no emphasis on family honour at all, we do not appreciate or understand these feelings of aggression.<sup>81</sup> Note that the study was conducted quantitatively and included a comparison of Turkish and Dutch individuals. We cannot assume that one honour culture is the same as another, and so this study is not representational of all non-Western cultures.

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<sup>76</sup> Rana Hussein, *Murder in the Name of Honour* (Oneworld Publications 2009), page 10

<sup>77</sup> Rodriguez Mosquera, 'The Role of Honour Concerns in Emotional Reactions to Offences' (2002) 16 *Cognition & Emotion* 143

<sup>78</sup> J. & Tsai Wong, J., 'Cultural Models of Shame and Guilt' in R. Robins and J. Tangney J. Tracy (ed), *Handbook of Self-Conscious Emotions* (Handbook of Self-Conscious Emotions, Guildford Press 2007)

<sup>79</sup> P.J. Henry, 'Low-Status Compensation: A Theory for Understanding the Role of Status in Cultures of Honor' (2009) 97 *Journal of Personal and Social Psychology* 451

<sup>80</sup> Yvette V. Osch, Breugelmans, Seger M., Zeelenberg, Marcel and Böyük, Pinar, 'A Different Kind of Honor Culture: Family Honor and Aggression in Turks' (2013) 16 *Group Processes & Intergroup Relations* 334

<sup>81</sup> George A. Panichas, 'The Absence of a Culture of Shame' (2003) *Modern Age* 3

This can potentially be tied to the cultural defence and the cases I am about to study, as it could provide an explanation for how the judge understands and approaches the cultural aspect of the case at hand. A judge who has grown up in a so-called ‘non honour culture’ may not understand the predicament of an individual who has grown up in a culture where the emphasis on family honour is strong, and where he is expected to react “swiftly and forcefully” to any insult to it. I believe theories regarding this, in addition to the cultural convergence theory and the theories on multiculturalism, may be of value to my thesis.

## 3 Methodology

### 3.1 Method used

There are several methods available to a student when taking on a large project like this. When thinking of how to best answer the thesis question on the implications that may arise for legal reasoning when culture is introduced as a mitigating circumstance, one may find that a multitude of the available methods are suitable. From the beginning I had qualitative methods in mind, all though I did consider quantitative methods at some points as well. This was because I had pictured a categorising of the cases analysed. After finding the relevant cases, however, I have seen that there will not be enough of them to make the method completely quantitative.

Thus, in order to answer the thesis question defined in Chapter 1 I will use a qualitative method. Qualitative methods do not rely on numbers in order to prove or disprove a statement, but rather an in-depth study of the topic at hand. I will compare the cases where applicable, particularly where they cover the same crime and topic, but not in order to give them any numerical value. I have chosen a qualitative method only, and not a mix of qualitative and quantitative methods, which is possible. This is because I believe I will be able to answer the thesis question best with a qualitative analysis of each case. A qualitative analysis will also allow me to better look at the differences and similarities between the cases. I will cover the specific method (document analysis) in more detail below.

First, I believe a description and explanation of the study of legal sources is necessary, as my main source of information in this thesis will be case law. The relevant jurisdictions, i.e. the United Kingdom and Norway both have a specific order of the law. In Norway this is considered to be ‘the legal method’, which deciphers the meaning of the different legal sources and the power and influence they hold over each other. It is this legal method that prescribes where a Norwegian judge must look when making a decision, which is why it is worth noting for the purposes of my thesis. Legal reference is vital in a decision, and there are certain guidelines regarding the sources of law available to us.<sup>82</sup> This hierarchy of the sources of law in Norway is often referred to as legal method.

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<sup>82</sup> Andenæs, *Rettskildelære*

The primary sources of law in both the British and Norwegian jurisdictions are the direct statements from legal institutions. This comprises legislation and statutes passed by the relevant legal authority (Parliament in the United Kingdom and Stortinget in Norway), as well as case law decided by the courts.

In the United Kingdom, the *ratio decidendi* of a case decided by the Supreme Court – formerly the House of Lords – must be followed by the lower courts. The *ratio decidendi* (‘ratio’ in short) is the rationale of a case, and is defined as being the main legal point and lesson to be taken from the case.<sup>83</sup> This is generally the rule in Norway, too, where the highest court is called ‘Høyesterett’. I will be referring to it as the Norwegian Supreme Court.

In contrast to the ratio of a case, there is also the notion of *obiter dicta*; ‘what is said in passing’.<sup>84</sup> The lower courts in both Norway and the United Kingdom are also expected to bear in mind the *obiter dicta* of the higher courts. This is in order to maintain consistency in judgments, and ensure a fair and equal trial for all. In short; the ratio of a case *must* be followed by the lower courts, while the *obiter dicta may*. Secondary sources of law are all written work that mentions, discuss and analyses the law, such as legal journals and law reviews.

Within the primary sources of law there is also a certain hierarchy as to what a judge must offer extra consideration when deciding a case. International law and treaties signed by the state will weigh heavier than national legislation once it has been ratified by a jurisdiction. A judge may deem a piece of national legislation unfit if it violates a statement or doctrine from international legislation. Following international and national written law are the decided cases of Courts in order of the hierarchy mentioned above, with the *ratio decidendi* weighing in heavier than the *obiter dicta*.<sup>85</sup>

### 3.1.1 Comparative Method

It has been said that all methods within social science are virtually comparative, as we draw comparisons constantly while doing research and drawing conclusions.<sup>86</sup> In spite of this, the comparative method itself is used to describe a research style where you specify your

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<sup>83</sup> , *Osborn's Concise Law Dictionary*

<sup>84</sup> Ibid

<sup>85</sup> Andenæs, *Rettskildelære*

<sup>86</sup> Charles C. Ragin, *The Comparative Method* (University of California Press 1989), Chapter 1

comparison in advance, and actively look for similarities and differences between the chosen subjects. With regards to the law and case law it can often be difficult to prove and explain certain outcomes, and this can be made easier with a strategic comparison and by looking at a set of similar cases. A qualitative comparison results in an analysis of each case as a part of something bigger – “as a whole.”<sup>87</sup>

The comparative method is worth noting with regards to my thesis. It will not be the core methodological focus of my thesis, but I still believe it was important for me to gain an overview of it. As I will be analysing similar case law from two different jurisdictions, it will be difficult for both me and the reader not to draw similarities and make comparisons. It is true that

Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research.<sup>88</sup>

Now that I have briefly explained the legal and comparative method relevant to my thesis, it is time to look at the method I mainly will be basing it on.

### **3.1.2 Qualitative Document Analysis**

As I have mentioned in Chapter 1, I believe that a systematic discussion of case law will make it possible to answer the thesis question. I wish to illustrate how cultural norms and legal practice meet in the courtroom through this study. Thus, I have chosen document analysis as my main qualitative method. There are several ways to approach a document for the purposes of an analysis, and I have put most weight on the straight-forward qualitative content analysis. This is when you search for underlying themes and opinions in a text, often by highlighting and extracting brief quotations from it.<sup>89</sup>

I have outlined and created a form of checklist for my analyses, which I will be using strategically when looking at each individual case. I have shaped the checklist after a published presentation by Per Sigvald Wang from a law seminar at the University of Oslo in

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<sup>87</sup> Ibid, Page 13

<sup>88</sup> Guy Swanson, 'Frameworks for Comparative Research: Structural Anthropology and the Theory of Action' in Evan Vallier (ed), *Comparative Methods in Sociology: Essays on Trends and Applications* (Comparative Methods in Sociology: Essays on Trends and Applications, University of California Press 1971), Page 145

<sup>89</sup> Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012), Chapter 23: Documents as sources of data

2012.<sup>90</sup> Since I will be interpreting the reasoning of the judges with regards to culture as a possible mitigating circumstance, it is necessary for me to look at the language used by them. In my analysis I will study their line of reasoning, and look at how (and whether) they rely on legal method to solve the issue at hand.

I will try my best to explain what the judge has done in his statement, and point out alternative interpretations if there are any. The judgment must be placed in a legal context, and this will often become clear then. The 'easiest' cases to analyse will be where the judge has used precise language, and ideally directly acknowledged the cultural background of the defendant and how it has affected the decision.

In each analysis I will, naturally, explain the case and issue at hand, and present the legal issue that is in front of the judge. If it is necessary, I will also explain the relevant statutory law. It may also be worth noting whether the decision was unanimous. If there are dissenting judgments, these will be made clear and explained as well.

I will take notice of whether the Court followed any clear ratio decidendi or not, and whether there were any obiter dicta statements of importance. An example of the latter would be the statement in Chapter 1 regarding the defendant in *People v Kimura*, where her cultural background was mentioned. I will also need to consider the age of the cases and whether they are still relevant, and if the judgment is reasoned for in a general or specific matter. This is important as the judgment may be so specific that it practically does not create any realistic precedence for later cases covering the same issue of law. In addition, I will take note of whether the judgment has, in fact, been used as precedence for any later case.

### **3.2 How I Selected the Cases**

In order to draw any sort of comparison with regards to the cases, I was hoping that they would have some common denominators. Thus, I decided to look for cases with certain characteristics. Mainly, I narrowed my search down to criminal law cases in the higher standing courts, and was aiming to come across cases where the defendant has had roots to a different culture from the jurisdiction he or she is prosecuted in. This would not necessarily

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<sup>90</sup> Per Sigvald Wang, *Domsanalyseoppgaver* (JUS3111 Formuerett - Kurs i Obligasjonsrett 2012)

mean a defendant hailing from a different country than the majority, as he could be hailing from a minority religion or a group of native people residing within the dominant jurisdiction.

The thesis focuses on cases where the cultural aspect being used and utilised is based on the defendant's background. Thus, the grounds for a possible cultural defence are rooted in the culture of the defendant. This decision was made in order to narrow down the cases, and to easier be able to find tendencies among them. Thus, all cases considered for the purposes of this thesis covers culture as a justification or excuse for a crime, as opposed to cases where for example the culture of a victim or witness is the relevant factor.

### 3.2.1 Finding the Norwegian Cases

I have been using LovData Pro to search for and find Norwegian cases that may be relevant to the project.<sup>91</sup> After searching the entire database for the keyword 'kultur' (Norwegian – 'culture') I specified the search to only include case law from the Norwegian Supreme Court. I also narrowed the search down to criminal law cases. This resulted in 103 cases, 18 of which I believed could be relevant to the thesis after reading the case briefing. LovData shows a neat summary of each case within the search results, making the task rather simple. I saved all 18 in a personal folder within the LovData system in order to study them more closely and eventually decide on a smaller number of cases to proceed with.

To make the thesis as current and up-to-date as possible, I eliminated the oldest cases. Some of them were from the 70s, and I tried to stick with cases from the past 30 years. This left me with 9 cases to choose from. My aim was to find 3 cases from each country, and to provide an in depth analysis of those. This would leave me with 6 cases to discuss, and compare where possible. Ideally I wanted to pick only cases from the 2000s, but I ended up choosing the cases that best illustrated the cultural defence instead, as some of the more recent cases were not as illustrative as I had hoped for. I ended up with 3 cases that I believe could aid me in answering the thesis question.

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<sup>91</sup> [www.Lovdata.no/pro](http://www.Lovdata.no/pro), *LovData Pro*

The Norwegian cases are as follows:

**RT-1984-1146** – 1984, Norwegian Supreme Court. A Turkish father and his two sons were charged with the murder of a family friend after learning of his sexual relationship with the daughter of the family. They believed the victim had raped her.

**RT-1989-445** – 1989, Norwegian Supreme Court. A 23-year-old Pakistani man was charged with the murder of his pregnant sister and brother-in-law after she had married a divorced man.

**LE-1994-100** – 1994, Eidsivating Court of Appeal. Two Pakistani men were charged with the murder of another man of Pakistani origin. The victim had, twelve years prior, received 3 years imprisonment for injuring (with deadly consequences) the father of one of the defendants.

### **3.2.2 Finding the British Cases**

Using CaseTrack I went along a similar path in order to find the British cases for my thesis. This proved to be a lot more time consuming than searching LovData Pro as CaseTrack does not show a summary of each case in the search results. Searching for ‘culture’ within cases from the United Kingdom Court of Appeal and administrative courts showed over 500 results, so I decided it was necessary to narrow the search term, as all the case notes I opened at first referred to terms such as ‘drug culture’ and ‘gang culture’.

Next I tried searching within the same courts for ‘cultural background’. This resulted in 109 results, which seemed a lot more comprehensible. I added several cases to a Favourites folder in my internet browser after skimming their introduction and using *CTRL + F* to locate the term ‘cultural’ and skimming the relevant sections. This way I could go into more depth later and see if some of them may actually be useful.

After selecting 10 cases from the search results, I decided to start reading through them in order to choose the 3 that could be most relevant for the purposes of this thesis. As the British case summaries are a lot more detailed, and thus a lot larger than the Norwegian ones, I skimmed the case notes and introductory marks by the judges, any paragraph containing the words ‘culture’, ‘cultural’ and ‘background’, and the verdict in order to decide whether the case was relevant or not. When a case was not relevant, I simply removed it from the folder.



The British cases are as follows:

*R v Muhammed Ahmed [2007] EWCA CRIM 2870* – 2007, Court of Appeal Criminal Division. The defendant of Indian origin was charged with kidnapping, false imprisonment and two offences of rape of his wife, whom he was recently separated from.

*R v B [2010] EWCA CRIM 315* – 2010, Court of Appeal Criminal Division. The defendant, of Bangladeshi origin, charged with causing her under aged daughter to engage in sexual activity after arranging a marriage between her daughter and a man 15-20 years older than her.

*R v Khan [2015] EWCA CRIM 1816* – 2015, Court of Appeal Criminal Division. The defendant, a minor of Asian Muslim origin was charged with the attempted murder of a fellow school pupil after the victim had entered into a relationship with the defendant's sister.

### **3.3 Structure of the next chapters**

In the next chapters, the cases are separated according to their respective jurisdictions. Chapter 4 will cover the Norwegian cases and Chapter 5 will cover the British cases. As mentioned above, I have made an outline for myself with regards to how I will summarise and begin to analyse the cases, and will try to stick to the same recipe for each case when doing this.

At first I will introduce the case by summarising its facts and provide information about the court and instance, as well as any other necessary material with regards to the decision. I will also give a brief mention of the judgment, and if it is an Appeal case I will clarify the grounds of appeal. The outcome of the case will be presented as well, and if necessary I will explain the relevant law referred to by the court.

Once the case facts are out of the way, I will go into detail about the cultural factors and influences of the case. This is what makes the case relevant to my thesis, and it is important to point out what the cultural aspect in the case is, who brings the aspect forward and why. Once the case has been presented, I can start going into the details of how the judge reacts to the cultural defence and how it is dealt with. I will look at the language used, and maintain a focus on the legal reasoning. It is the judge's approach to the cultural aspect is the most important for the purposes of this thesis.

After this, I will briefly assess whether there is any relevant ratio decidendi from the case, and if it will or can influence future cases of its kind. If a case is able to affect similar cases at a later point in time, this will be worth mentioning.

I will then proceed to assess the relation each case has with the theories presented in Chapter 2. Depending on the case and the outcome, it is not a given that it relates to every theory, but I hope that this will help shed some light on the notion of the cultural defence amongst the cases covered in this thesis. Some of the theories may even help provide an answer as to why the outcome of the case is what it is.

At the end of each case explanation, I will briefly compare its similarity to the other cases, as well as indicate any additional comments worth mentioning with regards to the facts of the case and topic at hand.

## 4 The Norwegian Case Law

The Norwegian cases are all Appeal cases, and range from the years 1984 to 1994. As stated above, I intended on and tried to find cases that were more current, but ended up with these as they do well in illustrating case law where the cultural defence has come into play in the Norwegian Courts. I held this to be more important than the date of the cases. The Norwegian cases are all interesting as they relate to the issue of family honour and honour culture. Below I will go through them chronologically, as well as compare and contrast them where possible.

We will see that the cases generally fall within the school of the critics of multiculturalism and multicultural theories. This provides us with a rather clear idea of the attitudes of the law towards cases involving the cultural defence in Norway. As the cases are all from the 1980s and 1990s, their precedence is likely to have affected later Norwegian cases. The first case is particularly interesting as it seems to reflect well on Cynthia Lee's cultural convergence theory, and the theory may aid in explaining the outcome of the case. As it is the earliest case, it seems natural to start with it.

### 4.1 RT-1984-1146: Murder

The first Norwegian case started in the Eidsivating Court of Appeal in 1984, and has continued on to the Norwegian Supreme Court – as an appeal by the three defendants based on the measure of penalty i.e. the sentencing of the case. It involves the murder of a 31 year old Turkish national (E), who had allegedly raped the daughter (D) of defendant A. She was the sister of defendants B and C.

The defendants; father A and his sons, B and C, were from a rural area in Western Turkey, and had come to Norway one by one in the years prior to the murder. Defendant A, the father, spoke little Norwegian, but his sons, B and C, had a greater understanding of the language. The family of 5 (father A, sons B and C, daughter D and the mother) lived in an area of Norway where there is a substantial colony from the same region in Turkey.

The daughter, D, was between 16 and 18 years old at the time of the sexual offence against her. There had been some inconsistencies in evidence regarding her exact age, but the judges decided to consider her a minor in the time leading up to the murder. She had entered into a sexual relationship with the victim, E, who was 13-15 years older than her. According to her

accounts and statements, the first intercourse was forced. She further stated that she never consented to intercourse during the nine months of their relationship, and this is what she also told her father when he first learned about the relationship.

The judge stated plainly that he would not make a decision as to whether these accusations of rape were true or not, as the man accused of this was now dead. He did say, however, that as the father considered the accounts of his daughter to be true, he would consider them true as well, and that he would pass a judgment based on this. It is worth noting that D was engaged to be married to a boy living in Turkey. This was an arrangement between the two families.

After learning about the forced sexual relationship between his daughter and the victim, A became very cross. He struck his daughter, and her mother had to intervene. After contemplating what he had learned of the relationship, he decided the next day that he had to kill E, who had ruined his family's honour. The day after that, he informed his sons of his decision, and together they all went to meet E, who considered himself a friend of the family. After driving to a remote area, with E in the driver's seat, the three defendants put a rope around his neck and pulled it until he died. They left the body in a ditch along the road.

The law relevant to this case is section 233 of the General Civil Penal Code, covering homicide.<sup>92</sup> The defendants were all found guilty of murder under the Act, and were sentenced to 16, 13 and 12 years imprisonment (for A, B and C respectively). In the Appeal case, the term of imprisonment was reduced to 12, 8 and 7 years.

The cultural aspect in this case may seem rather clear to most, as we are all acquainted with the notion of honour killings through the media and other publications.<sup>93</sup> Most fathers would become aggravated by learning of the rape of their daughter, and many will even have thoughts contemplating the idea of revenge and violence. As the defendants and victim had their roots in a culture where honour and shame are important factors of society, the aspect of family honour enters the picture and needs to be considered. Through having sexual intercourse with, and possibly raping, the (underage) daughter of the family, the victim had dramatically stained the family honour according to the customs of their cultural background.

As the head of the family, it was considered A's responsibility to maintain this honour, and to avenge it if necessary. The case is thus a rather typical illustration of how honour cultures

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<sup>92</sup> The General Civil Penal Code - Straffeloven

<sup>93</sup> Unni Wikan, *In Honor of Fadime* (Universitetsforlaget 2003)

function, and reflects on situations where someone feels the need to take their idea of justice into their own hands. This will seem particularly necessary to the head of the family who is responsible for the honour of 'his' women and children, and it is likely that it is especially important to take matters into your own hands when you have relocated to a country where the state does not, in your own mind, care about honour.

There was an expert witness questioned in this case, Professor in Social Anthropology Reidar Grønhaug. He had previously studied customs and traditions in rural Turkey, and the Court put a lot of value into his statements regarding the customs in the area where the defendants hailed from.<sup>94</sup> He explained the meaning of the Turkish term '*irz*', and what it may contain for a Turkish national. The term itself refers to honour, chastity and purity, and according to Grønhaug it may prove a little difficult to understand as it is not covered by a concise definition in Norwegian or English.

*Irz* describes something you have, and Professor Grønhaug referred to it with regards to relations between men and women. A man, especially the head of a family, 'has *irz*' when the women in his family are honourable and pure. If a woman, even if it is against her own will, engages in any form of sexual activities, the *irz* of the men in her family will be violated in addition to her own. This is because the men of the family are considered her guardians in all aspects of life. In addition, if she is engaged, the *irz* of her fiancé and his family will also be stained, as they are also considered to be responsible for her from the day the engagement is arranged.

In honour cultures, once honour is lost or diminished, the most important aspect is that the honour is somehow restored as soon as possible.<sup>95</sup> In rural Turkey, Professor Grønhaug explained, murder is not the only solution, but other means of restoring honour are not realistic or possible for a Turkish national residing in Norway. The expert witness continued to state that in practice it can be said that the leader of the family has two choices; to kill whoever is responsible for violating the *irz* or to live with the shame of his family forever. According to the Professor, murder is thus a result that is "difficult to control [my

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<sup>94</sup> Reidar Grønhaug, 'Micro-macro Relations. Social Organization in Southern Turkey' (1986) 7 *Studies in Social Anthropology*

<sup>95</sup> Unni Wikan, *Om Ære* (PAX Forlag 2008), Chapter 1: Hva er ære?

translation].”<sup>96</sup> It is also pointed out, via the Norwegian Embassy in Ankara, that in Turkish Penal Law the tradition of *irz* and the natural reactions to it is given special consideration.

It becomes clear throughout the case summary that A was under a great deal of pressure from his family and local community to restore this honour. As a result of the sexual relationship between his daughter and the victim, her engagement had been called off by the family of her fiancé, further shaming A and his family. As the head of the family, it was his job to give orders to the others, and so when he informed B and C of his intentions, they were obligated to agree and conform. The orders and wishes of the patriarch must be obeyed.

In addition to the expert witness, the father and wife of the deceased were questioned. Surprisingly to the Norwegian spectators of the case, they both acknowledged that in a situation where a family’s *irz* had been ruined through forced sexual relations, the killing of the violator was an acceptable and often necessary outcome. They were both from the same area in Turkey as the family of the defendants, and thus were of the same cultural background.

The cultural aspect of the case was acknowledged by the speaking judge (Judge Michelsen) several times, and he even called it out by stating that the decision to go through with the murder was “based in the tradition and cultural heritage the defendant had brought with him from rural Turkey [my translation].”<sup>97</sup> As mentioned above, a lot of weight was given to Professor Grønhaug and his expert testimony and, in my opinion, the fact that they appointed an expert witness in the case to begin with points to a leniency towards a greater cultural understanding.

In the first instance, the Court held that they could not give any concern to the moral and cultural views of the defendants. The Supreme Court disagreed with this, as stated in their introduction to the case.

It is incorrect of the Court to not provide any consideration to the moral views of the defendants.<sup>98</sup> [My translation]

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<sup>96</sup> *RT-1984-1146 (323-84)* (Høyesterett), page 1150

<sup>97</sup> *Ibid*, page 1149

<sup>98</sup> *Ibid*, page 1147

They claimed that the Court in the first instance had expressed themselves too weakly in their statements regarding the issue, and that the defendants were entitled to a clearer and more concise judgment considering their claim that their cultural background should be considered by the court.

Judge Michelsen starts his monologue by stating that in general, immigrants to Norway must obey the current national law and norms.

I agree with the prosecution that people from other countries and cultures who settle down in Norway generally cannot expect that the moral and cultural beliefs from their native country will be considered in criminal proceedings.<sup>99</sup> [My translation]

He also points out the aggravating circumstances of the case, namely the excessive brutality of the murder and the fact that it had been contemplated in advance and prepared for by the three defendants. He then goes on to consider the possible mitigating circumstances in the case, all of which are related to the cultural background of the defendants, and particularly the above-mentioned aspect of *irz*.

The judge further states that he will not make a decision on whether the intercourse between D and the victim was consensual or not. The most important aspect of this, he claims, is that the girl's father, defendant A, genuinely believed that his daughter had been raped. This is also what he told the other defendants, and thus what they truly believed, too. The main facet with regards to the measure of penalty is the impression the defendants had of the relationship prior to the murder.<sup>100</sup>

Once again, Judge Michelsen stresses that in general, people traveling to and permanently moving to Norway must obey our laws and customs, and that it cannot be, nor is it, expected that judges give special consideration to moral views and traditional understandings from other countries and cultures. He then goes on to state that in spite of this, the defendants in the case before him were so influenced by their local environment and cultural that he cannot simply ignore it. He ultimately decides to give special consideration to this, and considers their emotions and moral views to function as mitigating circumstances in the case.<sup>101</sup>

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<sup>99</sup> Ibid, page 1149

<sup>100</sup> Ibid, page 1149

<sup>101</sup> Ibid, page 1151

Judge Michelsen also states that another reason for his decision to reduce the sentence based on the defendant's culture as a mitigating circumstance was that also the murder victim was from rural Turkey and, judging from the witness statements from his father and widow, shared the same cultural views as the defendant.

Ultimately, the result of the appeal was that the defendants were given a reduced sentence. The term of imprisonment was set down from 16, 13 and 12 years to 12, 8 and 7 years respectively for each of the defendants. Judges Røstad, Philipson, Aasland and Justitiarius Ryssdal all agree, and did not wish to add anything to the case summary.

As this case was decided by the Norwegian Supreme Court, it has the legal power to set precedence for future cases decided by the Norwegian courts. The case was decided in 1984, and it is quite likely that similar cases have come up since then. From looking at the other Norwegian cases in this thesis, it seems that judges prefer to differentiate this judgment rather than use it as precedence. This may be in order to not 'open the floodgates' of cultural claims in the Norwegian courtroom. It is also worth noting, that since the judge in this case specifically stated that usually the courts will not allow for the consideration of a person's cultural background to affect the sentencing and outcome of a case, this is more likely to be considered the ratio decidendi of the case – i.e. the main lead to follow for later judgements.

The reduced sentence given in this appeal may very well be a nod in the direction of Will Kymlicka's group-differentiated rights and the notion that individuals should not be held personally responsible for any disadvantages they may suffer as a result of unchosen circumstances, such as which culture they belong to.<sup>102</sup> This being said, it is not clear whether multiculturalists consider the act of murdering someone in the name of honour to be such an unchosen circumstance, or whether it is a choice.

According to the luck egalitarianism branch of multicultural theories, individuals should be held responsible for their own choices and the disadvantages they hold, but not when the disadvantage derives from such unchosen circumstances. With regards to the statements made by Professor Grønhaug in this case, where he states that the result (murder) was "difficult to control", the lines may seem blurred. If the committed crime was an uncontrollable reaction for the defendants because of their cultural background (an unchosen circumstance), it seems

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<sup>102</sup> Kymlicka, *Multicultural Citizenship*



that Kymlicka and his fellow multiculturalists will agree with the decision of the Norwegian Supreme Court to reduce the sentence.

After further discussing the facts of the case, as well as the statements of the defendants and the expert witness, Judge Michelsen states that if the situation had been regarding a Norwegian family, it is likely that mitigating circumstances would have affected the sentencing of the case. This shows that the cultural convergence theory may be applied to the case. Judge Michelsen claims that,

If a Norwegian citizen had murdered the married man who he thought had forcibly raped his 18 year old, engaged daughter, who at the time of the intercourse was 13 years younger than the rapist, one would consider this situation and the pain felt by the defendant to be mitigating circumstances. [My translation]<sup>103</sup>

This statement underlines the point made by Cynthia Lee with regards to the cultural convergence theory, namely that we only accept claims of cultural defences when they can be said to converge with the norms of the dominant society.<sup>104</sup> In this case, judge Michelsen states rather clearly that this could be the case.

As mentioned above, most males would respond with anger and thoughts of violence when learning of the rape of their daughter, and so it becomes easier to accept the claim that the defendant's culture prescribed him to commit the murder. It is a common typecast in many societies that men are viewed as the strong and protective gender, and women as being in need of their protection.<sup>105</sup> This perception allows us to accept that a man reacting with violence to the rape of a female family member has acted in a rage that is harder for him to control than if he had simply assaulted someone without reason.<sup>106</sup> Thus, the cultural defence claimed in this case can be said to back up our mainstream patriarchal conventions.<sup>107</sup>

Summing up, *RT-1984-1146* was a very interesting murder case. The murder was what we often refer to as an honour killing, but can also be compared to killing out of rage or vengeance. I make this statement because Judge Michelsen, the sitting judge of the case,

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<sup>103</sup> *RT-1984-1146 (323-84), page 1150*

<sup>104</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?'

<sup>105</sup> Peter and Fiske Glick, Susan T., 'The Ambivalent Sexism Inventory: Differentiating hostile and benevolent sexism' (1996) 70 *Journal of Personality and Social Psychology* 491

<sup>106</sup> Phillips, 'When Culture Meets Gender: Issues of Cultural Defence in the English Courts'

<sup>107</sup> Song, 'Majority Norms, Multiculturalism and Gender Equality'

plainly did so himself by stating that a Norwegian man murdering his daughter's rapist also would have received a more lenient sentence based on such mitigating circumstances. The fact that the victim had, in the eyes of the defendant, forced himself upon the defendant's daughter made the whole difference, and I believe that if this fact had been lacking, the outcome of the case would have been different. I base this mainly on the judge's comments stating that generally they will not allow for persons from a minority background to receive a lesser sentence based on a claim of cultural mitigating circumstances.

## 4.2 RT-1989-445: Murder

The next case, from 1989, also started in the Norwegian Eidsivating Court of Appeal, and continued on to the Supreme Court as an appeal on the sentencing of the case. The case is summarised by Judge Backer in the Supreme Court. The first instance of the case was also regarding a breach of the General Civil Penal Code paragraph 233, covering murder. As this section of the Norwegian Penal Code has been elaborated upon above, I will not go into it again.

In the first instance of the case, a 23 year old Pakistani man (A) was sentenced to 17 years' imprisonment for the murder of his brother in law (C) and aggravated murder of his own sister (B). His mother had one year prior to the murder left his father, and because of this the family had been severely 'disrupted' in the time that followed their separation. The triggering factor of the murders was that one of the victims, B, had married the other victim, C, without the consent of her father and brothers.

This had, according to the defendant, caused shame to the family as his sister's new husband (C) had been previously married in Pakistan, where he had left behind several children upon moving to Norway. In his witness statement, the defendant said that as the oldest son in the family, he felt an emphasised responsibility in maintaining and avenging the family honour that had been stained by the marriage.<sup>108</sup>

A few days before the murders, A purchased an AG-3 gun with ammunition. On the day of the offences, he tested the gun before heading to his mother's apartment. He claimed that he only went there to speak with her and warn her, all though it is not clear as to what he wished

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<sup>108</sup> RT-1989-445 (129-89) (Høyesterett)

to warn her about. In spite of this statement, he brought his passport with him, and had packed a suitcase in case he had to leave the country swiftly. The victims were visiting the mother, and it is unclear in the case summary whether the defendant knew this or not. As he knocked on the door, his sister B opened and started screaming when she saw the gun. C came out of the bedroom in the apartment, and the defendant shot him immediately upon noticing him. As the defendant was leaving the apartment, he shot and killed his sister, who was nine months pregnant at the time.

The defendant fled the country immediately after, but was arrested as he was trying to cross the border from Denmark to Western Germany.

The cultural aspect of the case is rooted in the defendant's background from Pakistan. He claimed that his mother initially had brought shame to the family by leaving his father, and that this had led his sister to (wrongly, in his opinion) believe it was okay to marry a divorced man. Both women had dishonoured the family, and as the eldest son, it was A's responsibility to regain the family honour. The judge stated that "the appellant felt particularly responsible [my translation]" for keeping the family honour intact.<sup>109</sup> There was no expert witness in the case, and Judge Backer in the Supreme Court stated that the case summary from the first instance of the trial was very short and undetailed.<sup>110</sup> It does become clear that the defendant's grudges are mainly against his mother, and have come about as a result of her leaving her husband after moving to Norway.

Judge Backer gives a short summary of the case details and of the events from the day of the murder. He acknowledges the cultural background of the defendant towards the end of his summary, but concludes that he "cannot give any weight to whether his motive for the murders may be associated with his ideas and beliefs from his Pakistani background [my translation]."<sup>111</sup> It is pointed out that the defendant first came to Norway when he was eleven years old, and thus should be well accustomed, if not integrated, with our norms, laws and attitudes.

Case *RT-1984-1146*, which has been analysed at the start of this chapter, is referred to and ultimately differentiated by Judge Backer. Like the judges stated in the 1984 case, he emphasises that not only must immigrants align themselves with the current Norwegian law

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<sup>109</sup> Ibid, page 446

<sup>110</sup> Ibid, page 446

<sup>111</sup> Ibid, page 447

as a general rule, it is also vital that immigrants who choose to conform their way of life to the Norwegian norms have right to full protection under the law, even if these norms may clash with those of their cultural background. With regards to this statement, it is clear that he is referring to the sister (and mother) of the defendant.<sup>112</sup> It is more important that the law protect her than the culture she may hail from.

The judge finds that the murders are of such nature that the maximum sentence should be put in force, and thus the defendant is sentenced to 21 years' imprisonment.

As the judge in this case states that he does not wish to put any value into considering the cultural background of the defendant, the cultural convergence theory cannot be said to apply to the case. This is mainly because the theory is aimed at explaining why and when certain cases involving the cultural defence are successful. With regards to multicultural theories and the criticism of them, the case backs up the critics in that it does not allow for any leniency or acceptance of the group-differentiated rights put forth by Will Kymlicka.<sup>113</sup>

When Judge Backer refuses to take the defendant's Pakistani background into consideration, he seems to be aligning himself with some of the critics of multiculturalist theories, such as Brian Barry. As I have covered in Chapter 2 of this thesis, Barry claimed that we should not provide minority groups with any special consideration such as the group-differentiated rights presented by the multicultural theorists.<sup>114</sup> He argued that minorities, such as the defendant in this case, should be held responsible for the consequences they are faced with as a result of their own cultural beliefs.

Additionally, judge Backer's comments regarding the protection of those members of minority groups who conform with the ways of their new country, indicates a will to avoid the problem of 'internal minorities', as introduced by some (feminist) critics of multiculturalism. The judge clearly states that it is more important that the law protects individual victims, than the general culture of the defendant.<sup>115</sup> These critics fear that 'internal minorities' such as women may suffer as a result of their minority group being given group-differentiated rights. They fear that if certain minority groups supporting patriarchal norms are provided with group-differentiated rights such as leniency in the courtroom, this may further oppress women

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<sup>112</sup> Ibid

<sup>113</sup> Kymlicka, *Multicultural Citizenship*

<sup>114</sup> Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*

<sup>115</sup> RT-1989-445 (129-89)

within their group.<sup>116</sup> In this case, however, it seems that the judges are not willing to allow this. Thus, in light of the debate between multiculturalists and their critics, the case seems to align with those of the critics.

### 4.3 RT-1994-100: Murder

The final Norwegian case also originates in the Eidsivating Court of Appeal before continuing on to the Norwegian Supreme Court. As with the above cases *RT-1994-100* is also regarding a breach of the General Civil Penal Code paragraph 233. The case is from 1994, and is the most recent of the Norwegian cases. After the conviction in the first instance, the two defendants appealed the sentence.

The facts of the case are not too difficult to fathom. The two defendants, long term friends A and B, shot and fatally wounded the owner of a kiosk. The victim had, 12 years prior to the offence, been convicted of the murder of A's father. Both defendants were previously convicted; A for profitable crimes and B for drug related offences. A was of Pakistani nationality, and B was of Norwegian nationality with Pakistani parents. According to the case summary their motive for the offence was retaliation.<sup>117</sup>

A had purchased a gun a couple of weeks prior to the homicide, and informed B of his actions on the night of the murder. B had agreed to assist him, and they had tested the gun in a nearby forest area before driving a rented car towards the kiosk owned by the victim; C. B was the driver of the car, and according to both of their statements it was A who pulled the trigger. After asking C to bring a packet of cigarettes from behind the counter, A shot him in the arm and chest. The defendants fled in the rental car, with B in the driver's seat, and the victim managed to make his way out on the road to get help. He passed away as a result of the injuries in the hospital a few hours later.

As we have seen in the first two Norwegian cases; section 233 of The Norwegian General Civil Penal Code covers the offence of murder. The additional relevance for this case is that section 233 also covers the aiding and abetting of the offence.<sup>118</sup> The imprisonment term for a person liable under the section is at least six years. If the act is premeditated, repeated or is

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<sup>116</sup> Deveaux, *Gender and Justice in Multicultural Liberal States*

<sup>117</sup> *LE-1994-100* (Eidsivating Lagmannsrett)

<sup>118</sup> The General Civil Penal Code - Straffeloven, Section 233

covered by aggravating circumstances, it may be punishable with up to 21 years imprisonment.

As mentioned above, the motive of the defendants was revenge and retaliation for the murder of A's father 12 years prior to the offence relating to the current case. The defence claimed that, as a result of his Pakistani background defendant A had been put under a genuine pressure from his family and relatives to restore the family honour by avenging his father. As the eldest son, it was on A's shoulders to ensure that his father's murderer paid for what he had done. It seems that B was put under some pressure as well, and all though not clearly stated in the case summary, we may presume that this came about as a result of the two families being close.

The first instance of the case was overseen by Judges Lund, Karlsrud and Staudel whose decision was unanimous. The Supreme Court instance was arbitrated by Judges Aarbakke, Tjomsland, Bugge, Backer and Skåre. It is interesting to note that Judge Backer had five years prior to this case been the speaking judge in *RT-1989-445*. The decision at second instance was also unanimous. I will first discuss how the judges in first instance approached the cultural aspect brought forward by the defence.

It is Judge Georg Lund who has covered the case summary for the Eidsivating Instance. After going through the details of the case at hand and referring to the relevant law and its meaning, he approaches the issue of the defendant's cultural background. He plainly states that the murder of A's father, 12 years prior, had created a desire for vengeance within A;

These thoughts were based on a wish for revenge over the man who had caused his father's death, and were deeply rooted by his ideas of his native country's honour code and further strengthened through by attitudes of his family.<sup>119</sup> [My translation]

I believe it is worth noting that A was only thirteen years old when his father was killed, and had seemingly grown up knowing that one day someone would have to avenge him. As we have seen, the oldest son has a special responsibility with regards to the family honour, so it is likely that A grew up knowing it would have to be him.

Further on in the case summary, the judge cites *RT-1984-1146*, the case covered at the beginning of this chapter. In that case, the cultural background and its influence on the

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<sup>119</sup> *LE-1994-100*, page 2

defendant seemingly did have an effect on the sentencing, but it seems that Judge Lund has not considered this to be the rationale of the case. He states that they “cannot take into account the moral perceptions and traditions within people from a different country who choose to settle in Norway [my translation].”<sup>120</sup> As I mentioned above, it seemed that the judge in *RT-1984-1146* wished for his statement on this to be the main lead taken from the case, and I believe Judge Lund in the current case (ten years after) was of the same opinion. Thus, they decide not to pay any further attention to the cultural background and influences on the defendant’s when making a decision.

In the Supreme Court, i.e. the second instance, the judge starts by briefly summarising the decision of the first instance judgment. He quotes Judge Lund who stated that there will be put no emphasis on the cultural background of the defendant. The Court then proceeds to conclude that there is no reason for them to diverge from this. They also clarify the issue a bit more than the first instance summary by going into further detail as to why they have decided not to. I will discuss their reasons below.

It seems that the defence’s reliance on the cultural pressure for revenge from the family was based on pressure from the paternal relatives of A – who were all still residing in Pakistan. Defendant A had not visited these relatives for years, and there was apparently no valid proof that the family had tried to further reach out to him while he was living in Norway. There was also not added any valuable or effective information regarding A’s surroundings in Norway.<sup>121</sup> This may be a valid reason why the first instance court refused to take A’s cultural background into consideration.

As the Supreme Court chose to adhere to the decision of the Court of Appeal, the verdict has become precedence in Norwegian law. If a judge is faced with a specific legal question of similar circumstances in a later case, he will thus be obliged to follow this decision unless there are facts and circumstances making the cases significantly different, allowing him to differentiate between them.

Like in the previous case, the judges here cited and referred to *RT-1984-1146*, which was elaborated upon at the beginning of this chapter. They distinguished the case from the current facts, and did not use it as precedence for their decision. However, their decision not to

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<sup>120</sup> The General Civil Penal Code - Straffeloven

<sup>121</sup> *HR-1994-114-A* (Høyesterett)

consider the defendant's cultural background as a mitigating circumstance could be seen as a nod in the direction of how the judge in *RT-1984-1146* seemingly intended their decision to be seen as an exception to the general rule not to let culture affect a judgment.

As with the above cases from 1984 and 1989, the judges refused to allow for any leniency based on the culture of the defendant. This aligns the case with the opinions of the critics of multicultural theories, as it does not seem to adhere towards giving people with a different cultural background any differentiated rights purely because of it.

As the cultural defence was not successful in this case, the cultural convergence theory cannot be applied. With regards to general theories on honour culture, it is possible to point out that since Norway is not a country that put a considerable amount of emphasis on the notion of honour, it would not be natural for the judge in the case to completely understand and empathise with the feelings of revenge within the defendant. His wishes for retaliation were, as the judge put it, rooted in his cultural background and the views of his family, and mainly the fact that he hailed from a so-called honour culture. As mentioned in Chapter 2, in cultures where family honour is not given a great deal of importance, there will be a larger difficulty in appreciating and understanding these feelings of aggression that arise when family honour is lost or threatened.<sup>122</sup>

#### **4.4 Comments on the Norwegian cases**

It seems that these three cases have created a rather clear and precise precedence for future cases regarding the possibility of the cultural defence in Norway. The most important case to note amongst these is the oldest one; *RT-1984-1146*. Even though it is the only case where culture and cultural background actually seemed to play a part in the outcome, the rationale it set was the complete opposite. The judges stated clearly that the facts in front of them were the exception to the notion that when you settle down in a new country, you are expected to abide by its laws and customs. The defendants in the case received reduced sentences, but were in no way acquitted of murder and found guilty of a lesser offence, such as in the dramatic case of *People v Kimura* which was covered in the introduction of this thesis.

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<sup>122</sup> Panichas, 'The Absence of a Culture of Shame'



The other two cases follow within the next decade, and all though the initial circumstances of both cases may seem similar (murders based in an idea where the goal is to restore family honour), the judges have all distinguished the cases from *RT-1984-1146*. It seems quite clear that the Norwegian legal system is generally not willing to allow for foreign cultures with different moral norms to affect a judge in passing a sentence. We are all equal in the eyes of the law, and it is likely that the group-differentiated rights argued for by Will Kymlicka would shake up this notion. And to be fair, equality is one of the most important pillars of a legal system.

With regards to the cultural convergence theory, I believe it can be said to have been an influence behind the judge's decision to reduce the sentence in *RT-1984-1146*. This is based solely on the judge's comparison between the facts of the case itself and what would likely have been his decision if a Norwegian man had committed the same crime. In addition, by making this statement, the judge was able to show that the decision was not necessarily based on the culture of the defendant alone, and thus making it arguable whether the defendant's received any special treatment or not.



## 5 The British Case Law

The British cases, as opposed to the Norwegian ones, are not all based on the same offence and theme (i.e. murder, family honour and honour culture). In contrast, they are all very different from each other and each cover a new aspect of British criminal law. The first case, from 2007, is regarding several offences committed by the same defendant in a short period of time; kidnapping, false imprisonment and mainly, for the purposes of this thesis, two offences of marital rape. The second case revolves around an arranged marriage where the victim was below the British age of consent, and thus resulting in a charge of causing a minor to engage in sexual relations. The third case is based in a charge of attempted murder, where the under-aged defendant attacked a fellow student at his secondary school with a hammer.

The judiciary of the United Kingdom operate with two main sources of law. The common law is not written down and developed through years of legal practice, and it is originally based in the traditions and customs of the country. The other source of law is the statutory law; legislation passed by Parliament through the correct procedure. Statutory law, as opposed to the common law, has been codified i.e. written down.<sup>123</sup>

The offences in the British case law are a mix of both common law and statutory offences. Many criminal offences in the United Kingdom were not codified until the late 20<sup>th</sup> century and more recently, such as through the Sexual Offences Act 2003 which codified the offence of rape.<sup>124</sup> Kidnapping, for example, is still a common law offence, following the guidelines of the case *R v Spence and Thomas* from 1983.<sup>125</sup>

In all three of the British cases the cultural aspect has been raised with regards to the background of the defendant. The sitting judges, each referred to as Lord Justice, have been asked to consider the cultural background as a mitigating circumstance with regards to the sentencing of each case. In the first case, *R v Muhammed Ahmed*, they have been asked to consider the cultural background of the victim as well.

All the British cases are in the second instance, the first one being an appeal against the conviction and the second two being appeals against the sentences. We will see that the cases are vastly different with regards to the grounds of appeal, in spite of the cultural background

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<sup>123</sup> , *Osborn's Concise Law Dictionary*

<sup>124</sup> Sexual Offences Act

<sup>125</sup> *R v Spence and Thomas* Criminal Appeal Reports (Sentencing)

of the defendant being a common denominator. The cases are all very recent, the oldest being from 2007, and the most current from November 2015. It was a lot easier to find current cases from the British courts compared to finding Norwegian ones, which may be a reflection on the fact that they have a much larger population and a higher percentage of immigration than Norway.<sup>126</sup>

## **5.1 R v Muhammed Ahmed: Kidnapping, false imprisonment and rape**

The first British case came before the Court of Appeal Criminal Division in 2007.<sup>127</sup> The defendant was in the first instance of the case convicted of kidnapping, false imprisonment and two offences of rape. All of the offences were committed within a period of 24 hours, and the victim was his soon-to-be ex-wife. He was sentenced to a concurrent imprisonment of 6 years for the kidnapping, 4 years for the false imprisonment and 9 years for each offence of rape, meaning that he would serve all sentences at the same time. In the second instance he appeals against the guilty conviction on several grounds.

Both the victim and the defendant had immigrated to the United Kingdom from India, where they had gotten married in 1996. It is unclear when the defendant moved to the United Kingdom, but it is stated in the case summary that he returned to India in order to marry his new wife, so it seems that he had spent time in the country prior to their marriage in 1996. He brought his new wife back to the UK after the wedding ceremony as he was running a business there. Eight years later, in 2004, they started getting along worse, and the victim left their home and moved in with a family member a few hours away. From there she started filing for a divorce, all though in the following months there were made several attempts from both parties at getting back together. After a few months, the victim moved out from her relative's home and started renting her own apartment. She was still living several hours away from the defendant and their old home.

One day the appellant went to the city where she lived, and accosted her on the pavement without warning. According to her statement, he then forced her to join him in his car where they had sat and talked for a while. He then proceeded to drive them back to their matrimonial

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<sup>126</sup> Office for National Statistics, *Migration Statistics Quarterly Report: February 2016* (2016)

<sup>127</sup> *R v Muhammed Ahmed* EWCA Crim (Court of Appeal Criminal Division)

home, an approximate 4 hour drive away. The victim stated that during the journey he had tied her legs together so that she could not escape from the car. Once they got to the house, the appellant forced his (soon to be ex-) wife to an upstairs bedroom where he had slapped her across the face and raped her on two separate occasions. He left the house the next morning and locked her in the room. The victim found a phone there after he had gone and called the police immediately. Upon arrival they broke open the door and released her.

According to the appellant's witness statement, his wife had willingly and consensually gone with him and participated in the sexual intercourse. He pleaded not guilty in the first instance, and denied any claim of violence, as well as the claim that he had tied her up. With regards to locking her in the room, he claimed that locking that specific door was a habit, and that it was never his intention to hold her against her will.<sup>128</sup> It was thus up to the jury in the first instance to decide whether the victim's account of the events was true, or if the defendant's statement was more plausible. The judge in the second instance pointed out that much of the evidence was peripheral and that because of this, a great deal "turned on the credibility of the complainant and the appellant."<sup>129</sup>

After the guilty verdict and sentencing in the first instance, the defendant was given leave to appeal on several grounds. The grounds of appeal were mainly relating to the handling of documents with regards to client-solicitor privilege. Lord Justice Moore-Bick goes into a lot of detail on the issues, and ultimately dismisses the appeal on those grounds. I will not go into further details on that aspect of the case, as it does not affect the relevant ground of appeal, nor is it relevant for the purposes of this thesis. The cultural aspect of the case comes into play with regards to the final ground of appeal, which is aimed at the appellant's criminal liability for the two offences of rape.<sup>130</sup>

The notion of 'reasonable belief in consent' is a defence element to most of the offences under the Sexual Offences Act 2003.<sup>131</sup> The defendant must be able to show that he had a reasonable belief in that the victim consented to the act in order to rebut any assumption of an offence committed. In this case, the judge at first instance instructed the jury not to contemplate the use of the defence of reasonable belief in consent, and the defence's final ground of appeal is that the judge was wrong in doing so. The basis of this ground is that the

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<sup>128</sup> Ibid, section 6

<sup>129</sup> Ibid, section 7

<sup>130</sup> Ibid, section 49

<sup>131</sup> Sexual Offences Act

judge should have considered the cultural background of both the appellant and the victim with regards to the reasonable belief in consent defence, and that he should have instructed the jury to do so as well.

In his discussion of this final ground of appeal, Lord Justice Moore-Bick stated regarding the appellant and the victim that,

[they] are Muslims and have grown up in a culture in which a wife is expected to submit to her husband's wishes in all things.<sup>132</sup>

He continued to say that the victim herself acknowledged this way of upbringing in her evidence statements, where she also confirmed that she had indeed sought to submit to all of her husband's wishes during their marriage. Therefore, the judge in the second instance stated that there was a possibility that she could have seemed willing to submit to the intercourse without actual consenting to it. Contemplating their cultural background with regards to this could be a way of showing that the defendant did indeed possess a reasonable belief in consent.

This mitigating circumstance put forth by the defence with regards to the rape offences was contrasted by two very different evidence statements from the prosecution and the defence. According to the appellant, his wife had shown several signs of enjoyment during the intercourse, while the victim herself claimed to have visibly resisted through screaming and trying to use force in order to stop the intercourse.<sup>133</sup>

The judge at first instance did raise the issue of the couple's cultural background, but he only did so in order to point out that regardless of Islamic law and culture, it is the current laws of the United Kingdom that are governing the legal issue at hand. British law does not allow for a man to have sexual relations with a woman against her will, regardless of whether she is his wife or not.<sup>134</sup> The sitting judge in the case at second instance, Lord Justice Moore-Bick, seems to agree quite clearly with this statement, and ultimately dismissed the appeal.<sup>135</sup>

Lord Justice Moore-Bick cited the leading case of *Millberry* regarding the measure of penalty in rape cases, and stated that even though mitigating circumstances in some circumstances

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<sup>132</sup> *R v Muhammed Ahmed*, section 49

<sup>133</sup> *Ibid*, section 50

<sup>134</sup> *R v R* UKHL (United Kingdom House of Lords)

<sup>135</sup> *R v Muhammed Ahmed*, section 52

may be able to affect the sentencing following a guilty verdict, it had never been suggested that Islamic cultural values concerning marital relationships provided an acceptable mitigating circumstance in such a case.<sup>136</sup>

The cultural aspect of *R v Muhammed Ahmed* was constructed around a claim of the reasonable belief in consent defence. As we have seen in Chapter 2, there have been some cases where such a basis has been successful. Cynthia Lee argued that the reason behind these successful claims is that the subjective notion of a *reasonable* belief in consent is a Western custom allowing for defendants in rape cases to plead guilty to lesser crimes (or get a complete acquittal). This happens most commonly in cases involving defendants charged with so-called ‘date-rape’ crimes.<sup>137</sup>

The cultural background of the defendant in *R v Muhammed Ahmed*, and in the cases where ‘cultural’ claims of reasonable belief in consent have been successful, was put forth as a way of making the belief in consent even more reasonable and plausible. However, the judge in both the first instance and in the appeal case deemed it inapplicable to the defence, and thus the cultural convergence theory cannot be said to apply to this case. Had the claim been successful, it would have been possible to draw comparisons to cases where Hmong men had been acquitted from a rape charge by claiming a reasonable belief in consent, as they thought they (and their victims) were participating in a tribal tradition known as ‘marriage by capture.’

As the case is not directly related to honour and the honour culture the defendant may have grown up in, the general theories on honour culture are not relevant. As for multicultural theories, it seems that the case undermines the theories claiming that minorities and individuals with a different cultural background should be given superfluous rights to make up for their disadvantages. The cultural background of the defendant (and the victim) in this case did not amount to a more reasonable belief in consent, and so it did not provide the defendant with any special treatment, in accordance with the group-differentiated rights introduced by Will Kymlicka.<sup>138</sup>

In conclusion, the defence was unsuccessful in bringing forth the cultural background of Muhammed Ahmed as a mitigating circumstance. This was in spite of their attempt at linking

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<sup>136</sup> *Millberry* EWCA Crim (Court of Appeal Criminal Division)

<sup>137</sup> Lee, ‘Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?’, page 940

<sup>138</sup> Kymlicka, *Multicultural Citizenship*

the defendant's cultural background with an actual, existing defence in criminal law; the reasonable belief in consent, which according to Cynthia Lee and the advocates of the cultural convergence theory is the only way a cultural defence could possibly be successful.

## **5.2 R v B: Causing a minor to engage in sexual activity**

As mentioned in the introduction to this chapter, the British cases are all very recent. The second case is from 2010, and its summary was published by the British Court of Appeal Criminal Division.<sup>139</sup> The case was initiated in the Snaresbrook Crown Court, and is an appeal against a sentence of eight months' imprisonment for violating section 10(1) of the Sexual Offences Act 2003.<sup>140</sup>

Section 10 of the Act relates to causing or inciting a child (under the age of 16, which is the legal age of consent in the United Kingdom) to engage in sexual activity, the maximum sentence for which is 14 years of imprisonment. There is also the addition or alternative of a fine as a penalty for the offence. In the first instance, the defendant, B, was sentenced to eight months' imprisonment after providing the court with a written guilty plea. The defence was of the opinion that a fine would be a more appropriate punishment for the crime. They thus appealed against the sentencing on the basis of two main grounds. We will see that one of these grounds is based on the defendant's cultural background.

The appellant, a woman from Bangladesh, had moved to the United Kingdom with her husband 20 years prior to the case. She speaks little to no English, and has had four children since moving to the UK. She grew up in rural Sylhet in Bangladesh, and was married at the age of 15 to a man much older than herself. The victim, V, who was 15 at the time of the crime, was the eldest daughter of the appellant.

In the time leading up to the offence, B had been growing more and more concerned as her daughter had started dating a boy from her school. The appellant feared that they were having sexual relations and sought to find a way to remedy this. As she did not approve of her daughter's actions, B decided to have a marriage arranged for V, and was put in contact with a Bangladeshi man; K. After the marriage ceremony was completed, he moved into the home of

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<sup>139</sup> *R v B* EWCA Crim (Court of Appeal Criminal Division)

<sup>140</sup> Sexual Offences Act



the appellant and V, and after a few months' marriage, he began to regularly abuse his new wife.

It is worth taking notice of the fact that the appellant did not force V into going through with the wedding ceremony. They had a rather typical mother-daughter relationship based on trust and love, which led the victim to agree with the appellant's request for her to marry K. She had willingly gone through with the marriage on the assumption that her mother only wanted what was best for her.

Lord Justice Toulson points out the peculiarity of the case, stating that "it is an unusual case in the sense that the appellant was not acting for sexual gratification."<sup>141</sup> According to B's written statement she had spent some time discussing the situation with a few male relatives when she first started getting anxious about her daughter's relationship. It was these relatives who suggested that she arrange a marriage for V, and it seems that B approved of the idea. They also provided her with K's contact details in Bangladesh. In addition to this, she had discussed the situation with the religious leaders in her community, who had advised her to delay the ceremony. However, B did not wish to postpone and was adamant to go through with the wedding as soon as possible.<sup>142</sup>

When questioned, the appellant did not seem to have any remorse or sense of wrongdoing with regards to the arranged marriage. In reference to her daughter being only 15 years of age, the appellant stated that "this is not an unusual thing in Bangladesh", and continued to point out that she had been 15 years old when she got married herself.<sup>143</sup> She also stated that although she could safely assume that her daughter and her new husband would have sexual intercourse, she was completely unaware that her daughter was under the legal age of consent in the UK.

With regards to the appellant's awareness of the legal age of consent in the UK, the judge in the first instance rejected her claim of not knowing. He concluded that the marriage was a tool used by B as a means of controlling her daughter and making sure she did not date British boys.<sup>144</sup> He also separated rather clearly the legal issue at hand from opinions and practices regarding arranged marriages, and stated that he was not there to punish her for arranging the

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<sup>141</sup> *R v B, section 1*

<sup>142</sup> *Ibid*, section 7

<sup>143</sup> *Ibid*, section 9

<sup>144</sup> *Ibid*, section 10

marriage, nor to condemn the practice. The sole focus of the case was the fact that a minor had been incited into going through with sexual intercourse, not whether arranged marriages should be allowed to take place in the United Kingdom or not.

The cultural aspect in this case is brought out and argued for by Mr. Gross, who was the counsel for the appellant, as a basis for the appeal. He argued two grounds of appeal that he considered to go hand in hand, namely that the appellant only acted out of love for her daughter, genuinely believing the marriage to be in her best interest, and that her actions were natural and in accordance with her cultural background.<sup>145</sup> On the basis of these grounds, he submits that the judge in the first instance was wrong in ordering an imprisonment sentence, and that a fine should be sufficient in the case of the appellant. He seemed to be of the opinion that the imprisonment element to the sentence should be reserved for defendant's acting for sexual gratification.

In the first instance, the judge acknowledged the separate and isolated life the defendant had lived since moving from her home country to the United Kingdom. He also acknowledged and accepted the fact that K had come from Bangladesh and strongly influenced B into going through with an arranged marriage ceremony for her daughter. The judge later stated that "I accept that you have followed the precedent of your own life."<sup>146</sup> However, with regards to the sentencing appeal, he decides that the offence is so serious that a fine or community sentence will not justify it. He still states that the eight months imprisonment is the shortest "which in [his] opinion matches the seriousness of [the] offence."<sup>147</sup>

The judge in the second instance is asked to reconsider the imprisonment sentence in light of the mitigating circumstances put forward by Mr. Gross. The mitigating circumstances put forth are, as mentioned above, that B was only acting out of love for her child, and that her actions were greatly influenced by her cultural background and her own upbringing in Bangladesh. With regards to the first circumstance, Lord Justice Toulson does not see the motivation in the appellant. He repeats the opinion and point made by the judge in the first instance, namely that the appellant ostensibly acted first and foremost out of a need to control her daughter.

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<sup>145</sup> Ibid, section 11

<sup>146</sup> Ibid

<sup>147</sup> Ibid

As to the second point put forth by the counsel, the judge agreeably acknowledges that her behaviour “was natural given her cultural background.”<sup>148</sup> However, he continues to state that the law on the area has been put in place to first and foremost protect all children living under the British jurisdiction, regardless of their and their parents’ cultural background. Thus, all though the motive and wish of the appellant was not to inflict any harm on V, the consequences of her actions were in fact so. The appeal judge accordingly concludes that the first instance judge was correct in ordering an imprisonment sentence, and that the term imposed was not excessive. In short, the appeal is dismissed.

With regards to the ratio decidendi and precedence of the case, the Court of Appeal was invited to express their comments and opinions on the matter for the purpose of creating such a ratio and to set precedence for future cases of this kind. This is mainly because no British court higher than the County Courts had prior to the case (in 2010) made a decision regarding section 10 of the Sexual Offences Act 2003.<sup>149</sup>

Lord Justice Toulson stated that the court declined to do so, as they were of the opinion that this was not a ‘guideline case’, i.e. not the type of case they believe Section 10 of the Act was initially codified to cover. They left the case with a brief summary stating that they have purely made a decision based on the facts at hand, and that “this decision should not be treated as deciding anything more than [this] narrow question.”<sup>150</sup>

Similar to *R v Muhammed Ahmed* above, this case does not seem to give way for any leniency towards cultural background as a defence for committing a crime. The cultural convergence theory cannot be used to explain *R v B*, as there does not seem to be any precedence of a case where judges have allowed mitigating circumstances to affect a case regarding the Sexual Offences Act other than the reasonable belief in consent defence. As this case does not relate to rape, this will not be applicable either. As Lord Justice Toulson stated, it is a very peculiar case, and for this reason the judges decided not to make any statements as to what the ratio decidendi of the case should be.

The case is not related to honour culture, as the driving force behind B’s decision was her (seemingly) healthy relationship with her daughter, not shame or honour. Thus, a discussion on honour cultures versus non-honour cultures will not be relevant to this case.

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<sup>148</sup> Ibid, section 13

<sup>149</sup> Ibid, section 14

<sup>150</sup> Ibid

With regards to theories on multiculturalism, *R v B* is a good example of what Brian Barry and similar theorists argued. Barry stated that a simple claim that something is a custom or a tradition (in this case, the arranged marriage, and the fact that B herself had been married at such an age), does not have the ability to function as a justification for an (otherwise illegal or immoral) act.<sup>151</sup>

The case of *R v B* seems to align itself quite well with Barry's statement, as the judges did not accept the cultural background of the appellant as a mitigating circumstance purely because she stated that it was how it was done in her culture. With regards to those statements made by the defendant as to how young she was when she got married, it is worth mentioning that Barry emphasised the difference between mitigating circumstances and mere statements of facts. Plainly spoken, just because something is part of a culture, does not mean we can accept deviation from what we regard as moral discourse.<sup>152</sup>

*R v B* was, as the judge himself stated, a peculiar case, as it is rare that a case regarding sexual offences is not related to a defendant acting for sexual satisfaction. This is a common issue for judges to tackle; when the actual facts in front of them do not seem to fall within the standard, and has been referred to by Professor H. L. A. Hart as the 'problems of the penumbra'. Hart stated in a famous debate with Professor Lon Fuller in the 1950s that

If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use [...] must have some standard instance in which no doubts are felt about its application.<sup>153</sup>

The case of *R v B* falls on the outside of what behaviour the statute section intended to regulate, which is the reason the judges did not wish to create a ratio decidendi for the lower courts. The decision of the Court of Appeal in *R v B* made it clear that even in situations where the law has seemingly been written with a certain kind of situation in mind, its main focus is always to protect the victims.

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<sup>151</sup> Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, page 252-291

<sup>152</sup> Ibid, page 252

<sup>153</sup> H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, page 607

This focus can be linked to the multicultural issue of ‘internal minorities’ as mentioned in Chapter 2. The statement from the court regarding the law being put in place in order to protect all children, points towards a recognition of this issue. The critics of multiculturalism that point out this problem claim that when a judiciary protects minority groups as a whole, the women, children and other ‘internal minorities’ within these groups may suffer as a result. In the case of *R v B* we see that the court is more concerned with protecting the victim as an individual, rather than the cultural background of the defendant. I believe the court in this case has done well in avoiding this ‘paradox of multicultural vulnerability’, as Ayelet Shachar calls the issue.<sup>154</sup>

### **5.3 R v Adeel Khan: Attempted Murder**

The final British case is an appeal case from 2015, also starting in the Snaresbrook Crown Court.<sup>155</sup> In the first instance of the case the appellant received a sentence of 15 years’ detention in a Young Offender Institution. He had just passed his seventeenth birthday at the time of the offence, and appealed against the sentence on the grounds that it was too strict and excessive. The offence committed was an attempted murder of a fellow pupil at the defendant’s secondary school, and the victim was aged fifteen at the time of the offence. The defence claimed in the appeal that the first instance judge failed to give proper weight to the cultural issues and pressure put on the appellant as a result of his cultural background.

The relevant events leading up to the offence were that the victim had entered into a relationship with the appellant’s younger sister. The victim; Ismail Khan and the appellant’s sister had disappeared for a period of 24 hours the year prior to the offence, which could potentially be seen as staining the honour of the appellant’s sister and their family. There was concern amongst school officials and the families of the defendant and the victim that the defendant would seek to restore the family in some sort of revenge attack. A meeting with their teachers, parents and the police was set up for the purposes of avoiding this, but the meeting had ended with the appellant threatening the victim in a heated discussion.

The following year Ismail Khan was attacked by two masked men on a residential street in East London. He was struck across the head with a hammer several times, and suffered three severe fractures to the skull. The injury was serious, and extensive surgery was necessary. The

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<sup>154</sup> Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, page 3

<sup>155</sup> *R v Adeel Khan* EWCA Crim (England and Wales Court of Appeal)

victim suffered problems with regards to walking, blurred vision and loss of hearing in the time following the attack. The appellant was identified as one of the assailants from his distinct way of running and from a scar on his face that was visible at some point during the attack.

The attack was premeditated, and revenge and retaliation were outwardly the main motives. The only mitigating factors considered by the judge in the first instance when passing the sentence was the age of the appellant and the fact that he had no previous convictions.

The case summary has no mention of where the appellant and his sister are from, or of the background of the victim. Not knowing where they are originally from makes it difficult to pinpoint exactly what their cultural background is, but I have been able to draw some conclusions. They all share the same surname, Khan, which is widely common amongst Asian Muslims, predominantly in Pakistan and India.<sup>156</sup>

Their cultural background is mentioned by the judge, making it apparent that they hail from a culture other than that of the United Kingdom. It is not explained in detail anywhere in the case summary what exact culture the judge is referring to. However, it seems that the appellant hails from an honour culture, or that his parents do, and that the judges acknowledge his cultural background as being different from the majority in the United Kingdom. This is mainly based on the assumption that the cultural background of the defendant would not have been worth mentioning in the case had he been born and raised in the UK.

The prosecution claims in the appeal that the judge did not consider the cultural issue at hand, namely that the appellant's cultural background put pressure on him to avenge the honour of the family, following the disappearance of his sister and the victim. They define the offence as an attempt at an honour killing, and ask that the judge consider this when making a decision on the appeal.

The Appeal judge does not seem willing to accept this, stating that these so-called honour killings have nothing to do with honour, and that "they are vile crimes, nothing less."<sup>157</sup> He points out that even though the defendant is young there is no proof that he has been put under any pressure with regards to his cultural background. He continues to state that,

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<sup>156</sup> Ancestry.co.uk, 'Khan Family Name' 2013) <<http://www.ancestry.co.uk/name-origin?surname=khan>> accessed 14/04/2016

<sup>157</sup> *R v Adeel Khan*, section 23

We do not accept that an adult committing a revenge attack of this sort could suggest that such motivation provided any mitigation whatsoever.<sup>158</sup>

Thus, he makes it clear that he will not consider the appellant's cultural background to be a mitigating circumstance, and will not allow it to give him a more lenient sentence.

Lord Justice Burnett did add an interesting commentary saying that with regards to younger defendants there is a possibility to consider the cultural pressure from parents and grown-ups in the community, but that in this specific case it seems that there was none. This is specifically because the parents chose to participate in the meeting at the school in order to prevent such an attack. The judge states that "evidence suggests that the pressure exerted was entirely the other way, including [...] his parents."<sup>159</sup>

The judge proceeds to compare the argument put forth by the defence to a hypothetical appeal of the same facts by a British teenager. He states that if a 17-year-old beats someone up after insulting his girlfriend, it will not be sufficient to claim in his response that this "was the normal way of dealing with such matters in his family and social circles."<sup>160</sup>

The Appeal judge concludes that the first instance judge was correct in deeming the age of the victim to be an aggravating factor and the age of the appellant to be a mitigating one. Fifteen years' detention in an Institution for Young Offenders for attempted murder is held to be an appropriate sentence, and the appeal is thus dismissed.<sup>161</sup>

It seems to me that the cultural convergence theory may be applicable to this case, but not in the way Cynthia Lee imagined it when she first brought forth the idea behind the theory. The cultural convergence theory is generally used as reasoning behind successful cultural defence claims, while the case of *R v Khan* was not. Here, Lord Justice Burnett makes direct comparisons as to what would have been the case had the defendant been a member of the majority culture, stating that there would have been shown no leniency even if so. In this case, it seems that the cultural convergence theory can be used to explain why the case was not successful based on the statements from the Lord Justice himself. As he stated, such an appeal

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<sup>158</sup> Ibid

<sup>159</sup> Ibid, section 23

<sup>160</sup> Ibid

<sup>161</sup> Ibid, section 25

would not have been accepted from a British teenager, and he was not willing to accept it on the basis of the defendant's cultural background either.

It seems that the judges wish to emphasise that the mainstream norm in the United Kingdom is to abide by the law, and that regardless of where you are from or your reasons for not doing so, it will not be sufficient to plainly state that 'it is how it is done'. This can be linked to the cultural convergence theory, as the unsuccessful cultural defence in this case seems to converge with the norm in the UK to simply not commit a criminal offence. However, it is worth mentioning that such a usage of the cultural convergence theory is not how Cynthia Lee envisaged her theory.<sup>162</sup>

## 5.4 Comments on the British Cases

There seems to be a lack of willingness amongst the British courts to accept any attempts of a cultural defence. This may go hand in hand with the recent retreat in willingness to recognise special minority rights.<sup>163</sup> Due to recent increases in immigration numbers, failures to integrate when necessary and certain issues with 'internal minorities', the courts may be less willing to accept culture as a mitigating circumstance or defence in criminal law.<sup>164</sup>

The British cases illustrate three different attempts to use culture as a mitigating circumstance in criminal law, as opposed to the Norwegian cases which are all related to murder and family honour. In *R v Muhammed Ahmed*, we see an attempt to use culture as a basis for a reasonable belief in consent, while in *R v B* cultural background is promoted as an explanation as to why the defendant did not feel any sense of wrongdoing in arranging a marriage for her under-aged daughter knowing that she would have to participate in sexual intercourse. Lastly, in *R v Khan*, the defence tried to claim that the offence committed by a minor was an attempt at an honour killing after feeling pressurised as a result of his cultural background.

All three attempts at using culture as a defence were unsuccessful, which overall indicates an attitude amongst British judges to not show any leniency towards a defendant simply on the basis that they hail from a minority background. As mentioned at the end of the previous chapter, everyone is equal in the eyes of the law, and will all be judged accordingly. This

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<sup>162</sup> Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?'

<sup>163</sup> , 'Multiculturalism'

<sup>164</sup> Green, 'Internal Minorities and their Rights'



seems to be a feature of the law that the British courts are inherent on maintaining, in spite of theorists like Alison Dundes Renteln who claim that culture should be considered a valid defence in criminal law.<sup>165</sup>

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<sup>165</sup> Renteln, *The Cultural defense*



## 6 Concluding the thesis

### 6.1 Introduction to the final chapter

At the beginning of this thesis I set out to present and discuss case law from Norway and the United Kingdom where the phenomenon known as ‘the cultural defence’ has come into play. The cultural defence is a term used to describe situations where the cultural background of the defendant is presented as a possible mitigating circumstance with regards to sentencing in criminal law. Through evaluating three cases from each of the two jurisdictions, I hoped to shed some light on the topic and to answer the thesis question that I set for this project. The thesis question has been; what implications does culture have for legal reasoning when introduced as a mitigating circumstance in criminal court cases?

The cultural defence has in the recent years become a point of interest for several legal theorists, and the main discussion of the notion can be linked to principles regarding multiculturalism, and whether persons from minority backgrounds are entitled to special consideration with regards to social, economic and judicial aspects of society. We have seen in Chapter 2 that such a consideration is referred to as being given ‘group-differentiated rights’.<sup>166</sup> A recognised, legal cultural defence, as argued by Alison Dundes Renteln, would be considered such a group-differentiated right, and those who wish for it to be implemented claim that it would make up for the unchosen and unfair inequalities minorities are given based on our cultural background.

In this final chapter I will reflect on the research from the previous two chapters in order to answer the thesis question at hand. I will also present my own thoughts and observations on the result, as well as any limitations I believe the thesis may have. Lastly, I will comment on any possible further research in the area.

### 6.2 Initial thoughts after analysing the case law

Before conducting the research for this thesis I thought I would end up discovering a plethora of cases from Norway and the United Kingdom where the cultural defence had been successful. I believed their success would be such as in the case of *People v Kimura* which

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<sup>166</sup> Kymlicka, *Multicultural Citizenship*

was introduced in the first chapter of this thesis, where it seemed very clear that it was the culture of the defendant that had explained the outcome of the case. From reading the literature on the topic, I was given the (mistaken) impression that there were more cases where the cultural defence had succeeded than where it was disregarded by the courts.

In reality, it proved to be a lot more difficult to find cases including the cultural defence, and practically impossible to find cases where the implication of culture being introduced in the courtroom was a successful ‘cultural defence’ i.e. mitigating circumstance.

The main reasons for this, I believe, is that the books I mainly focused on in the beginning of writing this thesis; *The Cultural Defense*<sup>167</sup> and *Multicultural Jurisprudence*,<sup>168</sup> mentioned numerous cases involving the cultural defence across several jurisdictions. However, it seems that the cases mentioned and studied in those books totalled up most of the cases where the outcome was affected by the cultural background of the defendant. After conducting the further research necessary for this thesis, and searching LovData Pro and CaseTrack for relevant case law, I have found that practically every single case where the cultural background of the defendant has been put forth as a mitigating circumstance has been unsuccessful.

I would say that working on and writing this thesis has altered my impression of the cultural defence significantly throughout the process, as I discovered how seldom a cultural defence is successful.

### **6.3 What implications does culture have for legal reasoning when introduced as a mitigating circumstance in criminal court cases?**

The main findings of this thesis were presented in the previous two chapters; The Norwegian Case Law and The British Case Law. In this section I will compare the results from those discussions in order to answer the thesis question defined in Chapter 1 of this thesis.

There were six cases covered in this thesis, three recent British cases and three older Norwegian cases. In all but one, the defendant was unsuccessful in introducing cultural

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<sup>167</sup> Renteln, *The Cultural defense*

<sup>168</sup> Renteln (ed), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*

evidence to back up a defence or mitigating circumstance. The judges in all the cases, even the one where the cultural defence was successful, made it very clear that crimes are regulated by the current law in the jurisdiction of the courts you are obliged to follow. This is illustrated by a quote from Judge Backer, in the Norwegian case *RT-1989-445*:

[...] Immigrants must as a general rule yield to the state of affairs and imprints of this country with regards to the criminal law and criminal prosecution.<sup>169</sup> [My translation]

It is clear that the courts of Norway and the United Kingdom are not willing to accept culture as a defence or mitigating circumstance, and will not reconsider this general rule even in cases that are particularly ‘outside the box’, such as the case of *R v B* where the defendant was charged guilty of causing a minor to engage in sexual activities.

The main implication of culture on legal reasoning seems to be that when introduced the judges are required to acknowledge it as a mitigating circumstance, thus giving it some validity as a possible influence in the criminal courtroom.

The cases have created a clear precedence to be followed in both Norway and the United Kingdom. Both jurisdictions operate with a legal system where the lower courts follow the decisions of the higher courts. The exception to this is if a case can be distinguished and differentiated from the decision of the higher court. This means that the decisions of these cases have had implications for any later situations where the culture of the defendant may be introduced in the courtroom.

It seems from the legal reasoning that the courts are hesitant to open the floodgates for these kinds of defences. Naturally, if they were to accept the culture of the defendant as a mitigating circumstance, it could prove difficult to contain this new element of criminal law in future cases. This can be related to Professor Hart’s ‘problems of the penumbra’, in which he emphasises the importance of clarity within the law.<sup>170</sup> It is important that the law is clear, but also that it is firm. In the case of *RT-1989-445* Judge Backer stated that “for the purpose of general prevention it must be clear how the Norwegian government view these kinds of crimes, [my translation]”<sup>171</sup> which show that the courts wish to send a very clear message to

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<sup>169</sup> *RT-1989-445 (129-89)*, page 447

<sup>170</sup> Hart, ‘Positivism and the Separation of Law and Morals’

<sup>171</sup> *RT-1989-445 (129-89)*, page 447

new members of the jurisdiction as to how they deal with law-breakers, regardless of any excuse.

As for the sixth case, where the culture of the defendants can be said to have had implications for the sentencing of the case, the judges stated very clearly that this was not a new rule to be followed by the courts in the future. The implication of culture in this case was that the judges allowed for the 'use' of culture as a tool to reduce the sentences. The courts clearly considered the case of *RT-1984-1146* to be an exception to the general rule that you are expected to adhere to the law of the country you are residing in.

As for the thesis question of what implications culture has for legal reasoning when introduced as a mitigating circumstance in the criminal courtroom, the answer based on the cases discussed in this thesis is that there are none that are particularly ground-breaking. There are not many implications of the introduction of culture in criminal law, as the judges seem reluctant to let it be reflected in their legal reasoning. You could say that the main implication is that through the introduction of culture, the judges are expected to acknowledge it as a possible mitigating circumstance.

In the one exception, the extent to which culture seemed to be reflected in the legal reasoning in the case was marginal, as the defendant's received reduced sentences, but were in every way still as liable for the offence as they had been without the considerations of their culture made by the courts. This shows a possible implication in that the judges are able to allow culture to colour their reasoning, and thus the outcome of the case. However, based on the cases discussed in this thesis, they generally seem unwilling to allow culture to function as a mitigating circumstance in the criminal courtroom.

## 6.4 Theoretical implications

We saw in the previous two chapters that the judges for the most part seem to fall amongst the critics of multicultural theories. These critics argue that we cannot defend an act that is generally considered morally off (and for the purposes of this thesis; illegal) by stating that it was tradition or a part of our culture.<sup>172</sup> The case law studied in this thesis seem to back up

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<sup>172</sup> Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, page 255

this claim, as the defendants were not given any form of extenuating treatment based on these statements.

With regards to the main influence on this thesis; *The Cultural Defense* by Alison Dundes Renteln, I wish to point out her proposition that culture should qualify as a valid mitigating circumstance in criminal law.<sup>173</sup> It seems that Renteln's focus with *The Cultural Defense* is, in addition to shining the spotlight on the phenomenon, to showcase the unfairness of these cases and the prejudiced situations the defendants in such cases are finding themselves in. The case of *People v Kimura* and the likes are tragic, and Renteln is of the opinion that minority defendants in situations like Kimura's should receive more lenient sentences.<sup>174</sup> She is joined by theorists such as Elaine Chiu, who argues that the cultural background of the defendant should stand as a complete justification for a crime.<sup>175</sup>

This thesis has shown that academics such as Renteln and Chiu still have a long way to go in convincing the courts to allow culture as a part of legal reasoning. Their aim of an official cultural defence within the law seems less reasonable after seeing the general attitude amongst the courts in the case law discussed through this thesis, and it will be interesting to see whether more academics join their ranks in today's increasingly multicultural world.

As mentioned in the introduction to this thesis, the existing literature on the topic gives the impression that there is a vast plethora of cases where the cultural defence has been successful. In fact, it has proved very difficult to find recent cases in the United Kingdom and Norway where culture has affected the decision of the court, and I hope that this thesis may shed some light on the actual reach of the cultural defence in those two jurisdictions.

## 6.5 Limitations of the thesis and further research

The notion of the cultural defence is a very current issue, and increasingly so with regards to further escalations in immigration. As Jeremy Waldron and the advocates of the 'cosmopolitan cultural view' argue, the lines separating the different cultures of the world are getting blurred out, and as a result we are slowly diminishing our need to be placed within a

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<sup>173</sup> Renteln, *The Cultural defense*, page 187

<sup>174</sup> Ibid, page 191

<sup>175</sup> Chiu, 'Culture as Justification, Not Excuse'

certain 'cultural box'.<sup>176</sup> This will make the discussions around the cultural defence even more relevant, as some people will cling to their 'original' culture for dear life, while others will simply accept that the times are changing and that the separation between cultures may become less distinct.

The issue of culture meeting the law is a grand one, and in this thesis I have merely touched upon the surface. Ideally I would be able to spend more time working on a project like this, which would allow me to add more case law to the discussion in order to create a much broader image of the topic. Three cases from two jurisdictions have provided us with reasons to suggest that culture is not directly reflected in legal reasoning when introduced as a mitigating circumstance. If I had had more time I would have chosen more cases from the two jurisdictions, thus allowing me to quantify the findings and emphasise them further.

With regards to the Norwegian cases, there was not much variety amongst the offences, while amongst the British cases there was. This may be because Norway is a much smaller country with a lesser volume of immigration, and thus there are not as many criminal cases where someone from a minority background is being prosecuted. In the United Kingdom, on the other hand, they have seen a greater amount of immigration for a longer amount of time, and so it seems natural that the British case law is more varied and up-to-date.

The fact that the three British cases cover different legal issues and offences makes it slightly more difficult to compare the case law and find tendencies amongst them. However, it does allow for a broader view of the attitudes amongst the courts and their incline towards letting culture affect their legal reasoning. As for the Norwegian cases, the fact that they were all so similar makes it challenging to make a statement that speaks for the whole of the jurisdiction, as they were all covering the same offence and the same cultural claim (that the murders were committed in order to restore family honour). The only discussion we have regarding the cultural defence in Norway is based on cases involving honour killings, so it will be more correct to conclude that culture does not affect the legal reasoning in Norway with regards to cases involving honour killings, rather than stating that this goes for all case law where culture is involved.

The case of *RT-1984-1146* is interesting as it was the only case that allowed for culture to affect some of the legal reasoning. It was also the only case where an expert witness had been

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<sup>176</sup> Waldron, 'Minority Rights and the Cosmopolitan Alternative', page 762



brought in to advise the court on the cultural background of the defendant, something that seemingly had a great impact on the decision of the court. In future research it would be fascinating to try to find out if the defendants in the other cases may have been more successful in introducing the cultural defence had an expert witness been called upon to testify as to their culture. In the American cases *People v Kimura* and *People v Chen* the courts called upon expert witnesses in order to understand the cultural motive of the defendants, and in both cases the defendants were found guilty of a lesser crime and given minimum sentences.<sup>177</sup> An interesting future project would include a hypothesis regarding the effect of expert testimonies on the legal reasoning with regards to culture in future research.

Another possibility for further research is to discuss and analyse case law from one jurisdiction only. I have in this thesis covered cases from Norway and the United Kingdom, in order to get a broader impression of how culture may affect legal reasoning in the courtroom. For future research I believe it would be rewarding to go more in depth in a study of only Norwegian or British case law as opposed to a study across the jurisdictions.

## 6.6 Final remarks

In today's cosmopolitan world, with increasing numbers of immigration and issues as a result, it is not uncommon to feel sympathetic towards people who leave their countries in order to start new somewhere else. This has led to attempts to maintain as much as possible of one's cultural background, while still being pushed towards integrating with the majority culture. You would think that this tendency for sympathy would affect the courtroom as well, and specifically cases where a defendant's cultural background may have led him to act the way he did, even though it was not in accordance with the law.

This thesis has shown that, generally, the courtroom is hesitant to recognise this desire to show compassion, and that culture is rarely accepted as a mitigating circumstance in the criminal law. Based on a discussion of six cases from the United Kingdom and Norway, we have seen that culture does not seem to play a significant role in the legal reasoning of the courts. There does not seem to be any significant implications of culture being introduced as a mitigating circumstance in criminal court cases, other than the judges having to acknowledge the fact that it could potentially be one.

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<sup>177</sup> Dolan, 'Two Cultures Collide Over Act of Despair : Mother Facing Charges in Ceremonial Drowning' Lee, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?', page 942

The topic of the cultural defence is definitely a curious one, and it will be interesting to see how the increased scale of cultural diversity within a jurisdiction will affect the law. I believe the issue will become increasingly relevant for the discussion between multiculturalists and their critics, and will leave this thesis with a question from *Multicultural Jurisprudence*:

Does the idea of equal protection require identical treatment; or rather does it mean that a person must be treated differently in order to be treated equally?<sup>178</sup>

***Word count: 26 737***

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<sup>178</sup> Renteln (ed), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, page 337

# References

## Books & Chapters in Edited Books

- Osborn's Concise Law Dictionary* (Sweet & Maxwell 2009)
- Andenæs MH, *Rettskildelære* (2009)
- Baldwin JR (ed), *Redefining Culture: Perspectives Across the Disciplines* (Routledge 2006)
- Barry B, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press 2001)
- Bell DJ, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992)
- Berger DaT, Yoshitomo, 'Cultural Dynamics and the Unconscious Suicide in Japan' in D. LAaL (ed) *Suicide and the Unconscious* (Suicide and the Unconscious, Jason Aronson 1996)
- Bryman A, *Social Research Methods* (4th edn, Oxford University Press 2012)
- Deveaux M, *Gender and Justice in Multicultural Liberal States* (Oup Oxford 2006)
- Dressler J, *Understanding Criminal Law* (4 edn, LexisNexis 2006)
- Eriksen TH, *Hva er Sosialantropologi?* (Universitetsforlaget 2003)
- Green L, 'Internal Minorities and their Rights' in Baker J (ed) *Group Rights* (Group Rights, University of Toronto Press 1994)
- Haviland WA, *Anthropology* (Wadsworth Publishing 2010)
- Hussein R, *Murder in the Name of Honour* (Oneworld Publications 2009)
- Kymlicka W, *Multicultural Citizenship* (Oxford University Press 1995)
- Lee C, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (NYU Press 2003)
- Ragin CC, *The Comparative Method* (University of California Press 1989)
- Renteln AD, *The Cultural defense* (Oxford University Press 2004)
- Renteln ADaF, Marie-Claire (ed), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009)
- Shachar A, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press 2001)
- Swanson G, 'Frameworks for Comparative Research: Structural Anthropology and the Theory of Action' in Vallier E (ed) *Comparative Methods in Sociology: Essays on Trends and Applications* (Comparative Methods in Sociology: Essays on Trends and Applications, University of California Press 1971)
- Wikan U, *In Honor of Fadime* (Universitetsforlaget 2003)
- Wikan U, *Om Ære* (PAX Forlag 2008)
- Wong JT, J., 'Cultural Models of Shame and Guilt' in J. Tracy RRaJT (ed) *Handbook of Self-Conscious Emotions* (Handbook of Self-Conscious Emotions, Guildford Press 2007)

## Case Law

- Brown v Board of Education of Topeka* US
- R v Spence and Thomas* Criminal Appeal Reports (Sentencing)
- RT-1984-1146 (323-84) (Høyesterett)
- RT-1989-445 (129-89) (Høyesterett)
- R v R* UKHL (United Kingdom House of Lords)
- HR-1994-114-A (Høyesterett)
- LE-1994-100 (Eidsivating Lagmannsrett)
- Re A (Conjoined Twins)* 2 WLR 480 (Court of Appeal)
- Millberry* EWCA Crim (Court of Appeal Criminal Division)
- Misbruk av psykisk utviklingshemmet person* LE-00503
- R v Muhammed Ahmed* EWCA Crim (Court of Appeal Criminal Division)

*R v B* EWCA Crim (Court of Appeal Criminal Division)  
*R v Adeel Khan* EWCA Crim (England and Wales Court of Appeal)

## Government Documents

Statistics OfN, *Migration Statistics Quarterly Report: February 2016* (2016)

## Journal Articles

- Anderson ES, 'What is the point of equality?' (1999) 109 *Ethics* 287
- Arneson RJ, 'Equality and equal opportunity for welfare' (1989) 56 *Philosophical Studies* 77
- Bell DJ, 'Brown v Board of Education and the Interest-Convergence Dilemma' (1980) 93 *Harvard Law Review* 518
- Chiu DC, 'The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism' (1994) 82 *California Law Review*
- Chiu EM, 'Culture as Justification, Not Excuse' (2006) 43 *American Criminal Law Review*
- Coleman D, 'Individualizing Justice through Multiculturalism: The Liberal's Dilemma' (1996) 96 *Columbia Law Review*
- Delgado R, 'Explaining the Rise and Fall of African American Fortunes - Interest Convergence and Civil Rights Gains' (2002) 37 *Harvard CR-CL Law Review*
- Glick PaF, Susan T., 'The Ambivalent Sexism Inventory: Differentiating hostile and benevolent sexism' (1996) 70 *Journal of Personality and Social Psychology* 491
- Grønhaug R, 'Micro-macro Relations. Social Organization in Southern Turkey' (1986) 7 *Studies in Social Anthropology*
- Hart HLA, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593
- Henry PJ, 'Low-Status Compensation: A Theory for Understanding the Role of Status in Cultures of Honor' (2009) 97 *Journal of Personal and Social Psychology* 451
- Lee C, 'Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?' (2007) 49 *Arizona Law Review*
- Mitnick EJ, 'Three Models of Group-Differentiated Rights' (2004) 35 *Colum Hum Rts L Rev*
- Mosquera R, 'The Role of Honour Concerns in Emotional Reactions to Offences' (2002) 16 *Cognition & Emotion* 143
- Oberman M, 'Mothers Who Kill: Coming to Terms with Modern American Infanticide' (1996) 34 *American Criminal Law Review*
- Osch YV, Breugelmans, Seger M., Zeelenberg, Marcel and Böyük, Pinar, 'A Different Kind of Honor Culture: Family Honor and Aggression in Turks' (2013) 16 *Group Processes & Intergroup Relations* 334
- Panichas GA, 'The Absence of a Culture of Shame' (2003) *Modern Age* 3
- Phillips A, 'When Culture Meets Gender: Issues of Cultural Defence in the English Courts' (2003) 4 *Model Law Review*
- Renteln AD, 'Making Room for Culture in the Court' (2010) 49 *The Judges' Journal*
- Song S, 'Majority Norms, Multiculturalism and Gender Equality' (2005) 99 *American Political Science Review*
- Volpp L, '(Mis)Identifying Culture: Asian Women and the "Cultural Defence"' (1994) 17 *Harvard Women's Law Journal*
- Waldron J, 'Minority Rights and the Cosmopolitan Alternative' (1995) 25 *University of Michigan Journal of Law Reform*

## Newspaper Articles

Dolan M, 'Two Cultures Collide Over Act of Despair : Mother Facing Charges in Ceremonial Drowning' *Los Angeles Times* (Los Angeles February 24th)

## Online Databases

*LovData Pro*

'Multiculturalism' (2010) <<http://plato.stanford.edu/entries/multiculturalism> > accessed 05/03

Ancestry.co.uk, 'Khan Family Name' (2013) <<http://www.ancestry.co.uk/name-origin?surname=khan>> accessed 14/04/2016

## Published Research/Study Material

Grytbakk N-J, 'Kulturelle forholds betydning i norsk rett belyst gjennom rettspraksis i saker som gjelder æresdrap: Hvordan norske domstoler har vurdert kulturargumentet over tid.' (University of Oslo 2003)

Wang PS, *Domsanalyseoppgaver* (JUS3111 Formuerett - Kurs i Obligasjonsrett 2012)

## Statutes

The General Civil Penal Code - Straffeloven

Criminal Appeal Act

Lov om Sametinget og andre samiske rettsforhold

Sexual Offences Act