JLA FORUM

‘Community’ at the expense of ‘kinship’ in British courts

Melissa Demian

In February 2009, a complex and difficult case was brought before the civil division of the senior Court of Appeal in London. The appellant in this case, *AM v Local Authority, The Children's Guardian, B-M (Children)* ([2009] EWCA Civ 205), was the father of three children who had been removed from his and his wife's household by the local authority, and placed with foster carers. The foster carers had additionally moved house several times until they were satisfied that their location was unknown to their natal family, and the children's surnames were changed. The father was denied any further contact with his children. The children's mother was at this point in prison for having set fire to the family home in 2005.

The measures taken by the local authority were, in the estimation of both the original and the appeals court, unusually strong even for a child protection case. The reason for the severity of the original decision, subsequently upheld by the Court of Appeal, was that the children were held to be in immediate danger not only from their father, but also from their mother, her extended family, and potentially, their entire 'community'. This community in question was constituted, in the court's imagination, as all members of the Pathan ethnic group from Pakistan resident in the greater Leeds metropolitan area. And the reason the children were held to be endangered by contact with this community was that the wife of their mother's brother, identified in the court's anonymised decision as the 'intervener', was held to have 'dishonoured' the family. The source of the dishonour was the intervener's flight from the family of her abusive husband, who also ended up in jail after having caused the death of his first child. The arson in the family home had been one of several attempts to frame the intervener, presumably with a view to punishing her by discrediting her reports to police and social services, and regaining custody of her surviving child.

While undeniably disheartening, the case was also remarkable for the explicit way in which the presiding judge saw it as an opportunity to discuss a particular phenomenon vexing the British legal system as well as the public imagination. In the words of Lord Justice Wall, '[T]he underlying factual matrix of the case requires this court, in my judgment, to confront head on sordid criminal behaviour which has been identified by the wholly inappropriate oxymoron 'honour killings'' ([2009] EWCA Civ 205: 7). Lord Justice Wall was able to make this pronouncement in no small part because it was the testimony of expert witnesses, notably an Islamic scholar and a 'cultural expert' from an Asian women's NGO, that identified the case as one involving the concept of family honour, and the lengths to which a Pathan family would go to safeguard that honour.

My intention in this Comment is not to remark on the burgeoning issue of honour violence in British courts, as there are many others far more qualified than myself to do this. What interests me instead is the concept lurking behind the court's decision, and indeed behind the considerations of legal subjects as diverse as honour violence, the recognition of religious courts in the United Kingdom, and the advisability or feasibility of a 'cultural defence' in criminal law. The concept is community. In a manner analogous to the 'culture' of the cultural defence (Demian 2008), the idea of community has increasingly been used to cordon off the actions, beliefs or social organisation of minority groups in the United Kingdom. In line with Plant's (1978) critique of 'the uninterpreted use of community as a legitimating notion within the field of social policy' (1978: 80), I offer here a very preliminary investigation into the way community has recently been used in British courts to homogenise, and in so doing render intelligible, the actions or decisions of members of minority populations.

Community indexes a type of interest that can be imagined as free from the constraints of other interests that govern persons and their relations: neither entirely public nor entirely private, community has the capacity to appear in either form. It is held to be an extra-legal field, governed by sentiment, physical proximity or ideological concord, and at the very least 'norms', if not 'culture'. Lacey and Zedner (1995) have wryly observed that community can be mined for political value by either the Right or the Left: the former, because it imagines a more moral, orderly and harmonious society of the past (see also Cohen 1985: 101), and the latter, because it imagines a more just, compassionate and egalitarian society of the future. Community is where the two discourses meet – indeed they can overlap – and as Williams (1976: 76) once noted of community, 'unlike all other terms of social organisation (state, nation, society, etc.) it seems never to be used unfavourably, and never to be given any positive opposing or distinguishing term.'

This association of community with social relations in their ideal form is precisely the problematic I would apply to any consideration of its use in British legal contexts that deal with ambiguous units of social organisation,

especially those of minority populations. I choose three critiques of the community discourse to point to the concerns I wish to raise vis-à-vis the outcome of particular judgements appearing to depend on the presence or absence of an identifiable community. The first is Creed's (2006) exploration of community as 'modern pastoral', the abjected alter of city-dwellers, where community is an object of modernist desire because it appears to contain the promise of pre-modern face-to-face relationships as a therapeutic counter to the alienation and distrust of urban life. Creed identifies the vogue for 'community studies' in mid-20th century anthropology with the simultaneous depiction of peasant societies as both more authentic and more irrational and clannish than their urban industrial counterparts. This points to the second critique, exemplified in Lacey and Zedner (1995) and Bauman (2001), that the appeal of community stems in part from its perceived capacity to mitigate risk under conditions of post-industrial social and economic uncertainty. Lacey and Zedner (1995) note:

The idea of community, with its nostalgic evocation of a pre-modern world of fixed meanings, stable identities, and settled lives acquires salience in political rhetoric at precisely the moment of social development furthest removed from the conditions of pre-modern societies (Lacey and Zedner 1995: 307).

But perhaps the most salient critique for my purposes is that which focuses on the way that dispersed communities of interest are analogically associated with the face-to-face communities that urbanites are supposed to have lost. Young (1986) pointed out some time ago that community as an aspiration 'conceives that subjects no longer need be exterior to one another' (1986: 9). That is, the community concept seeks to obviate distinctions between subject positions through a teleology of perfectable understanding. In Young's account, community as ideology asserts that relations of domination, alienation and violence are outcomes of their mediation through the material and social technologies of late modernity. It is the identification of mediation with alienation (1986: 16) that poses the greatest problem for Young, because to achieve the unmediated relations of the communitarian ideal, all differences within groups seeking or asserting community would be intolerable.

Young's concerns point to two important reasons why a 'community' must be identified in order to authenticate judicial decisions that turn on social forms that appear to be restricted to particular groups of people in Britain. The first is fairly obvious: there cannot be discord within the cultural or ethnic group claimed, or authentication will fail because the group has demonstrated too much internal differentiation to claim a coherent culture in the discursive space of the court. But the second, of longstanding interest to anthropologists, is the fact that claims to cultural or national community are a product of media and mediation (Anderson 1981), not their antithesis. In

order to claim the kind of coherence required in a successful claim to community, the community must make its own mediation disappear through techniques of unity and solidarity.

For example, in *R. (on the application of E) v JFS Governing Body* ([2009] UKSC 15), the father of a 12-year-old boy took an independent school in north London, JFS, to court on grounds that its admissions criteria amounted to racial discrimination. JFS (formerly the Jews' Free School) required that applicants be Jewish according to Orthodox Jewish law: that is, that they be the children of mothers recognised as Jewish either through matrilineal descent or through an Orthodox conversion process. The boy's mother was a convert to Judaism, but her conversion had been effected through a Conservative (Masorti) rather than Orthodox synagogue. The boy was therefore deemed by the school to be not Jewish and ineligible for admission.

The United Kingdom Supreme Court found in favour of the father, but in doing so also found itself in the unenviable position of having to decide whether JFS was applying a 'racial' or a 'religious' test in its admissions criteria. Given that this very exercise required the court to confront directly the non-consensus among British Jews (and arguably Jews everywhere else) about whether Jewishness is a race or a religion, the court's decision refers to 'the Jewish community' eight times, and indeed invokes community as the very grounds on which the decision is based, by referring to 'concepts of inherited status and a descent-based community' ([2009] UKSC 15: 30). While much of the court's discussion turned on the issue of matrilineal descent, the issue of descent-based Jewishness was, for the judges, an issue of whether or not the Jewish 'community' was defined 'racially'. From the perspective of social anthropologists, for whom unilineal descent is no more and no less than a form of social organisation, the move to turn it into a matter of 'race' says a great deal more about the work required of the court in this case, than it does about the actual implications of Jewish reckonings of the way that Jewishness is transmitted intergenerationally.

The Supreme Court was asked to consider a charge of the racialisation of Jewishness by the boy's father, against the arguments of the school, the United Synagogue, and the Office of the Chief Rabbi, that the rule of Orthodox matriliney was a religious test – a complex one, to be sure, but ultimately religious in both origin and effect. In the process of being made to stand for an intelligible unity, a community such as 'the Anglo-Jewish community' invoked in this case often has the effect of more specific but less unifying relationships to disappear. I might call these relationships 'kinship', in one of its anthropological senses of a set of social obligations which a person may shoulder or reject, but cannot ignore. Kinship in this sense threatens the merging of subjectivities on which the community ideal is predicated, because kinship depends on differentiating persons sufficiently to establish or recognise a particular relationship between them. The kind of kinship subsumed in the community concept becomes, to paraphrase Joseph (2002), a

form of '[s]ocial difference [that] is again abstracted, appearing only in the market as the idiosyncratic desire of individual sovereign consumers' (2002: 162). This is not, I submit, the anthropologists' kinship, in which difference is precisely what makes particular relationships possible.

In a case I discussed in a previous essay (Demian 2008), *R v Sebastian Pinto, Sita Kisanga, Adelina Muanza* ([2006] EWCA Crim 749), three Angolan immigrants were convicted of the chronic abuse of a young girl in the care of one of them, Adelina Muanza. The detail of the case picked up and reported widely by the media was that Muanza and the other adults stated that the violence and deprivation inflicted on the child were an attempt to rid her of a possessing spirit that made her a kind of 'transmitter' of witchcraft. Community and culture had a very brief half-life in this case and the media interest that surrounded it: the director of the NSPCC invoked both in a statement on the case, and when attention turned to the practices of African evangelical churches in London, a number of pastors from these churches came forward to disavow the actions of Muanza and the others as being at all appropriate to an attempt at exorcism. Culture eventually disappeared from descriptions of the defendants' actions precisely because no community could be identified: culture is the capacity that communities are supposed to 'have' in order to demonstrate their communality, their concordance of perspective. But requiring that the actions of defendants be cultural can have the effect of composing groups without relationships either between or within them, since all that is required is that they have 'values', interests that stand prior to relations.

A community can make its interests knowable through the form of culture, as it has done in some 'cultural defence' cases, or decline or fail to do so, as it did in Pinto or in an American case from New Jersey reported by Levine (2003). An Orthodox Jew who had killed his children to prevent their being raised Christian by his ex-wife eventually pleaded guilty, because 'apparently he had learned that the Jewish community refused to support his depiction of Jewish law...Without the cultural requirement to explain his decision, Kostner became just another vengeful ex-husband who cared more about himself than his children' (2003: 65). The explicit withdrawal of support by a community prevented the defendant from rendering his actions culturally intelligible. As Amit and Rapport (2002) suggest, along with many of the other authors I have cited, community and the culture it encompasses is thought in late modernity to be the remnant of premodern solidarity, an 'elective identity in the private sphere' (2002: 82) that can be claimed against post-Second World War assertions of a universal humanity and universal values.

The community concept distils the local and the particular out of the translocal and universal by means of one of the most powerful and compelling of community's normative virtues: because it is supposed to be unmediated and undifferentiated, community renders our actions coherent and our intentions explicit. And it does so without any recourse to what

anthropologists might call kinship, which is to say, the actual recognition of difference. Bauman (2001) lays the renewed interest in community, culture, and other putative forms of unified interest that might be ‘recognised’ through appeals to various kinds of pluralism, at the feet of an educated elite that has adopted the ‘space’ of disengagement and non-commitment of the corporate sphere. ‘Engagement with the other,’ he observes, ‘unlike “letting the other be”, would cut into that space instead of adding to it’ (2001: 107). Even as courts in Britain strive in good faith to ‘recognise’ difference through appeals to community, community is at risk of becoming an instrument by means of which courts hold real difference at bay. The difference in question is that found within so-called communities, or what anthropologists have long documented as the distinctions within and between generations that enable the formation of relationships -that is, kinship.

References

- Amit, Vered and Nigel Rapport (2002) *The Trouble with Community: Anthropological Reflections on Movement, Identity and Collectivity*. London: Pluto Press.
- Bauman, Zygmunt (2001) *Community: Seeking Safety in an Insecure World*. Cambridge: Polity Press.
- Cohen, Anthony P. (1985) *The Symbolic Construction of Community*. London: Tavistock.
- Creed, Gerald W. (2006) ‘Community as Modern Pastoral,’ in Gerald W. Creed (ed) *The Seductions of Community: Emancipations, Oppressions, Quandaries*, pp. 23-48. Santa Fe: School of American Research Press.
- Demian, Melissa (2008) ‘Fictions of Intention in the “Cultural Defense”.’ *American Anthropologist* 110 (4), 432-442.
- Joseph, Miranda (2002) *Against the Romance of Community*. Minneapolis: University of Minnesota Press.
- Lacey, Nicola and Lucia Zedner (1995) ‘Discourses of Community in Criminal Justice.’ *Journal of Law and Society* 22 (3), 301-325.
- Levine, Kay L. (2003) ‘Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies.’ *Law and Social Inquiry* 28 (1), 39-86.
- Plant, Raymond (1978) ‘Community: Concept, Conception, and Ideology.’ *Politics and Society* 8 (1), 79-107.
- Williams, Raymond (1976) *Keywords*. London: Fontana. Young, Iris Marion (1986) ‘The Ideal of Community and the Politics of Difference.’ *Social Theory and Practice* 12 (1), 1-26.

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Comment on 'Community' at the Expense of 'Kinship' in British Courts

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This is an excellent piece, very well written. My only wish would be to extend Melissa Demian's last sentences. When she writes: 'Even as courts in Britain strive in good faith to 'recognise' difference through appeals to community, community is at risk of becoming an instrument by means of which courts hold real difference at bay. The difference in question is that found within so-called communities...', I would want to define this latter ('real difference') not in terms of kinship, as she does, and intergenerational differences, but the difference of individuality. Community is a rhetoric of homogeneity: individuality is the ontological reality of embodied difference.

The danger of community--and it becomes more so as 'community' and 'culture' threaten to become legal instruments--is that real (individual) difference is obscured and a politics of identity succeeds in ghettoising people in essentialist categories and classes that have no place in a free and open society. Paul Feyerabend (1995:152) said this most succinctly: 'There is no such thing as a "culturally authentic" suppression, or a "culturally authentic" murder. There is only suppression and murder, and both should be treated as such, with determination if necessary'.

'Culture' and 'community' should not be allowed to come between the individual and the protections and guarantees and opportunities of the liberal state. The law as an instrument of equality recognises Anyone as a global human actor whose local affiliations and lifestyle choices ('community' and 'culture') supervene neither upon his or her fundamental individual rights nor upon those of other individuals with whom he or she comes into contact.

Reference

Feyerabend, Paul .1995. *Killing Time*. Chicago: University of Chicago Press.

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Comment on ‘Community’ at the Expense of ‘Kinship’ in British Courts

Stephanie Riak Akuei

Melissa Demian has taken on an interesting topic in addressing the concept of ‘community’ in British courts. Her main argument seems to be that in a host of legal contexts cases adjudicated involving minority populations are subjected to relentless application of an ‘authentic’ undifferentiated notion of community, ethnic or otherwise, one with boundaries between itself and the other but no internal ambiguities, differences or distinctions. Moreover, courts avoid the otherwise necessary risk-taking of unravelling consummate ideologies to expose ambiguities and difference, whether social, cultural, racial or religious that ultimately would shed a different light on the outcome of judgements. Another key point is that the pre-modern notion of community is still left largely uncontested despite circumstances in which the virtue of being unmediated by certain cultural precedents cannot be assured, as demonstrated in examples incorporating representatives of ‘the community,’ witnesses or cultural experts.

Demian guides the reader through several critiques of the discourse on community to highlight her concerns about how cohesive notions of community have been invoked in legal decisions whether a community has been identified or not. I am not so convinced that references to ‘modern pastoral’ (Creed 2006), community as mitigating risk (Lacey and Zedner 1995; Bauman 2001) and urbanites’ lost sense of community (Young 1986) are that applicable to the current debate over community. Reference to Williams (1976: 76) that community ‘seems never to be used unfavourably, and never to be given any positive opposing or distinguishing term’ is valuable in that it resonates with analysis of similar legal contexts where community has been used as a medium for arbitrating the actions and behaviours of members of a particular minority population.

In my own cultural expert witness work I have been asked periodically by authorities and for legal purposes to assess the ‘role of the community’ or ‘response of the community’ in cases where there has been a breakdown of parental authority and child delinquency. In these it was not the Pathan or Jewish community but ‘the Sudanese community’ to which an un-interpreted versioning of community was applied. Merely by posing and requesting answers to these questions, there was a supposition that the exotic, ethnic and different (as minority) must also still have – if they ever did – a homogenising core answerable to the subject positions of actor members.

The author's linking of this use of community to kinship, however, is not always clear and occasionally contradictory. On the one hand, kinship is posited as the ultimate form of 'difference' but it remains unacknowledged within the concept of community, and within communities, by the British court system. Based on the main argument and supported by reference to Young (1986), kinship also equates with mediation as it is this social institution that in late modernity can be and often is subjected to 'relations of domination, alienation and violence' as the initial case of the Pathan family demonstrates. Yet, for such a practical discussion of the British legal system and judgements on minority cases, further interrogation of what is implicated in the relationship between kinship and the assertion of family honour would have been quite helpful. Similarly, the author does not extrapolate on connections between community, the safeguarding of family honour and risk associated with Pathan ethnicity in greater Leeds. A possible contradiction to the differentiating aspect of kinship is Demian's reference to 'ambiguous units of social organization.' The reference appears to be to kinship which the author claims the court does not sufficiently address because of its idealised notion of the relationship between community and social relations. As is stated, 'kinship threatens the merging of subjectivities on which the community ideal is predicated...'. At the same time, in the discussion kinship is never really defined as an institution other than to say that it represents 'the actual recognition of difference.' Also, one is left wondering where, in the author's eyes, the intersection lies between community, culture and kinship. In the legal realm, need these be mutually exclusive?

The role of the cultural expert is ultimately to testify as a 'witness' to culture and not argue with it, thus cultural witness testimony is also somehow aligned to an idealized concept of community. Community in this context is not necessarily undifferentiated but similar to Williams (1976) does rely on a positive interpretation; namely, the definition in anthropological and Weberian terms of community as a 'sense of belonging together,' based on solidarity and a shared identity, attributes that are also reflected in the notion of *gemeinschaft* (Brow 1990: 1). Demian's work also posits how powerful such testimonies can be, possibly to their discredit, for influencing the judicial system. Because disengagement is unfortunately a common response to complex cultural ideas and norms (reference to Bauman 2001), greater trust is placed in cultural defence in developing certain ways of thinking about community and culture within a structure that has few other methods for synthesizing concepts such as 'honour killings.' One might, then, give Lord Justice Wall and other judges credit for the very attempt at considering the notion of community in cross-cultural contexts. The problem that the legal domain with its own loyalties tied to a set of abstract principles faces is in how to comprehend cultural and social artefacts represented by minority populations if they are in a constant state of flux in confrontation with late modernity.

In sum, Demian's article provides a good argument for the need to examine the concept and application of community, and use of cultural defence, in the British legal system and in litigation spheres more broadly.

References

Brow, James. 1990. Notes on Community, Hegemony, and the Uses of the Past. *Anthropological Quarterly* 63:1-5.

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Comment on 'Community' at the Expense of 'Kinship' in British Courts

Katharine Dow

Melissa Demian's thought-provoking analysis illustrates a central characteristic of community as it is conceived of in British courts, and in the wider cultural milieu in which these institutions operate. Community is a tautological concept, often defined by reference to itself. This lends it authority, as it appears to have an inherent and essential identity. As Demian shows in her summary of critiques of the idea of community, anthropologists need to interrogate this concept and recognise the way it refracts our own hopes and fears for the world in which we live, and will come to live in the future. Community is a concept that can appeal to and be appealed to by both Left and Right, it may be mobilised to support visions of society that are utopian, dystopian and perhaps even heterotopian according to differing perspectives. No one may agree about what community is, but they seem to concur that it is, at least, a good thing. All this makes it a powerful tool in the hands of those meting out justice.

Demian's central thesis is that 'because it is supposed to be unmediated and undifferentiated, community renders our actions coherent and our intentions explicit'. Community is appealed to in sensitive court cases as a catch-all term to index cultural difference – which, most Britons agree, is

something that should be respected or at the very least tolerated, not least because of its apparently inherent nature. As Demian shows, this has the effect of drawing a veil over internal differences within communities, thereby perpetuating a vision of contemporary Britain that is less a melting pot and more a *mezze* of different communities living side-by-side. So while appeals to community may appear in part the result of a well-meant attempt at tolerating difference, it seems to me that also lurking behind this is anxiety about what happens when communities do not mix successfully. Community may represent a collection of co-existing, homogenous groups, but it also seems to index fear – of degradation, breakdown and, most importantly, difference. As she makes clear, community is not a politically neutral concept, but one with a great capacity for social critique. So, when judges and other commentators refer to community to explain (away) abhorrent or offensive practices such as ‘honour killings’, they may do so not so much to rationalise them, as to isolate – and insulate themselves from – the difference.

Demian correctly reminds us that recognising differences within communities is at least as important as recognising those between them. In doing so, she appeals to kinship, which she defines as ‘the distinctions within and between generations that enable the formation of relationships’. I would appreciate clarification on this point. Undoubtedly, a certain amount of differentiation is necessary in kinship – in order that people may be married, for example – but it seems to me that kinship is at least as much about creating and celebrating similarity as it is about recognising difference, at least in the British context. Indeed, one reason why communities are thought of as unified is the assumption that their members are related to each other. This is, as far as I can tell, also true of the cases outlined in Demian’s paper, in which the relatedness of kin seems just as taken for granted by those involved as the homogeneity of communities. Children may be taken away from their parents, but no one seems to be questioning the relationship – and thus similarity – between them.

Demian gives some tantalising glimpses of another facet to her argument, which I would be interested to see her explore further. In her references to both Bauman and Joseph, she hints at the role of capitalism in British conceptions of community, suggesting that judges are reluctant to stray into the messy differences that exist within communities due to an underlying belief in the sovereign individual. As she shows, social scientists’ increasing interest in community has in many ways gone along with an uneasy sense that society is atomised and individuals are alienated. So it is, perhaps, the individual consumer with his or her self-referencing needs that stands in contrast to community after all. This sovereign individual provides form to the concept by representing exactly what it is not. In other words, homogenous, unified communities and atomised, alienated individuals cannot be conceptually separated from each other. So, community may be universally thought of as good, but this goodness may not, after all, be freestanding.

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Comment on ‘Community’ at the Expense of ‘Kinship’ in British Courts

James Weiner

I think that Melissa Demian thoughtfully and artfully raises the judicial issue of community in this short piece. Here I will make three observations: 1) I also think, as Demian implies towards the end of the piece, that the twin concepts of community and culture are as inextricably linked judicially as they are anthropologically. 2) I have a rather different view both of how the community is brought into being in a judicially-constituted multicultural nation state and on the substantive aspects of community behaviour, opinion-formation and social integration that are implied in Demian’s portrayal of the judicial invocation of the community as her focus of critical scrutiny. 3) Following on from this second point, I do not necessarily concur with her rendition of a Strathernian/ Wagnerian concept of kinship and difference, and in fact I view the centripetal effects of kin differentiation and segmentation to be the most salient behavioural and communal properties of such kinship systems. I will expand on these opinions using my own experience analyzing Papua New Guinea social life and customs, and of the judicialization of Aboriginal culture and community, particularly in the context of Native Title in Australia.

1) Demian observes that writers such as Bauman (2001) “lay... the renewed interest in community, culture, and other putative forms of unified interest that might be ‘recognised’ through appeals to various kinds of pluralism, at the feet of an educated elite that has adopted the ‘space’ of disengagement and noncommitment of the corporate sphere.” But here I elaborate on one of Demian’s final observations concerning the differences found within communities. Although there is obviously a relationship between community and culture sociologically, there is no one-to-one relationship between the two, and certainly no self-evident causal or even emergent relationship between them either. Even in pre-colonial Papua New Guinea,

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where I conducted fieldwork among the Foi less than 27 years after their first effective European Contact, and where I assumed an isomorphy between a village, community and culture at the outset, there was marked intra-cultural and intra-linguistic variation even among as small a group of language speakers as the Foi (who numbered 4000 when I first arrived in 1979). Further, Foi villagers' external relationships with neighbouring communities possessing different languages and customs were essential to the internal economy and religious life of Foi villages.

In Australia, with far more traditional uniformity culturally across the continent (from my PNG perspective), there is nevertheless a number of levels at which Aboriginal people acknowledge degrees of inclusiveness, from the extended family, all the way up to large regional configurations oriented around the tasks of male initiation and the maintenance of religious narratives that cover large tracts of territory. With the widening of networks that have occurred more recently in even the remotest parts of the globe, these multiple levels of inclusion become more entrenched and proliferated, and this works to further erode our anthropological commitment to any simple correspondence between culture and community.

2) I believe that a gesture towards the opinions of some scholars such as Nikolas Rose (e.g. 2000) or anthropologists John Kelly and Martha Kaplan (2001), would have provided a more balanced view of what we could call the pathology of the whole community concept. I hasten to add, however, that this is implicit in Demian's entire comment. Rose, for example, sees community in Foucaultian terms as an artefact of governmental technologies of civic construction and management. Kelly and Kaplan see the community as possessing a "sinister life" (2001: 199), as for example when indigenism in Fiji is poised against the legitimate interests and citizenly aspirations of Fijian Indians. Here it is the policy and governmental machinery of the State that create important differences between the State and its non-monolithic citizenry. What are the effects of this progressive "uniformitization" of cultural "communities" on their own internal kinship-based regimes of differentiation?

In Australia, remote Aboriginal settlements in the Northern Territory are commonly labelled communities, and here the geographic and cultural discreteness of the settlement is taken for granted (even though Professor Jon Altman (2001) points out the bicultural (Aboriginal and non-Aboriginal Australian) composition of even the remotest of these settlements). But the making public of marked levels of family violence, child abuse, and alcohol and substance abuse in these communities prompted the previous Coalition government's Northern Territory Emergency Response, a joint Federal Police and Australian Defence Force venture to wrest back control of these settlements in 2007. While it only targeted the 13% of the Aboriginal population that lived in such communities in the Northern Territory, it is precisely in these remote communities that Aboriginal tradition, and law and custom, is considered by the Australian public at large (including its

anthropologists) to have still survived in its most undiminished form—an assumption that is now finally being publicly debated within Australian anthropology.

3) Demian says that “kinship depends on differentiating persons sufficiently to establish or recognize a particular relationship between them”. I agree—but the differentiating moment in creating kinship is very powerful indeed and includes within its own architecture the prefigured separation points for fragmentation, fission and segmentation of a kinship polity. These fracturings commonly occur more frequently when the kinship polity itself is subject to social, economic and political stress, such as is the case with kinship systems of indigenous and/or ethnic minorities within an encompassing nation state. In Native Title, Aboriginal claimants are obliged to make applications to the Federal Court on behalf of a group that, according to the Native Title Act (1993), must hold that title communally, on behalf of what Peter Sutton calls a “community of native title holders” (2003).

But competition for control of claimant group decision-making, as well as the prospect of lucrative financial deals with developers negotiating large-scale projects within the native title claim area, make these “fracturing points” very obvious, and fission and subdivision of native title claim groups, even within family groups, in the course of their application process is common. All this shows that those persons possessing a similar language and/or culture, or even inhabiting the same life space, may not be united by shared interests or experiences, and that the sharing of “culture” (a word that surely deserves the same suspicion that Demian has leveled at “community” itself) does not imply the emergence of solidarity in the social or political sense.

On the other hand, the indifferent judgments of the Australian Federal Courts on a number of native title applications since 1994 have probably done more to set a wide variety of base-line propositions for the nation at large (as opposed to simply its “community” of anthropologists) concerning Aboriginal placedness, territoriality, custom, law and patterns of occupation and use of country. Anthropologists often lose patience with the lack of sophistication of such judgments, their neutrality and lack of passionate commitment to the idea of human difference itself. I can live with that, however, because my job as native title consultant anthropologist these days is to see that people’s interests, not necessarily their cultures or their communities, are served as best they can by the process. Anthropologists will continue to be obliged to wrestle with the role of culture, cultural difference and the nature of the community, while the Courts will continue to do what they can to protect the rights and interests of citizens against the backdrop of such perceived contrast. Is a total fusion of these horizons absolutely necessary?

References

- Altman, J. (2001) “Stable Development Options on Aboriginal Land: The Hybrid Economy in the 21st century.” CAEPR Discussion Paper

No. 226. Canberra, The ANU.

Kelly, J. and Kaplan, M. (2001). *Represented Communities*. Chicago: University of Chicago Press.

Rose, N. (2000) "Government and Control". *British Journal of Criminology* 40: 321-339.

Sutton, P. (2003) *Native Title in Australia: An Ethnographic Account*. Cambridge: Cambridge University Press.

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REPLY

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In their insightful responses to my comment, all four authors point in different ways to the problematics of choosing to privilege one social unit over another as the object of analysis. This may be primarily a theoretical exercise for anthropologists, but it can have very real consequences for actors in the legal system. Because questions also arise in these responses about the relationship between, say, 'kinship' and 'culture', the respondents ask: why should one of these objects of analysis be more effective a tool for arriving at an appropriate legal decision than any other?

I am fully in accordance, for example, with Nigel Rapport's concern about ghettoising minority groups in Britain, which I suspect will be an inevitable side effect of courts' search for community. Already this is happening elsewhere in the legal system: the Solicitors' Journal reports that 'police in Teesside do not, as a matter of policy, allow South Asian officers to have access to files in cases of honour-based violence to protect them from possible pressure from members of their community' (24/03/2009). This extraordinary move on the part of a police department sends the unequivocal message that South Asian officers in Teesside (or anywhere else) are deemed so uniquely vulnerable to the mores and obligations of their putative community that they cannot be trusted to do their jobs if that community is implicated in a case.

But where Rapport would prefer a stronger claim made on behalf of the individual as against a homogenised culture or community, I might suggest

that there is more than enough emphasis placed on the individual/collective opposition in much of Euro-American discourse, both popular and scholarly. I am more interested in exploring the possibility of social relations that are actually analysable, rather than falling back on rhetorical and reified social units such as community. And it is precisely the 'underlying belief in the sovereign individual', as Katharine Dow identifies it in her remarks, that requires judges and other political actors to seek social units that appear to be made up of sovereign individuals who are collectively identified by common interests, a common religion, a common language, or a common culture. It seems the last thing they are looking for is the first thing an anthropologist would seek: a social organisation which would help to unfold the complexity of obligations that are grossly oversimplified in concepts such as, say, honour.

I use 'kinship' as a shorthand for indexing these obligations, and as a means of pointing to internal differentiation within families and wider social groups. Both Dow and James Weiner signal discomfort with the latter use of kinship. Whilst happy to acknowledge the 'Strathernian/Wagnerian' take on kinship with which I am charged by Weiner, I would actually point to deeper roots for an anthropological understanding of kinship as differentiation, through Schneider back to Lévi-Strauss and Fortes. Each time kinship has been periodically held up for scrutiny by anthropologists, we 'discover' again and again that even as people talk about kinship as a means of knowing to whom they are related and obligated, they are simultaneously talking about knowing from whom they are differentiated in order to recognise relations and obligations with particular others, as opposed to the world of as-yet undifferentiated others who are not kin.

This is why it is valuable to ask, as Stephanie Riak Akuei does, what difference kinship might make in a legal system as opposed to terms such as community and culture. I would start by observing, along with Weiner, that community and culture are not coterminous concepts. But they have had analogous effects in courtroom discourse, some of which I have detailed elsewhere (Demian 2008). Notable among these effects in British and other European courtrooms is the expectation that community and culture can both be used tools to explain in retrospect, or predict in prospect, a person's actions. One finds this effect most powerfully expressed in the experiences of anthropologists who have been asked to serve as expert witnesses, such as Good (2004) and Wikan (2002). And as Akuei herself notes, 'The role of the cultural expert is ultimately to testify as a "witness" to culture and not argue with it'. Culture has been made to serve a particular legal purpose before the anthropologist or other expert witness even begins to compose her report. In Good's analysis of the role of the expert witness, the moment such a witness is perceived as deviating from the role prescribed him by the court, the value of, and even basis for, his expertise can be systematically called into question.

I will freely admit that my preference as a social anthropologist is to treat kinship as if it were ethnographically observable, and culture and community as if they were discourses. This is a disciplinary privileging that I chose to

exercise in order to highlight the way in which British courts are also making deliberate choices when they privilege 'community' as a collective of interests or 'culture' as a parsing device through which to render people's actions intelligible. Used in this way, both community and culture are 'black boxes' to use Latour's (1987) term for processes whose conceptual, historical or technical complexity requires that they be quarantined beyond the need for (or possibility of) description.

In other words, efforts like Wikan's (2002: 87-88) careful dissection of the way the culture concept has been complicated by anthropologists' own deliberations of it are collapsed by the requirements of the court into a black box for which the input is the defendant's or appellant's actions, as well as the expert witness' testimony, and the output is the court's decision. Since 'everyone knows' what a culture is or how a community works, neither of these categories need be interrogated. But if the social organisation of a British minority group – or even, heaven forfend, the majority! – were taken seriously by the courts, then the recognition of internal differentiation might aid them in avoiding the kinds of egregious miscarriages of justice documented by Wikan in Norwegian and Swedish courts.

As Wikan illustrates with honour violence in Scandinavia, and as Weiner illustrates with native title claims in Australia, minority populations are increasingly required by courts to appear in the form of communities in order to stake particular claims – whether to ancestral lands or to the legitimacy of particular actions vis-à-vis their relations. And as these sharply contrasting examples point up, the category of community almost invariably constitutes these populations as a ghetto of irrational subjects who are incapable of (in Britain and Scandinavia) or disallowed from (in Australia) determining the shape of their own future. Such a future would, I submit, be one in which both minority populations and the courts in which their actions are adjudicated are able to recognise the social relationships through which people can lay claim either to common or to differentiated interests.

References

- Good, A. (2004) 'Undoubtedly an expert'? Anthropologists in British asylum courts. *Journal of the Royal Anthropological Institute* (N.S.) 10: 113-133.
- Latour, B. (1987) *Science in Action: How to Follow Scientists and Engineers through Society*. Milton Keynes: Open University Press.
- Solicitors Journal (2009) Honour killings judgement 'blows the lid off the cultural issue'. 24/03/2009, accessed on 27/08/10 at <http://www.solicitorsjournal.com/story.asp?sectioncode=103&storycode=13872>
- Wikan, U. (2002) *Generous Betrayal: Politics of Culture in the New Europe*. Chicago: University of Chicago Press.