

LEGAL PLURALISM IN THE UNITED STATES: A FANTASY? *

Jae-Hyup Lee **

Contents

- I . Introduction
- II . Legal Pluralism in the United States
- III . Court Culture as Manifestation of Bias
- IV . The Problem of Cultural Defense
- V . Conclusions

I . Introduction

The cultural attribute of American society is probably one of the most frequently discussed topics among American social scientists. From the early “melting pot” and “salad bowl” ideals to a recent discussion on the cultural pluralism and multiculturalism in a college curriculum, scholars (Gordon, Fischer, Sollors, Bloom, and Takaki among others) have paid much attention on the racial, ethnic, cultural, or religious mixture of the American people and its culture. It is no doubt that the contemporary American culture is a result of different

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** Professor in the College of Law, Kyung Hee University.

experiences of diverse ethnic groups that make up the American society.

On the other hand, however, the basic ideology which underlies social institutions, politics and the law in the United States has been strikingly uniform. The constant influx of immigration and mixture of cultures of different ethnic groups have not altered the American legal ethos much. In a sense, not everything added to the cultural melting pot is actually assimilated.

In a legal arena, with increased immigration from different nations, however, courts have been paying more attention to cultural diversity. In many instances, legal rules and immigrant culture clash in American courtrooms. Sometimes the values of a religious or cultural minority are incompatible with laws that reflect the values of the majority. The inevitable tension that results from trying to balance the need for unity with the desire for diversity has often been a matter for the courts. The connections between culturally rooted concepts of honor, shame, patriarchy, the treatment of women as property, and gender violence pose a dilemma for American courts, which find themselves having to mediate the contradictions between serving justice in a culturally diverse society and adhering to the requirements of a single standard of law.

This paper discusses whether legal pluralism exists in the United States. Specifically it looks at whether and how American jurisprudence embraces pluralistic idea. Regarding courts as a cultural arena for negotiating between dominant cultural values and those of subcultures, this paper aims to examine the degree to which American law can and should be modified to take into account foreign cultural practices. To

illustrate this theme, this paper presents a cultural critique of the use of cultural defense in American criminal proceedings as an example. It maintains that the effective use of the cultural defense depends on court's sophisticated understanding of the concept of culture.

II. Legal Pluralism in the United States

Legal pluralism can be defined as “the coexistence of different normative orders within one socio-political space” (Benda-Beckman 1). In U.S. law, the only recognized subset of law is the Indian law. The term “Indians” refers generally to the indigenous peoples of the continent at the time of European colonization. On the other hand, “Alaska Natives” and “Native Hawaiians” refer to peoples indigenous to the areas occupied by those named states. Federal law recognizes a special kind of sovereign authority in Indian tribes to govern themselves, subject to an over-riding federal authority. Indian tribes are considered by federal law to be “domestic, dependent nations.” This subordination to federal authority is said to be a “protection” from the power of states. Customs or decisions of tribal authorities are controlling in large areas of civil and criminal law, including questions of tribal membership, tribal property and tribal taxation, the form of tribal government, domestic relations and inheritance. There are three different types of Indian Courts or Tribunals in which Indians may be tried, i.e., Traditional Courts, Courts of Indian Offenses and Tribal Courts.

Other than this exception, American law does not formally take

cultural pluralism into account. There are no separate substantial legal rules that apply differently to a different group of people in the United States. Even the Indian law has a limited scope of application. Moreover the influence of Indian law to American jurisprudence has been minimal (Krakoff 1178).

For the most part, American courts assume a cultural homogeneity for purposes of applying one standard of law to everyone. The American criminal justice system, for instance, is committed to securing justice for the individual defendant. In the context of the criminal law, the ultimate aim of this principle of individualized justice is to tailor punishment to fit the degree of the defendant's personal culpability. The ideal of impartiality suggests that all moral situations should be treated according to the same rules. However, at the same time, by claiming to provide a standpoint which all subjects can adopt, it denies the difference between subjects.

Courts' usage of key terminology within the cultural pluralism debate has not been consistent. American courts interchangeably use the cultural identity and the ethnic identity without clear distinction. The cultural identity is generally broader concept than the ethnic identity. However, as Barth aptly illustrates, culture is intensely intervened in the arena of political process when the ethnic identity is formed and the behavior based on such identity is manifested. In addition, the cultural defense has been frequently introduced in the context of the criminal conducts of foreign immigrants. In this paper, I am not going to press upon the strict conceptual differences of these terms. Rather, I will loosely use them as they are commonly adopted by courts.

III. Court Culture as Manifestation of Bias

. The failure of American courts in incorporating cultural pluralism can be explained in many ways. I would like to demonstrate two aspects here: structural and psychological. Ironically these legal mechanisms that have originally been developed in to ensure plurality have produced quite opposite effects.

1. Structural Aspects

Let us start with examining actors involved in litigation. Besides disputing parties, who are not necessarily legal professionals, a variety of professionals and nonprofessionals participate in the court proceeding. Judges, lawyers for the plaintiff (or prosecutor) and the defendant, and the juries (if the defendant opted for the jury trial), together with witnesses (both lay and expert) actively interact with other. They form a distinctive form of courtroom culture and the way of thinking.

One of the main contributions of anthropology or sociology has been to demonstrate the profound manner in which a person's culture shapes his worldview. The term used for this process is called enculturation or socialization. Socialization shapes the way individuals perceive reality, and thus guides their actions. If the legal system is to understand what motivates the actions of another, it must understand that person's culture. However it is often hard to characterize or define culture because the cultural aspect is so dynamic.

Professionals

Judges and lawyers are the main professional actors in the process. Cultural characteristics of the court are mainly established by professionals, though influenced to some degree by non-professionals. When the judge and the judged have experienced different processes of enculturation, judicial bias is sometimes unavoidable. The invasion of constitutional rights is least likely to encounter judicial resistance when judges perceive the victims to be markedly different from themselves (Karst 257). A judge who is raised within the mainstream culture will perceive social reality differently from a defendant who is raised within a subculture. In addition, socialized differences inhibit the judge's ability to judge fairly when he or she cannot perceive social reality in the same way as does the defendant being judged. The judge, in evaluating the facts of a case and the application and construction of the governing legal doctrine, will interpret them according to his or her own perceptions and not those of the defendant (Lam 50).

As holders of elective or appointive offices, judges and prosecutors may be motivated to view the stake from the frame of reference of a particular political or ethnic group. Although the defense counsel is more of a free agent, he can view his stake in the preservation and maintenance of the existing socio-cultural order more in the light of his own personal inclinations. Since the entry requirements into the legal profession include graduation from an accredited school of law and passing of a state bar examination, the professional members of the courtroom culture all undergo a similar enculturational experience regardless of their courtroom role.

Cultural process produces unarticulated assumptions and self-fulfilling expectations about people who are different, and those assumptions and expectations can affect the behavior of legislators and judges alike. When identity becomes a legal issue, the legal institution adds another layer of power relationships to the dynamics between majority and minority groups (Lam 54). Lawyers and judges constitute themselves in the course of defining others. When lawyers and judges neglect the dynamic negotiations over questions of identity, and treat identity as simply something that exists innately and can be uncovered rather than forged and invented, they risk producing not only unfortunate results, but also unconvincing reasons for the results. The use of a specific notion of identity to resolve a legal dispute can obscure the complexity of lived experiences while imposing the force of the state behind the selected notion of identity (Minow 105). When the instrument for excluding a group is the law, the hurt is magnified, for the law is seen to embody the community's values.

Non-professionals

While influence of the non-professionals on the courtroom culture is largely passive, it is nonetheless real, and ranges in degree of effectiveness from high for the juror to low for the witnesses and defendant. Cultural characteristics of jurors are thus important. Ideally the jury panels represent ethnic, economic and sociocultural cross-section of the population in the court's jurisdiction. However the results of the jury paneling and selection show that it is not always the case.

Although elaborate procedural rules have been developed to ensure due process and impartiality in forming a 12-member jury, they fall

short of realizing pluralistic and democratic ideals. First, a random selection from the voter registration works in favor of property owners or persons with a high degree of residence stability. Second, ethnic minorities with a low tendency to exercise suffrage are underrepresented on the voter rolls. Third, certain occupational categories are either excluded from jury panel automatically or usually excused from service because of their public nature of service, such as members of the legal profession, law enforcement officers, holders of elective public office, active medical practitioners, clergymen, and public school teachers. Because of these factors, the middle-aged to elderly, middle-class, ethnic and cultural majority tend to predominate on any jury panel. The right to exercise a limited number of peremptory challenges further increases the diversity, since each challenge of a member of an underrepresented group decreases the relative representation of that group on the panel (Swett 97).

2. Psychological Aspects

Justin Levinson has stressed the powerful cognitive forces that jury duty triggers in citizens. He argues the premise that jury members import community norms onto the jury trial falls short of reality (1060). Assuming or hoping that cultural diversity accurately shapes decision-making in the legal context ignores the cultural context created by the law.

Many scholars have commented on the importance of a variety of roles of the jury and the elaborate process of jury selection manifests the assumption that juries bring to bear community values on their

decisions. Those who embrace the role of diversity in decision-making assume that people of different backgrounds contribute different perspectives to a jury (Van Dyke 23). This assumption is supported by many psychological studies that members of different cultural communities, both within the United States and around the world, perceive the world differently relative to one another in systematic and predictable ways.

However, when judges decide cases, they claim their decisions are compelled by the law. The main standards against which a defendant's actions are judged are those of "the reasonable person." But it is precisely this idea of reasonableness that lies at the heart of the conflict. The reasonable person concept as adopted in American court does not allow cultural diversity as it is actually based on a specific cultural tradition. Although jurors are protected from being excluded from juries based on race or gender, the "reasonable person" view holds that particular jury decisions are not impacted by the diversity of the jurors. More specifically, the view holds that reasonable persons will decide cases in the same way no matter who they are. Critical Legal Studies writers argue, that judicial decisions cannot be the self-contained models of reasoning that they pretend to be, but instead, they must rest on grounds outside of formal legal doctrine, grounds which are ultimately political.

Placing people on juries operates as priming the set of knowledge constructs that affect decision-making. By the time the trial is finished and the jury retreats to deliberate, scores of societal notions about the law that she has encountered have been activated. The law carries with it a unique set of norms and beliefs. It is this set of norms and beliefs

that is triggered when legal priming occurs. It is this set of beliefs, mixed with biases that accompany their various delivery mechanisms, that in the jury context clashes with the preexisting set of values and experiences each juror brings (Levinson 1070).

The cultural diversity of jury composition does not seem to contribute much to the legal pluralism because the law setting itself provides the cultural bias. The legal prime alters diversity effects because jurors invoke shared constructs about the law that are filled with biased information, including stereotypes. Therefore “thinking like a juror” means triggering cognitive patterns that deviate from typical patterns of thought (particularly in minority cultural communities), then the legal prime has impacted the role of diversity on juries. As a result, potentially the legal prime could trigger “majority” thinking patterns in underrepresented communities, such that minority members conceivably could unconsciously discriminate against members of their own community (Levinson 1074).

IV. The Problem of Cultural Defense

1. The Concept

Another area of culture and law as it relates to legal pluralism is so-called “cultural defense.” A cultural defense holds that persons socialized in a minority or foreign culture, who regularly conduct themselves in accordance with their own culture’s norms, should not be held fully accountable for conduct that violates official United

States law, if those individuals' conduct conforms to the prescriptions of their own culture (Norgen and Nanda 296). It significantly entwines cultural identities with individuals' responsibilities rather than with groups' rights (Torry 127).

Cultural factors can be used to reduce charges or mitigate punishment by establishing the defendants' state of mind, situation and perceptions, and extenuating cultural circumstances contributing to provocation or diminished capacity. While no jurisdiction has recognized the cultural defense formally, there are a growing number of cases across the United States where defendants have introduced, and/or prosecutors and judges have been receptive to, cultural evidence proffered as a means either to reduce or to avoid criminal sanction.

The logical justification of the cultural defense has two aspects: cognitive and volitional. Cultural defense in a genuine sense of the term covers both. Relevant court cases have shown that the court has used two aspects without formulating strict theories to account for. Court seems to weigh volitional aspect more in the case of murder.

The cognitive aspect of the cultural defense has it that the defendant should not be held responsible when she was either not aware that her conduct is contrary to the law or her conduct is different from the one that is prohibited by law. This view is somewhat similar to a traditional 'mistake of fact' defense. For example, a recent Hmong immigrant defendant knew that rape is a criminal offense but he believed that his conduct does not amount to rape in his own culture (*People v. Moua*). Or a Yoruba woman who made scars in her son's face tattooing tribal symbols would have no

idea that she can be charged with battery (Renteln 483). In all these cases, whether the defendants had a free will is not a matter of concern because they would not violate the law in the first place if they knew their behavior was against the law. Therefore from this cognitive angle, court can allow the cultural defense for the first offense only. In this way, court is sending notification or warnings to the immigrant community that similar offenses will not be tolerated later.

The volitional aspect has it that the defendant is compelled to behave a certain way due to cultural influence even though she is aware her conduct is against the law. This view is based on a deterministic perspective of culture: culture is a program that controls human behavior and human being is a prisoner of culture. Culturally compelled actors face a choice of complying with the law or breaching a cultural dictate. Cultural dictates in the end prevail, as the price of disregarding them exceeds the costs imposed by legally enforced penalties, e.g., losing an actor's subcultural identity (Torry 128). Or a cultural dictate may produce an action automatically. Viewing from this volitional angle makes the cultural defense similar to traditional defenses such as insanity or diminished capacity.

There are a variety of contexts where the cultural defense has been used in courts. For example, an Eskimo man is acquitted of a conviction of child molestation while swatting at the crotch area and pulling down the pants of his grandson because his behavior had no erotic content but, according to the Eskimo culture, was designed to teach boys to respond quickly to adversity (*State v. Jones*). In another context, a Korean American woman who was charged with bribery of an IRS officer introduced the cultural defense that providing "thank

you money” is customary in Korea (*U.S. v. Yu*). The court rejected to accept such defense because at the time of her offense, she had spent 12 years in the United States, was a naturalized citizen, had received a college education in the United States, and was a certified tax preparer. Some cases are more serious than others but the majority of these cases involve behaviors of colored immigrants including Asians. This is just one area that reflects the perspective of the mainstream American society that the cultures of these colored immigrants are fundamentally different from theirs.

However, the notion of cultural defense conflicts with the Western legal assumption that all persons are free to make and act upon decisions, limited only by physical coercion or the extremes of mental duress. Therefore the majority of courts in the United States have had a hard time accepting cultural defense arguments because they view a major function of the law to be the laying down of a common set of values necessary to maintaining social order.

There are three basic schools of thought about how to use a cultural defense at trial. First of all, there is full use, where the defendant’s cultural background is an affirmative defense. The second school of thought completely rejects culture as having any relevance to a criminal case and asserts the concepts of “ignorance of the law is no excuse.” The third school of thought calls for an integrated use, where the defendant’s cultural background is integrated into more traditional defenses at trial such as intent, mistake of fact, reasonableness of fear or provocation (Lee 25).

2. Critiques

Some of the problems inherent in cultural defense debate is the concept of culture itself. The most traditional definition of culture, which is used by most courts, is anthropological constructions such as “rituals,” “customs,” “native practices” and “traditions.” Early generation of anthropologists believed the existence of “authentic culture,” to which all members of a given society subscribe. According to them, culture is manifested as a holistic system of essential meanings that is independently reproduced apart from economics and politics.

However another important interpretation of culture emphasizes the external forces that engage in the process of development and self-definition. Modern anthropologists have paid attention to how groups mobilize, shape, and reshape cultural repertoire and are in turn shaped by them. Nagel conceives of culture as a socially constructed phenomenon “continuously negotiated, revised, and revitalized, both by ethnic groups themselves as well as by observers” (153). Similarly, Swidler conceives of culture as a “toolkit” that individuals draw upon as needed, not a fixed set of values and norms that affect an individual in every setting. Restricting culture as a combination of customs or traditions would prohibit the realization that culture can encompass information about social context that implicates an individual’s relationship to the dominant community or the state (Volpp 1554). Modern anthropology tends to understand culture as a reaction to major changes in everyday conditions, rather than independent and *sui generis* system or provinces.

In addition, culture is differently experienced and contested within communities. As Giddens has reminded us, what must be grasped is not how structure determines action or how a combination of actions makes up structure, but rather how action is structured in everyday contexts and how the structured features of action are thereby reproduced. In terms of cultural defense, the courts should be aware that members of the culture may utilize differently, along the lines of age, gender, class, race, or sexual orientation and that defendants may use whatever means necessary to explain their actions.

Therefore when using cultural defense, criminal behaviors of immigrants must be analyzed in a sociocultural setting in consideration of the holistic and contextual characteristics of culture. In this connection, contextual analyses should be used when considering how culture interacts with the multiple pressures which subordinate individual defendants. For example, the parent-child suicide in *People v. Kimura* is not the result of women enacting a dictated response to “shame,” but rather the result of women experiencing extreme marginalization and abuse, and exercising agency within that context. In other words people are not subsumed by culture, but are in active negotiation with it (Volpp 1590).

An emphasis on the indeterminate is an approach that fits more closely to the changing image of culture. Culture is not simply a personal attribute reducible to psychological assessment but a range of difference for which a quest for common process is both the distinctively American way to render groups compatible and leave the range of diversity interact that is true to the quality of culture itself. Courts would then be saying to the culturally distinctive defendant

that they must engage in the process of choosing which cultural features to retain and which to drop. Culture, then, becomes a repertoire, an array, an entity reaching simultaneously in multiple directions but one that may be contained by process more than a definitive list of acceptable features. By seeing culture itself as ambivalent and uncertain, courts could probe for the fuller cultural meaning of a defendant's act, eliminate the stereotype of other cultures as determinate and unvarying, and construct a more discriminating base for accepting or rejecting in American repertoire of permissible acts (Rosen 602).

Furthermore, cultural defense as adopted in American courts assumes "American culture" as opposed to the minority or immigrant culture. The concept of cultural defense, therefore, regards that on the one hand the defendants' behaviors can be affected by their own culture, but on the other, that the American law is a neutral norm that does not contain any cultural elements. This presumption needs to be challenged.

V. Conclusion

The basic assumption of this paper is that the relationship between law and culture is a two-way relationship. Not only does culture provide a tool for the study of law, but also that law provides a tool for the study of culture. The relationship between law and culture is so close that it may be more accurate to speak of law as an integral part of culture, reflecting the same assumptions, values, and interests

reflected in every other part. At the same time, laws are never stable and self-evident. They are constantly being contested, interpreted, and manipulated.

Examination of the relationship between law and culture and the culture clash within the context of legal proceedings provides excellent setting for a fundamental critique and challenge against a core American culture and value. In a culturally diverse society, there is an inherent conflict between the unity required to govern, the need to honor diverse traditions and practices of cultural groups, and the recognition accorded to autonomous individual actors. So far I have discussed the legal pluralism and the cultural defense based on the assumption that the different actors of a society utilize their cultural capital in litigation. In this context, the court functions as a field of cultural practice where the values of mainstream culture and those of minority culture interact with each other. However, whether the court will be an effective forum for cultural practice needs to be examined further.

Cultural defense tackles with essential tensions between law and culture. By definition, law controls, regulates, manages, and defines activities and relations, whereas culture, by its nature, violates and pushes boundaries, striving for diversity and freedom. Because inherent conflicts exist between law and culture, it would be very difficult for a court to resolve the contest of cultures. At the same time, however, it will be inevitable to see more and more clashes of cultural practices and traditions in the era of globalization.

American jurisprudence has not embraced the idea of cultural pluralism. The procedural guarantee to include voices and perspectives

from diverse groups has acted to produce unintended results. The increased use of cultural defense has not fundamentally altered the courts' positions. More attention should be paid on whether the cultural defense can be accepted to the American jurisprudence. However we should also seek a broader inquiry toward crossing the borders between majority values and minority or foreign values, and lastly, culture and law. To discuss the debate over the cultural defense, therefore, will show how far America can go in testing the limits of its social institutions and its multiculturalism.

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Abstract

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This paper discusses whether legal pluralism exists in the United States. Specifically it looks at whether and how American jurisprudence embraces pluralistic idea. Regarding courts as a cultural arena for negotiating between dominant cultural values and those of subcultures, this paper aims to examine the degree to which American law can and should be modified to take into account foreign cultural practices. To illustrate this theme, this paper presents a cultural critique of the use of cultural defense in American criminal proceedings as an example. In sum, American jurisprudence has not embraced the idea of cultural pluralism. The procedural guarantee to include voices and perspectives from diverse groups has acted to produce unintended results. The increased use of cultural defense has not fundamentally altered the courts' positions. The effective use of the cultural defense depends on court's sophisticated understanding of the concept of culture.

Key words: pluralism, jury, cultural defense, multiculturalism, American culture

