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CULTURAL DEFENSE -- A LEGAL TACTIC

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**BODY:**

Kong Moua, a Hmong tribesman from the hills of Laos, drove to the Fresno City College campus looking for his intended bride. Locating her at her job in the student finance office, he spirited her away to his cousin's house.

Kong Moua called it *zij poj niam*, or "marriage by capture," in his culture an accepted form of matrimony akin to elopement.

However, his "bride," also a Hmong but more assimilated into American culture, called it kidnaping and rape. She also called the police.

Kong Moua's lawyer, in negotiating a plea to the lesser charge of false imprisonment, introduced literature documenting the Hmong marital customs.

After reading the material, the judge sentenced Kong Moua to 120 days in jail and fined him \$1,000, with \$900 of that going to the victim as reparations -- far less than the state prison term he could have gotten for kidnaping and rape.

**Increasingly Used**

The would-be bridegroom benefited from a "cultural defense" or, as some attorneys prefer to call it, "cultural evidence," a rare but increasingly employed legal tactic to help immigrants who run afoul of unfamiliar U.S. laws.

A cultural defense argues that someone reared in a foreign culture should not be held fully accountable for conduct that violates U.S. law but would be acceptable in the country or culture where he grew up.

In very rare instances, a cultural defense can lead to acquittal in crimes where intent or motivation is a key element, such as murder. But most often, lawyers and judges say, it helps to reduce the charge an immigrant faces or to mitigate the sentence.

### Wave of Popularity

Cultural defense is riding a new wave of popularity because of the huge influx of Asians from diverse cultural backgrounds into the United States in the last 15 years. The immigration has introduced to American courts such foreign customs as the Hmong *zij poj niam* and the Japanese *oyako-shinju*, or "parent-child suicide."

European immigrants' need for cultural defense is minimal, experts say, because the laws of their homelands spring from the same roots as U.S. laws, and because they have immigrated in large numbers for many years and now assimilate rapidly into American culture.

"I think more and more cases will arise where the issues of ethnicity are going to reach court because people are clinging far harder to traditions than they used to," said Deirdre Evans-Pritchard, a British-born USC instructor with degrees in anthropology and folklore. Examples of cultural evidence used recently across the country in attempts to reduce charges or sentences include:

\* A Nigerian insurance salesman in Houston, accused of child abuse for hitting his misbehaving nephew and then putting pepper in the boy's abrasions, argued that the practice was acceptable discipline in his native Nigeria. He got probation.

\* At Carson High School near Los Angeles, a Vietnamese family avoided child abuse charges after a friend explained that a boy's wounds were the result of *cao gio*, or "coining," a folk remedy to cure headaches by massaging the back and shoulders with the serrated edge of a coin.

\* A Mexican woman in Los Angeles was accused of child abuse and had her children taken away when she beat her 15-year-old son with a wooden spoon and bit him to punish him for taking money from her purse. She argued that what she did was acceptable discipline in Mexico, and avoided serious penalties. She was ordered to get counseling.

\* Immigrants from Senegal arrested in New York City for street peddling without permits claimed the permits were unnecessary in Senegal. They also argued that they were unfairly singled out by police as "dangerous" and prosecuted criminally while other peddlers were given civil citations. The case against them was dismissed.

\* In San Francisco and Los Angeles, two young Japanese mothers killed their children after learning that their husbands were having affairs. They were allowed to plead guilty to manslaughter after experts asserted that *oyako-shinju*, or parent-child suicide, is frequently practiced in the women's native culture by wives humiliated by a husband's straying.

### Mitigating Circumstances

Judges and lawyers agree that cultural defense is most widely used -- and most generally accepted -- in explaining a defendant's state of mind or his lack of intent to commit a serious crime, which is helpful in mitigating charges or sentences.

Hardly any believe that it can be used to acquit a defendant, excusing him completely for violating a U.S. law.

"The essence of criminal offense has always been 'an evil hand and an evil mind,' " said Michele Maxian, director of special litigation for New York City's Legal Aid Society, which represents most of the city's criminal defendants and handled the Senegalese cases.

"Cultural defense proves that the person did not have an evil mind when he did it," she said. "So cultural defense is in keeping with a long history of criminal jurisprudence, and I think it's great."

"In a special-intent crime like murder, I think cultural defense could go all the way to acquittal, but as a practical matter I don't think that will happen," said Fresno Superior Court Judge Gene M. Gomes, who handled Kong Moua's case.

"Even without intent (to commit a certain crime), if an act is harmful to society, we are not going to condone it," Gomes said. "We can't have Robin Hoods breaking the peace no matter how pure their motivations are."

In Miami, Dade County Public Defender Bennett H. Brummer, agreeing that complete acquittal is extremely rare, said his office once did win a "not guilty" jury verdict, however, for a Greek immigrant charged with murder.

"He murdered a fellow who had raped his daughter," Brummer said. "The cultural aspect of our defense was that this was a question of honor to him and he had to avenge his daughter. The jury acquitted him."

#### Witchcraft Case

An unusual witchcraft case in Oakland illustrates how cultural defense can be used to win reduction of both the charge and the sentence.

Although prosecutors twitted him about his "voodoo" case, Alameda County Assistant Public Defender Michael Ogul took it seriously when his client, an Ethiopian national, explained that he shot a woman to defend himself against her witchcraft.

The defendant, a revolutionary from the Eritrea region of Ethiopia, claimed that he suffered headaches and stomachaches because an Ethiopian woman he had dated was a *bouda* controlled by the Evil Spirit and inflicting pain on him. After begging her several times to stop, he said, he went to her apartment with a gun, intending only to frighten her, but shot her twice.

Problems for the attorney raising a cultural defense, Ogul said, include proving that the defendant's explanation is a valid belief or custom in the culture where he grew up and proving that the defendant did believe or practice the custom.

Ogul presented testimony from UC Berkeley anthropology professor William Shack, who said Ethiopians from the Eritrea area do indeed believe that the Evil Spirit inflicts pain through a woman selected as a *bouda*.

A psychologist also testified that because of the defendant's war-torn background he was unusually likely to interpret physical pain according to the culture of his upbringing.

#### Lesser Charge

Apparently swayed by the testimony, jurors decided that the man had no intent to kill his victim, acquitting him of attempted murder. They found him guilty of the lesser charge of assault with a deadly weapon.

Alameda County Superior Court Judge Richard A. Hodge sentenced the man to seven years in prison -- five less than he would have received for attempted murder.

Hodge, unlike many judges, said he had no hesitation about permitting the anthropologist's testimony.

The evidence "was important to show two things -- to show whether his mental state was diminished by his belief and to show that he was not making this up," Hodge said. "I thought it was similar to having a psychiatrist testify if a guy has a mental disease manifested by believing he's Jesus Christ."

Fresno's Judge Gomes, who has dealt with several cultural defenses in plea bargains for Hmong defendants but tried none before a jury, said he would have difficulty excluding any cultural testimony or information that could help him understand the person's behavior.

"I don't think a judge can ever get enough information when he is sentencing someone," Gomes said. "I am surprised there are judges around who won't allow cultural defenses at least at the time of sentencing. It appears to me to be extremely relevant."

Gomes said he permitted a Guatemalan to plead guilty to manslaughter rather than murder for slitting the throat of a friend who had been savagely beaten by five men.

"It was a heinous crime but not a heinous motive," Gomes said. "As a guerrilla fighter, he thought the guy was dying and that he was giving him a painless death."

#### Value Systems

"If I had not heard that," Gomes said, "I might very well have sentenced this man for an act motivated by our very different set of values."

He gave the man 11 years instead of a possible life sentence for murder.

In another Hmong "marriage by capture" case, this one in St. Paul, Minn., Ramsey County Assistant Attorney Daniel Hollihan, decided not to take the case to trial.

With the help of St. Paul's Southeast Asian Refugee Study Project, Hollihan learned that in the Hmong "marriage by capture," the woman or girl, often under 15 years of age, must protest her capture by insisting "No, no, I am not ready" to be considered virtuous and desirable. If the man does not take her by the hand and lead her off to his own home, he is considered too weak to be a husband.

The prosecutor decided that it would be almost impossible to convince a jury that the girl really meant "no" and had been taken away against her will and raped. So he opted for a plea bargain.

"I went to the victim's family and said, 'How would you resolve this in the old country?' " Hollihan said.

"The victim's aunt, who spoke English, told me \$3,000 and no jail, \$2,000 and 60 days, or \$1,000 and 90 days, to restore the family honor and pride," he said.

The defendant was allowed to plead guilty to sexual intercourse with a child under the age of 12, and fined \$1,000 with no jail time.

When a defense lawyer does take a cultural defense to trial, said Los Angeles attorney Charles T. Mathews, "it has a very, very important role with the jury because juries have the ability to ignore the law and do what is fair."

Mathews won acquittal for two Korean youths charged with rape by showing that, under Korean cultural standards, the women had tacitly consented to having sex by remaining silent and by assisting in disrobing.

#### Night of Drinking

He said the young Korean women met his clients in a nightclub, drank heavily and accompanied them to two other nightclubs, continuing to drink and never complaining about the men to security guards. He said they willingly accompanied the men to the beach at Malibu where the sex occurred.

"It is very, very improper for a Korean girl in her culture to go to bars and drink and carry on with men alone," said Mathews, whose wife is Korean. "So I was asking the jury to translate American party attitudes into Asian."

Perhaps one of the most startling cultural crimes to Americans has been *oyako-shinju*, or parent-child suicide.

Peter Keane, chief attorney in the San Francisco public defender's office, said that about five years ago a Japanese woman slit her baby's throat (but did not commit suicide) when she learned that her husband had been unfaithful.

"We put on evidence that there is a Medea-like need for a woman coming from a Japanese culture to react to infidelity by killing her children," Keane said. "A Stanford professor testified that there was no malice in her intent to kill."

(Medea was a mythical Greek woman who helped Jason get the Golden Fleece and then killed her own children when he deserted her.)

After one trial ended with a hung jury, Keane said, the woman was allowed to plead guilty to manslaughter.

In Los Angeles, the case of Fumiko Kimura generated widespread sympathy among Asian Americans and further raised public consciousness about cultural defense.

Kimura was the young Japanese housewife who walked her two small children into the ocean at Santa Monica three years ago in an attempted parent-child suicide because of humiliation over her husband's affair. The children died, and she survived to face charges of murder.

#### Mental Defense

Although her attorney chose to rely on psychiatric testimony that she was mentally disturbed rather than present a cultural defense, 4,000 Japanese-Americans signed letters indicating that her crime was common (although illegal) in Japan where it would be treated as no more than manslaughter. She was allowed to plead guilty to manslaughter and placed on five years' probation with psychiatric treatment and a year in County Jail, which she had served by the time of sentencing.

Cultural factors most frequently arise in family relation matters because many cultures differ from U.S. attitudes and laws protecting women and children, said Alison Dundes Renteln, USC assistant professor of political science, who is researching a book on cultural defense. Estelle Chun, an attorney with the Asian Pacific American Legal Center, which serves an estimated 1 million Asians in the Los Angeles area, considers cultural background in deciding whether to file for a divorce or to seek a restraining order to keep an abusive husband away from his wife.

"I have a lot of clients who don't need legal help. They are just going through all this mental stress because of marital problems," she said. "But mental health counseling is just unheard of in the Orient. You go only if you are crazy."

While trying to enlist mental health professionals to help her would-be clients, Chun said, she never hesitates to seek a court restraining order when warranted. But she tries to explain that a woman cannot seek such an order or a divorce and continue living with the husband she fears.

"I counsel them that an order is not magic, that they have to be able to call the police to enforce it," she said. "That is when most of them start falling apart, saying, 'Oh, I couldn't do that.'"

#### Deals With the Men

Michael R. Yamaki, a third-generation Japanese-American criminal defense lawyer, deals more with the husbands.

"A few years ago I had a whole stream of Vietnamese men accused of wife beating," he said. "They would look incredulously at the police and say, 'This is my wife,' like a wife was property almost. They would look at me and say, 'What is the problem here? How can they put me in jail for this?'"

*Education* is a word used often by scholars, counselors and lawyers and judges knowledgeable about cultural defense. Sometimes, Yamaki said, the best education is a publicized court case.

"As they start going to court and start getting carted off to jail for things like wife beating, it gets the word out," he said. "Some of these guys get the brunt of being educated for the benefit of the whole community."

Said Evans-Pritchard, the anthropologist: "What is really being said is that new immigrants can keep their customs as long as they are harmless, like food, and dress and art. But . . . when something clashes with American morality, you can't do it."

**GRAPHIC:** Photo, Michael R. Yamaki, Criminal defense lawyer MARSHA TRAEGER / Los Angeles Times