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Section: NEWS

WHEN IS CULTURAL DIFFERENCE A LEGAL DEFENSE? IMMIGRANTS' NATIVE TRADITIONS
CLASH WITH U.S. LAW

DICK POLMAN KNIGHT-RIDDER NEWSPAPERS

NEW YORK When he was done, he didn't run. He didn't even change his bloody shirt. And when his teen-age son came home, he met the boy at the door and announced, "I killed your mother."

For this, Chinese immigrant Dong Lu Chen was convicted of manslaughter last December - and given five years' probation.

Chen, 51, who left China in 1986, eluded jail with the help of a novel strategy known as a "cultural defense" - the notion that a person raised abroad should not be held fully responsible for conduct that, while illegal here, might be acceptable in the homeland.

The garment factory worker killed his wife, Gian Wan Chen, in their Brooklyn apartment on Sept. 7, 1987, because she had been unfaithful. At Chen's trial in a Kings County court, his attorney argued that traditional Chinese notions about the shame of adultery had propelled him to violence. And at his sentencing in March, Judge Edward Pincus agreed.

It wasn't a popular sentence then, and it isn't now, even among Asian immigrants. There are critics who believe that jail is the proper place for a man who picked up a hammer and delivered eight blows to his wife's skull, leaving her to die on her bed in a pool of blood.

Last week in Chinatown, 75 people heard a critique of the case by feminist lawyer Holly Maguigan and two community leaders. Maguigan, who works with battered women, warned the audience, "We're going to need damage control. In the real world, other judges will find this case 'innovative.' Lawyers defending other (immigrant men) are going to race to get the Chen testimony."

Nationwide, the "cultural defense" has surfaced in a number of criminal cases in recent years, the majority involving Asian immigrants. But rarely has it played such a pivotal role as in the Chen case.

And with several million Asians having immigrated to the United States since 1970, and more still arriving from Indochina alone at a rate of 4,000 a month, the cultural argument is expected to gain popularity among defense lawyers. It also could be applied to cases involving immigrants from other Third World cultures.

"Is it relevant to consider cultural background in looking at a defendant's state of mind?" asks Manhattan lawyer Stewart Orden, who defended Chen. "Well, why not use everything you can get your hands on? What's the alternative? Do we stop looking at state of mind?"

"Cultural defense is a real hot topic in law classes," says Susan Herman, a Brooklyn Law School professor and a board member of the American Civil Liberties Union. "It's on the cutting edge - the idea of using it to help explain a defendant's personal circumstances."

To defenders, the concept is in sync with American traditions of "individualized justice" and "cultural pluralism." Yet there is grave concern in some quarters that increased use of the cultural defense will expose U.S. courts to patriarchal values from abroad - to the detriment of immigrant women, many of whom were treated as second-class citizens in the lands they left behind.

"You don't want to import those cultural values into our judicial system," says Margaret Fung, who directs the Asian American Legal Defense and Education Fund. "We don't want women victimized by backward customs" - customs that, in fact, may no longer be sanctioned in their homelands.

"We don't want so-called cultural experts perpetuating certain stereotypes that may not be accurate," Fung says.

In 1851, Secretary of State Daniel Webster declared, "Every foreigner residing in a country . . . is as much bound to obey its laws as native citizens." But contemporary justice is more complex:

-- Four years ago in Los Angeles, Fumiko Kimura, who had immigrated from Japan 14 years earlier as a young adult, tried to drown herself and her two children after learning of her husband's affair. She survived, but the children didn't. She was charged with murder, but 4,000 local Asians signed a petition pointing out that in Japan, the ancient rite of "oyako-shinju" (parent-child suicide) isn't considered murder. In the end, she pleaded guilty to a manslaughter charge and got probation.

-- Four years ago in Fresno, Tou Moua, a refugee member of the Hmong mountain tribe of Laos, killed his wife, Yeg Yang Moua, for having an affair. He was convicted of manslaughter. His lawyer said there was no provision for divorce under Hmong custom, that a Hmong husband was required to "execute justice" in such circumstances and that killing the wife was one traditional option. Moua got eight years in jail.

-- Two years ago in St. Paul, Minn., a 23-year-old Hmong man faced a rape charge after engaging in what appeared to be forcible sex with a Hmong girl, age 13. But the prosecutor begged off after learning that under the

courtship ritual of "marriage by capture," the girl only "pretends" to be resisting. The prosecutor wasn't necessarily convinced but decided the case was too shaky for a jury.

-- Four years ago in Oakland, Calif., an Ethiopian man, Hagos Gebreamlak, 27, shot and injured an Ethiopian woman, Katema Miltenberger, also 27. He was charged with attempted murder but claimed at his trial that he had taken action because the woman, whom he had dated, was practicing witchcraft on him. An expert on Ethiopia testified that, where the defendant was raised, it was believed that some women, known as "boudas," carried evil spirits. The man was convicted on a lesser charge, assault with a deadly weapon, which carried five fewer years in jail than the original charge.

"I don't like to call it a 'cultural defense,' because that sounds like a concocted strategy," says public defender Michael Ogul, who handled the case in Alameda County (Calif.) Superior Court. "I prefer the term 'cultural evidence,' which is relevant to what the defendant was thinking."

-- Six years ago, May Aphaylath, a Laotian living in upstate New York, was convicted of murder and jailed for stabbing his wife, Lati, to death. His reason: She was talking by phone to a single man, a fellow student. At the trial, Aphaylath's attorney tried to introduce an expert witness who planned to argue that, in Laos, the shame of having a wife receive calls from a single man is so great that the husband can lose control. The judge refused to hear the witness. However, in November 1986, the state's highest court overturned the murder verdict, ruling that Aphaylath may have lost the chance to provide "information relevant to his defense." A new trial was ordered, but Aphaylath later pleaded guilty to the lesser charge of first-degree manslaughter and was given a minimum of eight years in prison.

"A cultural defense doesn't excuse the person's act," says public defender Howard Broder of Rochester, who argued Aphaylath's case to the high court. "It just means that someone thrown into a new cultural pattern is perhaps a little less culpable. Without quarreling with the women's liberation movement, the law requires that a jury be allowed to determine whether someone's actions were reasonable, given all the personal circumstances."

That is what Stewart Orden was arguing in the Chen case.

On Sept. 7, 1987, Chen's wife told him she was having an affair. The next morning, he attacked her with a hammer. In a non-jury murder trial, Chen was described by Orden as a product of China, where, it was alleged, infidelity is treated as a shameful slur on the man's ancestral family. Chen didn't intend to kill his wife, Orden claimed. Chen was just "confused" when he wielded the hammer, because of stress rooted in his cultural heritage.

Judge Pincus convicted Chen, but on the lesser charge of second-degree manslaughter: reckless homicide without intent. Jail was an option, but not mandatory. And on March 30, Pincus gave Chen five years' probation, ruling that Chen "took all his Chinese culture with him to the U.S."

Pincus said in court that, if the same crime had been "committed by someone born and raised in America," he

would have felt "constrained" to jail the defendant.

Brooklyn District Attorney Elizabeth Holtzman is angry that Chen is free. "Foreign customs should not override American law," she says. "Whatever the view is in another society toward women, it should have no bearing here. The value of a wife's life is as great as that of any other human being. That should be a cultural factor, too."

Many Americans of Asian ancestry are less concerned with the concept than the way it has been used - particularly in the Chen case. Orden has been attacked for depicting China as a place where unfaithful wives can be punished with impunity.

"That's an outdated version of the culture," says Philadelphia lawyer Tsiwen Law, former president of the local Asian American Bar Association. "Under the feudal system, misuse of a spouse may have been acceptable. But now in China, you can be prosecuted."

The danger, says Philip Tajitsu Nash, a law professor at City University of New York, is "the perpetuation of stereotypes by 'experts' who spread the idea that Asian lives are worth less."

Orden scoffs at these attacks: "That's a denial (by critics) of the way things are in China. And a trial is supposed to concern itself with the truth about the way things are."

Orden is also unmoved by the allegation, made again last week, that Chen's sentence sanctions violence against immigrant women. "A court shouldn't be concerned with social ramifications," Orden says. "It should be concerned with whether the defendant is guilty, based on the evidence."

Why didn't the Brooklyn prosecutor get his own ethnic expert, someone to contend that this image of China was archaic?

Assistant District Attorney Kenneth Rigby, who handled the case, said he didn't think it was necessary. "In our wildest imaginations, we couldn't conjure up a scenario where the judge would believe that anthropological hocus-pocus."

The public defenders have taken notice. Michele Maxian, director of special litigation for the New York Legal Aid Society, says, "In the wake of 'Chen,' we'd use the cultural defense any time it appears."

Asian-Americans worry about a backlash - the notion, in Margaret Fung's words, that because of the Chen case, "people will get the idea that Asian-Americans are getting away with something. . . . It's not true. But we all know that (a cultural-defense case) is bound to happen again."

"It's all so difficult and troubling," says Susan Herman of the American Civil Liberties Union. In the Chen case, she says, "I think (Judge Pincus) was being empathetic. To understand is to forgive. But to forgive everyone means there's no criminal law. There can be a pretty arbitrary line between those we forgive and those we condemn, and we don't like to confront the arbitrariness. But the cultural defense makes us do it."

PHOTO

FUMIKO KIMURA: AN ANCIENT RITE OF SUICIDE?

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NEWS SUBJECT: (Violent Crime (1VI27); Legal (1LE33); Social Issues (1SO05); Minority & Ethnic Groups (1MI43); Crime (1CR87); Judicial (1JU36); Criminal Law (1CR79))

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