

1-1-2003

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Recommended Citation

Berta Esperanza Hernández-Truyol, *Glocalizing Law and Culture: Towards a Cross-Constitutive Paradigm*, 67 Alb. L. Rev. 617 (2003), available at <http://scholarship.law.ufl.edu/facultypub/198>

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GLOCALIZING LAW AND CULTURE: TOWARDS A CROSS-CONSTITUTIVE PARADIGM

*Berta Esperanza Hernández-Truyol**

Good afternoon. It is a pleasure and honor to be here today. I want to thank Professors Patricia Reyhan and James Gathii for their kind invitation to participate in this most exciting conference. Thank you also to Dean Thomas Guernsey, without whose support these exciting and challenging encounters could not take place.

It is always a special pleasure, though a nerve-wracking experience, for me to return to my alma mater and be part of these intellectual conversations, particularly in this room where I suffered through courses like Trusts and Estates. Needless to say, even almost twenty-five years after graduating, I still get a peculiar feeling when reciting facts and law to former professors such as Kathy Katz, and to new friends and colleagues such as Nancy Ota, Peter Halewood, and Donna Young.

I hope I am not misunderstood when I say the faculty today looks dramatically different from back in my day. Not that the faculty wasn't wonderful back in my day. We too had change. For example, Kathy Katz was the second woman hired by this faculty. For those of you who heard last night's tribute to her, I can tell you that as a first year student in her first contracts class here at Albany Law School, she indeed was a teacher, scholar, activist, and mentor. I remember the activist part quite clearly. On the day we learned that the Equal Rights Amendment was defeated because not enough states had ratified it, she walked into class wearing a black arm band and started the class with a moment of silence. Let me tell you, as contracts students we might not have understood the concept of consideration, but I assure you, we understood that.

My comment about how this faculty looks different from back in my day is actually a very good, positive comment. Change, in fact, is precisely my focus today. This talk, titled "Glocalizing Law and Culture: Towards a Cross-Constitutive Paradigm," interrogates what factors determine whether law that effects cultural change is

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embraced or rejected by a culture. In this regard, I must note at the outset what I call the glocal nature of culture: it can be both local—as reflected in particular native geographies—and global—as reflected in diaspora communities.

This lecture addresses the relationship between law and culture in three general parts. The first part consists of a brief review of the theories addressing the relationship of law and culture, mainly the mirror theory. But I will suggest that there is more to the relationship of law and culture than one being an inert reflection of the other; hence my proposal for what I call, as a working concept, a cross-constitutive paradigm of law and culture. The second part reviews the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”),¹ a law that seeks to effect change by mandating equality for women in part by identifying and attempting to change what are perceived as deleterious cultural practices. As such, CEDAW has been both successful and unsuccessful: in some instances, at least on paper, CEDAW has changed culture; in other cases, it has failed to do so. Third, I will look at Cuba as a particular location in which to explore the relationship between legal change and cultural change. Specifically, I will compare two laws in the context of Cubans in exile and Cubans on the island. This analysis allows me to suggest some factors that may provide insight as to whether or not law will be effective in changing culture. It probably need not be underscored here that, by talking about Cuba, a socialist state, I am intentionally toying with the notion of markets which, in globalization terms, are synonymous with capitalism and the so-called “free markets.”

THEORIES OF CULTURE

Before presenting theories of culture, it is important to define what I mean by culture. Interestingly, many who write about culture do not bother to explain their understanding of—or the meaning they ascribe to—the term. The term, of course, may have myriad meanings. I do not mean culture in the high-brow sense. Rather, by culture, I refer to those trappings that form one’s identity and influence one’s perception of the world. Culture has both concrete and abstract qualities: it is a complex of information that provides meaning for an individual or community in particular

¹ G.A. Res. 180, U.N. GAOR, 34th Sess., 19 I.L.M. 33, available at <http://www.hrweb.org/legal/cdw.html>.

circumstances. As to culture and the market, it is central to my working interrogation of cultural change that the following premise be a foundation of analysis: majority cultures should not use the trope of culture as a sword to eviscerate local traditional practices, heading down the homogenizing road of globalism, nor should minority cultures use culture and tradition as shields to insulate harmful patriarchal local practices that are affronts to human rights norms.

Most Western legal theories, from classical Greek, to legal positivism, to sociological theories, start with a basic common presumption: that law is a derivation of the culture that surrounds it, i.e., that law is a mirror of society that operates to maintain social order.² The mirror thesis is the idea that,

[l]egal systems do not float in some cultural void, free of space and time and social context; necessarily, they reflect what is happening in their own societies. In the long run, they assume the shape of these societies, like a glove that molds itself to the shape of a person's hand.³

Another articulation is that "law mirrors . . . a part of social life."⁴

Interestingly, the assumption that law is a mirror of society that functions to maintain social order is so strong "that it is routinely asserted by social and legal theorists without supportive evidence or argument, with a sense . . . [that it is] self-evident."⁵ This perhaps explains why this theory remains dominant as to the relationship between law and culture. This broad and blind acceptance, in a peculiar way, makes logical sense. Laws are, in essence, codified forms of the customs and habits of the societies in which they originate. To some extent, as well, they must reflect conduct that is deemed appropriate and acceptable in those societies. On the other hand, conduct that is viewed as illegitimate would not be embraced by codification or as accepted practice. People tacitly agree to live by those norms governing their communities, thereby legitimizing generally accepted conduct. This reasoning, of course, becomes circular.

Evolutionary theories of culture, for example, largely take this

² BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 1 (2001). *But see* ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (2d ed. Temple Univ. Press 2001) (1977) (observing that the law may be more of a reflection of the interests of the ruling elite than of society as a whole).

³ Lawrence Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 *STAN. J. INT'L L.* 65, 72 (1996).

⁴ DURKHEIM AND THE LAW 34 (Steven Lukes & Andrew Scull eds., 1983).

⁵ TAMANAHA, *supra* note 3, at 1-2.

position by their basic assumption that cultures develop along much the same evolutionary lines as do creatures. Those that are “fittest”—that is, make the most positive cultural contributions—survive, while the rest die out through war and conquest, internal political strife, or absorption by “fitter” cultures. Under such a model, effective law serves as a positive cultural contribution, and those societies with more effective law are more likely to thrive.

Significantly, mirror image theorists react against the universalist character of natural law theories and argue that reason applied to different circumstances would result, not in one universal law, but rather in laws as varied and particular as the nations in which they exist. In this analysis, all facets of a society would have an impact on what sort of laws would be appropriate for that specific society. Such a view suggests that culture *is* law. This makes sense; after all, what is law if not a set of norms that guides and informs human behavior and interaction, including cultural norms, conduct, perceptions, understandings, communications, and exchanges? This view, that social norms of acceptable conduct are the same as law, goes as far back as the ancient Greeks.

These observations also reveal that law, to be effective, need not be made solely in an official prescriptive fashion by the state.⁶ Rather, everyday codes of conduct, in civil society settings such as families, communities, businesses, schools, churches, and other voluntary associations and organizations *are* all law, whether or not they are recognized and codified by the state’s legal apparatus.⁷ In some contexts, this “living law” may be even more effective than the legal norms created by the state, some of which may not reflect the norms of the society generally.

At the same time, government-sponsored norm change is not limited simply to actual laws, but may also take the form of less formal social programs, supports, or policies. A number of tools such as education, persuasion, economic incentives or disincentives, time, place and manner restrictions, shunning, and/or outright coercion or prohibition of undesirable conduct may effect norm change.⁸ Of course, in all of the analyses, one must be sensitive to

⁶ See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (noting that formal state law is but one form of legal order in society and often is not the controlling legal order which may be generated by informal societal controls).

⁷ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 915–16 (1996) (recognizing the tremendous influence that social norms have on individual judgments and choices).

⁸ See *id.* at 758–59 (explaining that governments may partly succeed in changing norms through direct coercion, but that much of this task is accomplished through efforts to

the subordinating or marginalizing consequences of cultural tropes imposed by the powerful on the vulnerable. This complex of relations and institutions—private and public, formal and informal—informs my proposed cross-constitutive paradigm.⁹ This paradigm accepts that culture creates law and that law creates culture—for both good and bad.

The acceptability or unacceptability of norms reflects or embodies the will of the community, while community norms generate compatible behavior. This cross-constitutive process is grounded in community morality and reason, which also serve as legitimizing forces for law. Again, those laws that conflict with moral codes or those that seem irrational are unlikely to win the support and consent of the populace and thus are unlikely to become “lived” law.

Of the two Cuban laws I will address, one shows that law can change culture and the other shows that cultural norms can withstand, survive and effectively reject legal change. Before I discuss that specific scenario, let me turn to CEDAW, as it sheds light on the relationship between law and culture.

CEDAW

CEDAW is an example of a law that seeks expressly to change culture by mandating sex equality in a world in which the reality is anything but. In so doing, CEDAW has also evoked a reaction—here I am talking about the State Parties’ extensive reservations—that shows culture resisting changes imposed by the law.

I will briefly highlight some of the norm changing provisions of CEDAW that expressly seek to change cultural tropes. To this audience, I need not specify the details of the strong rejection of a universalist notion of cultural equality. In this regard, national statements claiming, for example, that the state is on board with equality as long as it does not disrupt the laws of the Koran¹⁰ or conflict with succession schemes in monarchical regimes,¹¹ are

indirectly “inculcate the relevant norms”).

⁹ This cross-constitutive proposal is supported by the theoretical work of others. Tamanaha, for example, mentions that his mirror thesis might well work both ways, with culture reflecting law as law reflects culture. See TAMANAHA, *supra* note 3, at 231–36. Similarly, ancient Greeks felt that law could serve an educational purpose in creating good citizens. This educational function of law means that law creates better citizens, and better citizens effect a change in culture. In contemporary times, Cass Sunstein suggests that laws themselves can create cultural change. Sunstein, *supra* note 8, at 958–59.

¹⁰ See LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 307 (1995) (describing Bangladesh, Egypt, and Iraq’s objections based on Shari’a law).

¹¹ See, e.g., *id.* at 306 (describing reservations of the United Kingdom with respect to royal

evidence of cultural resistance to social norm transformation by legal fiat.

That CEDAW seeks to effect cultural change is not in dispute. Its preambular language specifically notes that the State Parties are “[a]ware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.”¹² In setting out the aspiration of equality, CEDAW refers to the Universal Declaration,¹³ to the ICCPR¹⁴ and to the Economic Covenant.¹⁵ Interestingly, all of these already include sex-equality mandates. Yet these mandates have been ineffective in changing the condition of women in every society in the world. Hence, while CEDAW is needed and welcomed, this is not to say that it has been, or will be effective.

CEDAW’s article 2 mandates that states enact laws to change the culture of inequality. Subsection (f) requires State Parties “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women.”¹⁶ Article 3 requires that states take measures in, among other fields, the *cultural* field, “to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”¹⁷ Article 5 requires that states modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on *stereotyped* roles for men and women.¹⁸ Finally, Article 13 requires State Parties to take measures to eliminate discrimination against women in economic and social life, specifically including the right to participate in all aspects of cultural life.¹⁹

These provisions show that law—here CEDAW—seeks to change

succession); see generally *id.* 356–62 (describing United Kingdom reservations).

¹² CEDAW, *supra* note 2, at preamble.

¹³ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, U.N. Doc. A/810 (1948).

¹⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

¹⁵ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

¹⁶ CEDAW, *supra* note 2, at art. 2 (emphasis added).

¹⁷ *Id.* at art. 3.

¹⁸ *Id.* at art. 5.

¹⁹ *Id.* at art. 13.

culture. The ratification of the treaty evidences a willingness of states to have law change culture, at least at the formal state level. On the other hand, the reservations to CEDAW show that some cultural traditions remain impermeable to attempted legal change, and that the states are willing to use the weight of their international legal personality to prevent such change.

Next we move on to the Cuba examples I want to explore. In considering these, it is significant to note that Cuba signed CEDAW on March 6, 1980, and ratified it on July 17, 1980.²⁰ Thus, Cuba's legal commitment to sex equality is confirmed in both its domestic undertakings—as the following section explains—and its international obligations.

CUBA: LAW AND CULTURE

Cuba presents an interesting site for interrogations about the relationship of law and culture because, in effect, there are two Cubas that can be compared. The first Cuba is the island sovereign. The second Cuba is the Cuban diaspora. Until the 1959 revolution the two Cubas were one, with shared history and culture. The revolution caused the separation, and thus allows for the investigation of whether there is some essence of Cubanidad that resists change. In this context I am going to explore two post-1959 legal changes in the island: a general legal change and a specific legal change—neither of which was experienced by Cubans in the diaspora. In this context, I will compare the two Cubas to see if they have followed different cultural trajectories.

The general legal change is the wholesale legal reform that followed in the wake of the revolution and the imposition/embrace of a communist regime on the island. Castro not only outlawed private industry by instituting agrarian reforms as part of the wholesale nationalization of means of production, but he also outlawed religion and religious practice. In addition, specifically of interest to women, he acknowledged women's inequality and forged ahead with what he dubbed a "revolution within the [r]evolution",²¹ as a means of liberating women, having them attain equality and become productive members of society. In a communist state, this

²⁰ See *United Nations Treaty Collection*, Convention on the Elimination of All Forms of Discrimination against Women, at http://untreaty.un.org/English/Status/Chapter_iv/treaty10.asp (last visited Feb. 10, 2004).

²¹ See Susan Kaufman Purcell, *Modernizing Women for a Modern Society: The Cuban Case*, in *FEMALE AND MALE IN LATIN AMERICA* 257, 258 (Ann Pescatello ed., 1973).

meant that women would leave the home and engage in the productive work of the collective. Castro created the Federación de Mujeres Cubanas (“FMC”) who were primary actors in an alphabetization program which trained domestics and prostitutes for more fruitful employment in the early days of the revolution.²² The FMC was also responsible for sending brigades to the country to educate the rural population.

In addition, programs like maternity leave and children’s circles were instituted so that the system could accommodate women’s reproductive roles as well as ensure that childcare concerns would not hold women back from joining the workforce.²³ This effectively created state protection of maternity and a public substitute for the tasks of motherhood. Notably, Cuba’s pre-Castro era constitution was one of the most progressive in the world for women.²⁴ As a matter of paper rights it fully recognized women’s equality. Pre-Castro reforms included family law and property law reforms that created rights for women that some Latin-American states have yet to achieve.

Thus, the “general” reforms are the wholesale agrarian reform, nationalization of property, and secularization of society. The particular legal reform on which I will focus is the 1975 family code which requires that men and women be equally responsible for the raising and care of children.²⁵ This law was so strongly embraced that it is even incorporated into the marriage ceremony. Further, the rights and obligations of this law are enforceable in the courts.

With these two legal reforms in mind, I asked myself, did these legal reforms—the general and the specific—effect changes in the way people actually live their lives? Here, the comparison with the diaspora is particularly useful as it presents a Cuban population with the same history but no reform laws. The question then becomes: Did culture resist or has there been change? The answer

²² *Id.* at 262–63.

²³ See, e.g., Lois M. Smith & Alfredo Padula, *The Cuban Family in the 1980s, in TRANSFORMATION AND STRUGGLE: CUBA FACES THE 1990S*, at 179 (Sandor Halesbsky & John M. Kirk eds., 1990) (discussing the 1974 Maternity Law); ISABEL HOLGADO FERNÁNDEZ, ¡NO ES FÁCIL! MUJERES CUBANAS Y LA CRISIS REVOLUCIONARIA 92–94 (2000) (describing childcare facilities called children’s circles aimed at enabling women’s workforce participation).

²⁴ See K. LYNN STONER, *FROM THE HOUSE TO THE STREETS: THE CUBAN WOMAN’S MOVEMENT FOR LEGAL REFORM, 1896–1940*, at 25–39 (1991).

²⁵ FAMILY CODE (CUBA), Law No. 1289, Feb. 14, 1975, arts. 24, 26 (Official Publication of the Ministry of Justice 1975) (providing that marriage partners have equal rights and duties and that they both must care for the family); *id.* at art. 27 (stating that both spouses must contribute to the needs of the family by sharing household duties and childcare, regardless of whether only one or both partners work outside the home); *id.* at art. 28 (stating that both partners have right to practice their profession or skill).

is yes to both: In one case, culture resisted change; in the other, the legal reforms effected cultural change.

First turning to the provision requiring equal responsibility in childcare: notwithstanding the legal mandate, men do not share equally in child-care and child-rearing responsibilities, and like their exiled counterparts without the specific protections, Cuban women bear a double burden.²⁶ In Cuba, the average working woman spends six hours and twenty-nine minutes at her occupation and then an additional four hours and four minutes doing domestic work.²⁷ In comparison, the average man spends seven hours and forty-eight minutes at his occupation and only thirty-two minutes on domestic work.²⁸ The reinforcement of the double-bind for Cuban women is more than a theory—research shows that for all of its paper reform, the Cuban revolution has been unable to eradicate discriminatory gender roles imposed by society and culture.²⁹ Instead, the socialist regime has enabled the reproduction of cultural patterns that consider women to be the only ones responsible for the care of the home and children by its ideological privileging of economic issues and dictating, but not enforcing, gender equality. This parallels the double burden that working women in the United States—Latinas and non-Latinas alike—bear.³⁰ In this context, for better or for worse, culture was impermeable to changes sought to be effected by law.

Second, to explore the impact of the wholesale changes on culture, I looked at family formation and dissolution. In pre-1959 Cuba, the predominantly Catholic population had a relatively low rate of divorce. In exile, from data on Cubans in Miami, the Cuban population is still largely Catholic and has divorce rates that are lower than either the general or the Latina/o population in the United States. Therefore, any difference from this outcome shows both a change from pre-1959 Cuba and from post-1959 Cuba in exile, which, I would suggest, could be attributable to the wholesale reforms instituted by the Castro regime. And indeed, such a change has occurred.

Rather than intact marriages and a low incidence of divorce in Castro's Cuba, one finds very high rates of divorce—in the fifty

²⁶ Smith & Padula, *supra* note 23, at 177.

²⁷ Diana M. Riveira, *Women's Legal Advances in Cuba* 34 (1989) (unpublished Masters Thesis, University of Miami) (on file with author).

²⁸ *Id.*

²⁹ Smith & Padula, *supra* note 24.

³⁰ See Uva de Aragón, *La Mujer Cubana: Historia e Infrahistoria (El Exilio)*, in *LA MUJER CUBANA: HISTORIA E INFRAHISTORIA* 79, 86 (2000).

percent range. Moreover, there has been a substantial abandonment of formal marriage by many couples. From the available research, which, not surprisingly, is limited, it is not unusual to find persons entering into numerous serially monogamous relations throughout the course of their life; some formal, some informal. Indeed, it seems that it is not unusual for a woman to have had five or six such relationships that have produced children from five or six different fathers.³¹ One noteworthy, if predictable, outcome in this context is that the mother-child bond seems to persist not only as a very strong one, but also as a primary one. Significantly, as the maternity laws show, this relation is preserved and protected by the legal reforms. This is even manifested in women who instruct the men in their lives—who are not the child's father—not to discipline, scold, or otherwise take responsibility for the child.

Why did particular laws on parenting and parental responsibility fail to result in cultural change while the wholesale law reforms succeeded in changing culture? Factors that favored cultural change in light of the wholesale legal reforms are numerous. For one, the taboo of sexuality that was enforced and reinforced by the Catholic Church was eliminated and thus the external force that effected one behavior (i.e., low incidence of divorce) was eliminated. Another significant factor is that governmentally imposed economic changes and expectations freed women from economic dependence on their husbands. For example, there was a governmentally created economic safety net that included free medical care for women and their children, free education, free housing, and other family support like the children's circles. This safety net allowed women the economic freedom to end a marriage, as well as to enter and exit other informal relationships. One author called this a shift from private patriarchy to public patriarchy.³²

Given these diametrically different outcomes of law effecting cultural changes as evidenced by the wholesale reforms and the particular legal change, respectively, the interesting question is what factors can be identified that may determine the way culture and law will affect each other? As of now, I have identified three sets of factors that may explain the differences. One is the *nature* of the change—whether the cultural tradition the law seeks to change is a private or a public one. The second is the *consequences* of the

³¹ See generally HELEN I. SAFA, *THE MYTH OF THE MALE BREADWINNER: WOMEN AND INDUSTRIALIZATION IN THE CARIBBEAN* (1995).

³² *Id.* at 165–66.

change. This factor requires analyzing whether the cultural marker is a burdensome or beneficial/liberating one so that the law can be perceived, respectively, as liberating or subordinating. The third component is the *relation* of the proponent of change to the culture. This invites an interrogation of whether there are relations of power at work that either will put their weight behind the change or will resist it.

The inefficacy of the childcare normative change can thus be explained because it is private conduct about which only the parties involved will care. Further, the law is liberating for women but burdensome for men; and men, utilizing in their favor the power of the status quo, which deems as normative maternal, but not paternal, involvement in domestic work, resist change. As an interesting aside, the woman-subordinating status quo is also reinforced and perpetuated by older women in an extended family household—living conditions which are the norm in Cuba due to extreme housing shortages. With such internal pressures—from grandmothers and other female elders as well as from husbands—culture resists change.

In contrast, the act of marriage is a public act. It was formerly supported by the church which is now an outlawed institution whose powerful hold yields to the government's strong hold on social conduct. The notion of intact marriages was a burdensome one that was kept in place by an institution that no longer exists. Further, the power of the government in creating economic conditions that liberated women from dependency on a sole spouse is also behind effecting the cultural change. It is a norm that is empowering of women, while not burdensome to men. Indeed, it is the culture of socialism that outlawed religion and created complex economic supports, having a change in law resulting from a change of state culture.

As these examples show, and as theories considered together collectively have posited, there is a strong nexus between law and culture. But the power of influence goes both ways. In this regard, I believe that it is not only appropriate but necessary to embrace a cross-constitutive theory of law and culture.

