Centaur Jurisprudence Research Project

McGill Centre for Human Rights and Legal Pluralism

Project Description

Objectives: Many claims to justice ask law to be responsive to the lived experiences of those to and through whom it is applied. "Culture" is one label attached to collective forms of this lived experience. But what does it mean for courts and other legal institutions to be culturally sensitive? What are the institutional implications and consequences of such an aspiration? To what extent is legal discourse capable of accommodating multiple cultural narratives without losing its claim to normative specificity? And how are we to understand meetings of law and culture in the context of formal legal processes, such as when a criminal defendant invokes the acceptability of domestic violence within his ethnic community (, 2006), when oral traditions are presented as the basis for an aboriginal land claim (, 1997), or when the custom of 'bush

in an attempt to be culturally sensitive. This includes experimenting with alternative modes of conflict resolution, where legal processes are adapted to local cultural exigencies. The third, "pluralised narratives of law and cultures," touches on the impact within a given community of the narrative created by legal institutions in the process of applying legal norms. In this respect, the project seeks to assess the of legal culture beyond the boundaries of legal institutions and, by the same process, analyze the extent to which legal culture itself is shaped through these encounters. These three normative sites are neither insular nor neatly bounded, but rather three facets of the continuous interaction between legal and cultural perspectives.

Overall, through each of the three sites, the project seeks to provide a better understanding of the productive and transformative nature of the encounter of law and culture, making this encounter the primary locus of our inquiry (Kasirer, 2003). More specifically, the project objectives include: (1) offering a critical understanding of the production of legal and cultural narratives by the various interveners in the legal process, including parties, judges, experts, and community leaders; (2) questioning a vision of the encounter of law and culture as necessarily asymmetrical, as the subjugation of a given culture by law's own culture; (3) assessing the extent to which the production of cultural narratives through legal processes can endow them with greater legitimacy, in ways for which legal pluralism may have failed to fully account up to now (Tamanaha, 2008); and (4) at a more general level, critically addressing the interactive process whereby legal and anthropological knowledge is created and labeled as belonging to distinct disciplines (Clifford, 2005; Riles, 1994), something we hope to achieve without unquestioningly surrendering to the hegemony of either anthropological or legal hermeneutics.

Context: Site 1 (Translation of Cultures): A first investigation of the deployment of the culture concept within formal legal processes begins with the observation that about aspects of life as culture is first and foremost a linguistic practice or discourse whose shape and consequences can be analysed discursively. Culture, it is suggested, has been largely invoked in courts to describe a "thing" rather than a process or a normative regime. In Aboriginal rights cases, for example, Indigenous culture is something that can be measured and empirically observed (, 1996). In an initial step, we will attempt to identify the implicit model of culture that is operative before Canadian and select hybrid-international courts.

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whereby a culture becomes reduced to facts as one in which a particular cultural narrative is created. The massaging of culture into facts involves a translation of beliefs and practices into the description of a static context, in a language suitable to be understood and relied upon by legal actors (Twining, 1990). It involves a version of the culture which has been transformed by the parties, packaging their culture in terms comprehensible by courts. As with any translation, cultural translators can never be reduced to mere conduits channeling information in a different
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practice of official institutions as well as the informal understanding of legal norms by all social agents can lead to the emergence of expectations which, when they intersect, become part of the normative fabric that gives law its meaning (Fuller, 1969). In addition, legal pluralism sees normative regimes entirely dissociated from any state institution or approval as falling within a broad definition of law (Moore, 1978; de Sousa Santos, 1987; Melissaris, 2004). These insights suggest an understanding of the encounter of law and culture before legal institutions whereby courts and other legal institutions stand at the confluence of multiple regimes (Griffiths, 2005). Culture, in offering an account of a discursive practice, is taken to be inherently normative (Merry, 2003; Riles, 2006; Provost, 2009). Formal law is not seen as a monolithic system being forced upon an 'other' culture, but rather a regime whose fabric is liable to be transformed by the encounter (Anker, 2005; Berger, 2008). In its most extreme form the very individuals involved, judges, lawyers, experts, community representatives, become normative sites in which a polyvocal legal culture is created (Jackson, 1995; Kleinhans and Macdonald, 1997; Webber, 2006).

Site 2 (Acculturation of Justice): Even if it were posited that courts and other legal institutions ought to be culturally responsive, what does that imply for the way in which the law is actually applied? Claims of cultural specificity can lead to a culturally reflexive jurisprudence in which substantive legal norms are adapted to respond to such claims (Howes, 2005). Thus whereas Site 1 considers the process by which culture is made to speak in terms cognizable to the legal system – whether as something "similar" or something "different" – Site 2 focuses on the way law appears to change in order to respond to claims of cultural specificity. The project proposes to assess both the process whereby such adjustments are made and the cultural narrative that is created. For instance, (1996) requires courts to take into account "aboriginal perspectives" on the meaning of the rights claimed. In later cases this perspective is said to influence the concepts of rights, title and culture itself, with judges debating just what this "reconciliation" of perspectives means in terms of evaluating evidence (, 1997; , 2006; , 2007). In the international criminal law sphere, references have been made before the Sierra Leone Special Court to the fact that "bush wives", cannibalism, and the use of child soldiers hold particular meaning in the cultural context of that armed conflict, and that legal norms should reflect such a fact (, 2008; Barnes, 2007; Bélair, 2006). The so-called "cultural defense" raised in some criminal cases in the United States (, 1999) and Canada (, 1998; , 2004; , 2006) likewise evokes the possibility of altering the fabric of criminal law to reflect the accused's distinct cultural background (Bhabha, 1994; Renteln, 2004).

The acculturation of legal institutions can also lead to development of rules governing the process whereby a matter is brought before a judge or other third party. In Canada, an initial response to the perception that criminal justice is f

range of programs has been initiated, some of which attempt to build "hybrid" institutions or practices by grafting "traditional" ways of dealing with offending onto a modern context, including sentencing circles, elders' panels, potlatch and the use of totem symbols (, 2004; Andersen, 1999; Green, 1998; Johnston, 2005; Regan, 2008). In Aboriginal land claims, the Supreme Court has held that "[t]he law of evidence must be adapted in order that this type of evidence [aboriginal oral testimony] can be accommodated and placed on an equal footing with other types of historical evidence that courts are familiar with, which largely consists of historical documents" (, 1997). One undeveloped question, explored mainly by anthropologists and historians as a matter of expert witnessing (Ray, 2003), is to ask whether, and if so how, in pragmatic terms, courtroom process and practices have been altered by the changes to evidentiary law.

The very institutional design of legal mechanisms ref1(m46p-3(c)1(t3(ms)-c1(o)-4(u)-3(l)-1(u)-(p)-1(r)-2(a)l(ed

communities (Shepler, 2005; Muller, 2008; Park, 2008). What, then becomes of such a cultural narrative beyond the specific case with which it was associated? To what extent, for example, do First Nations in Canada – and particular members within them – co-opt the picture of their community produced in the extensive litigation of Aboriginal rights? How transformative is this encounter for a given culture? Can Indigenous accounts of court proceedings such as the Sissons-Morrow collection of Inuit sculptures be seen as a reverse cultural translation of the legal process, a contribution to the constitution of a legal order for that community (Almog, 2005; Richland,

interviews with key actors – will be undertaken where possible. In the **third phase**, results will be developed progressively by way of a graduate research seminar, symposium and conference, more fully described under "Communication of results". The project engages two research methodologies: first is qualitative field research in the form of semi-directed interviews (Hollway & Jefferson, 1997) and on-site observation; second, conceptual written analysis of complementary texts (Richardson, 2004) including court judgments, courts records, policy papers, academic articles and books. The mapping of different types of primary and secondary data will serve to trace connections among the diverse institutions, legal actors, and substantive legal issues, as informed by contemporaneous assessment and retrospective reflection (Charmaz, 2004; Harding 2004).

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to retry the decision by submitting the Canadian and B.C. Government's claims to ownership and jurisdiction of the interior of British Columbia to the Gitksan-Wet'suwet'en feast hall. Through published accounts and interviews with relevant cultural practitioners, Indigenous legal institutions will be taken as a means to re-think the cultural constructs of non-Indigenous peoples and thus produce a new pluralized narrative.

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Research team

The team is composed of two members of the Faculty of Law at McGill University and two members of the Faculty of Arts (Anthropology and History) at Concordia University. All but Reiter are members of the McGill Centre for Human Rights and Legal Pluralism, and each has worked independently on issues touching on the intersection of law and culture. While every member of the team received legal training, the team was composed as an attempt to escape the totalizing nature of legal culture towards a more congenial of law and anthropological perspectives at every stage of the research, including the preparatory work carried out by hybrid law-anthropology research teams. The fact that all members are based in Montréal will allow for intense interaction throughout the project by way of conferences, workshops and informal meetings. We will develop a proposal for a collaborative seminar in which we can share our findings with graduate students in Law and Anthropology at McGill and Concordia.

The Principal Investigator, **René Provost**, is the founding Director of the McGill Centre for Human Rights and Legal Pluralism (CHRLP) and an Associate Professor in the Faculty of Law of McGill University. He was Associate Dean (Academic) of the Faculty if Law from 2001 until 2003. He is recognized as an expert on international law, human rights and humanitarian law and has been innovating in this domain by incorporating attentiveness to cultural diversity and legal plurality. He initiated the Sierra Leone Special Court Clinic at the CHRLP whereby LLB, BCL, LLM and DCL students work as "remote law clerks' for the judges of the SCSL, a programme now expanded to include the Khmer Rouge court in Cambodia. He launched and currently oversees the CHRLP International Courts and Tribunals Programme which places young jurists with the leading international judicial institutions around the world, including the SCSL Chambers and Prosecutor.

David Howes was trained in law and anthropology and is a Professor in the Department of Anthropology of Concordia University. He is a member of the McGill Centre for Human Rights and Legal Pluralism. His principal areas of research expertise are in law/legal pluralism, globalization, commerce/consumption, and aesthetics/material culture studies. In his capacity as Director of the Concordia Sensoria Research Team (1988-present), and Director of the Concordia Culture and Consumption Research Group (1998-present), he has been responsible for directing the research of
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