CULTURE IN THE DOMAINS OF LAW

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 and informal legal processes, when demands are made to accommodate cultural difference? The encounter of law and culture is a polycentric relation, but these questions draw our attention to law and legal institutions as one site of encounter warranting further investigation, to map out the place of culture in the domains of law by relying on the insights of law, anthropology, politics, and philosophy. *Culture in the Domains of Law* seeks to examine and answer these questions resulting in a richer outlook on both law and culture.

RENÉ PROVOST is Professor of Law at McGill University, Canada, where he was the founding director of the McGill Centre for Human Rights and Legal Pluralism. He has researched and published widely on international law and legal pluralism. In 2015, he was named a fellow of the Trudeau Foundation for his contribution to the advancement of knowledge in the humanities and social sciences.

CAMBRIDGE STUDIES IN LAW AND SOCIETY

Cambridge Studies in Law and Society aims to publish the best scholarly work on legal discourse and practice in its social and institutional contexts, combining theoretical insights and empirical research.

The fields that it covers are: studies of law in action; the sociology of law; the anthropology of law; cultural studies of law, including the role of legal discourses in social formations; law and economics; law and politics; and studies of governance. The books consider all forms of legal discourse across societies, rather than being limited to lawyers' discourses alone.

The series editors come from a range of disciplines: academic law; socio-legal studies; sociology; and anthropology. All have been actively involved in teaching and writing about law in context.

Series Editors Chris Arup Monash University, Victoria Sally Engle Merry New York University Susan Silbey Massachusetts Institute of Technology

A list of books in the series can be found at the back of this book.

CULTURE IN THE DOMAINS OF LAW

Edited by RENÉ PROVOST McGill University



CAMBRIDGE

Cambridge University Press 978-1-316-61513-3 — Culture in the Domains of Law Edited by René Provost Frontmatter <u>More Information</u>

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781107163331

© René Provost 2017

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2017

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data Names: Provost, René, 1965– editor. Title: Culture in the domains of law / edited by René Provost. Description: Cambridge [UK] ; New York : Cambridge University Press, 2016. | Series: Cambridge studies in law and society | Includes bibliographical references and index. Identifiers: LCCN 2016028915 | ISBN 9781107163331 (Hardback) Subjects: LCSH: Culture and law. | Sociological jurisprudence. | BISAC: LAW / General.

Classification: LCC K487.C8 C88 2016 | DDC 340/.115-dc23 LC record available at https://lccn.loc.gov/2016028915

ISBN 978-1-107-16333-1 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

CAMBRIDGE

Cambridge University Press 978-1-316-61513-3 — Culture in the Domains of Law Edited by René Provost Frontmatter <u>More Information</u>

> To Patrick Glenn and Rod Macdonald, without whom we wouldn't have written this quite the same way

CONTENTS

Acknowledgments	ix
List of Contributors	2

1 Centaur Jurisprudence: Culture before the Law 1 RENÉ PROVOST

PART I – Accommodation of Minority Cultural Practices 21

- 2 Legal Pluralism and the Interpretive Limits of Law 23 ANTHONY J. CONNOLLY
- Family Law, State Recognition and Intersecting Spheres/ Spaces: Jewish and Muslim Women Divorcing in the United Kingdom 54
 PASCALE FOURNIER
- 4 Customary Norms vs State Law: French Courts' Responses to the Traditional Practice of *Excision* 85 LUCIA BELLUCCI

PART II – Aboriginal Law 125

- Law, Culture, and Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition 127
 KIRSTEN ANKER
- 6 On Perpetuity: Tradition, Law and the Pluralism of Hopi Jurisprudence 152 JUSTIN B. RICHLAND
- 7 **"Existing in the Hyphen": On Relational Legal Culture** 179 JENNIFER HENDRY

viii

CONTENTS

8 The Unexpected Effects of the Recognition of Indigenous Rights in New Caledonia: The Story of an Assimilation Measure Becoming the Trigger for the Acculturation of the French Legal System 191

THOMAS BURELLI & RÉGIS LAFARGUE

PART III – Alternative Dispute Resolution 221

- 9 Cultures of Conflict: Welcoming and Resisting "Non-Western" Influence in Alternative Dispute Resolution 223
 ERIC H. REITER
- 10 Rebalancing Power and Culture? The Case of Alternative Dispute Resolution 247 MORGAN BRIGG
- 11 Grassroots Law in Context: Moving Beyond the Cultural Justification 266
- PART IV Law in Conflicts 291
 - 12 Cannibal Laws 293 RENÉ PROVOST
 - Beyond the Paradox of Exporting the Rule of Law: Resilience and the War on Drugs in the Americas 344
 DAVID CHANDLER

Bibliography 369 Index 420

ACKNOWLEDGMENTS

This volume is the outcome of a multi-year research project supported by the Canadian Social Sciences and Humanities Research Council, in which Kirsten Anker, David Howes, René Provost, and Eric Reiter were participants. The research agenda was developed over three years, and included a research seminar in which undergraduate students in Law at McGill University and graduate students in Anthropology at Concordia University carried out research as a team. The work of these students, Annelise Godber, Caylee Hong, Jessica McCaffrey, Karmjit Sidhu, and Maike Storks, helped to lay the foundation for both the overall project and individual papers. The specific contributions included in this volume were prepared over a period of one year in which initial ideas and drafts were circulated, culminating in a public conference held at the McGill Centre for Human Rights and Legal Pluralism in 2014. In addition to the contributing authors, thanks are due to David Howes (Anthropology, Concordia), Alison Dundes Renteln (Law and Anthropology, University of Southern California), Ronald Niezen (Law and Anthropology, McGill), Frédéric Bachand (Law, McGill), Annie Bunting (Law and Society, York), Kamari Maxine Clarke (Anthropology, Yale), and Genevieve Painter (Law and Social Policy, UC Berkeley), for their contribution to the conference. Finally, the research assistance of Rachel Zuroff and Anne-Sophie Ouellet in editing the chapters is gratefully acknowledged.

The volume is dedicated to the memory of my colleagues H. Patrick Glenn and Roderick A. Macdonald, both of whom passed away during 2015. They appear in the footnotes of many of the chapters, and stand to remain sources of inspiration and models of creativity for many years to come.

> René Provost McGill University

ix

CONTRIBUTORS

KIRSTEN ANKER is an associate professor of law at McGill University, where she teaches in the areas of property, legal theory, and Aboriginal peoples and the law, and has research interests that combine these areas, as well as translation studies, anthropology, education, evidence, and alternative dispute resolution. Her new book, *Declarations of Interdependence: Indigenous Rights, Legal Pluralism and Postcolonial Jurisprudence* (2014) explores various aspects of claiming Aboriginal Title as a way to inspire a re-imagination of law.

LUCIA BELLUCCI is an assistant professor at the University of Milan, Law School. She is the co-founder and co-director of the Summer School in 'Law and Bilateral Trade: North America-Europe' (Université de Montréal-University of Milan). She has taught (Flying Faculty) at the College of Europe (Natolin, Warsaw) and the Oñati International Institute for the Sociology of Law. She has been a Visiting Professor at the Université de Montréal, Law School, CRDP and a Visiting Researcher at the Oxford Centre for Socio-Legal Studies. She holds a PhD in Sociology of Law from the University of Milan as well as a PhD in Law from the University of Paris 1-Panthéon Sorbonne. In addition she holds a postgraduate degree in Economics and Management of Cultural and Artistic Goods from Bocconi University-SDA, and a master's and bachelor's degree in law from the University of Bologna. She has lectured in Italian, English and French at Italian and Canadian Universities (Université de Montréal and McGill University). She has researched and published on Law and Anthropology, EU Law and Politics, International Economic Law and Politics, and Media Law and Policy.

MORGAN BRIGG is Senior lecturer in the School of Political Science and International Studies at The University of Queensland. His research examines questions of culture, governance and selfhood in conflict resolution, peacebuilding, and development studies. Morgan's books include

LIST OF CONTRIBUTORS

The New Politics of Conflict Resolution: Responding to Difference (2008), and Mediating across Difference: Oceanic and Asian Approaches to Conflict Resolution (2011) (co-edited with Roland Bleiker). He is a practicing mediator and facilitator, and has provided policy and practice advice in Australia and internationally.

THOMAS BURELLI is a professor of law at the University of Ottawa. He specialized in environmental law, intellectual property, indigenous rights and research ethics. The main focus of his research is on the relationships between scientists and indigenous people in research projects involving the use of traditional knowledge (in particular ethnobotany and ethnopharmacology projects). He has investigated and revealed several biopiracy cases in New Caledonia and French Guyana in 2014 and 2016. He has contested these cases and contributed to the development of new tools such as models of contracts for the Institut de Recherche pour le Développement (IRD) and the Code éthique du Centre de Recherches Insulaires et Observatoire de l'Environnement (Criobe) in French Polynesia. He has also conducted several field missions in the French territories abroad (New Caledonia, French Polynesia, and French Guiana). He is currently working with the Legal Research Chair in Food Diversity and Security held by Professor Geneviève Parent from the Université Laval and with the Canada Research Chair on Legal Diversity and Indigenous People.

DAVID CHANDLER is Professor of International Relations, Department of Politics and International Relations, University of Westminster, London. He is the founding editor of the Journal of Intervention and Statebuilding and currently the editor of Resilience: International Policies, Practices and Discourses. His most recent books are The Neoliberal Subject: Resilience, Adaptation and Vulnerability (with Julian Reid) (2016); Resilience: The Governance of Complexity (2014); Freedom vs Necessity in International Relations (2013); and The Routledge Handbook of International Statebuilding (co-edited with Tim Sisk) (2013).

ANTHONY J. CONNOLLY is an associate professor at the Law School of the Australian National University, specializing in legal philosophy, indigenous rights law, and public law. He is the author of *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding* (2010) and the editor of *Indigenous Rights* (2009), *Public Law in the Age*

xi

xii

LIST OF CONTRIBUTORS

of Statutes (2015), and Cultural Heritage Rights (2015). He has also published a number of book chapters and journal articles on topics in his areas of expertise.

KRISTIN DOUGHTY is Assistant Professor of Anthropology at University of Rochester. Her book, *Remediation in Rwanda: Grassroots Legal Forums* (2016, Ethnography of Political Violence Series) examines how Rwandans navigated the combination of harmony and punishment in grassroots courts purportedly designed to rebuild the social fabric in the wake of the 1994 genocide. It is based on eighteen months of ethnographic research with grassroots legal forums in Rwanda, including genocide courts (gacaca courts) in which suspects from the 1994 genocide were tried among their neighbors before locally elected judges, as well as mediation committees for ordinary disputes (comite y'abunzi), and a legal aid clinic. Her teaching includes courses on political and legal anthropology, transitional justice, Africa, and human rights.

PASCALE FOURNIER, LLB (Université Laval), LLM (Toronto), SJD (Harvard), is Full Professor and Research Chair in Legal Pluralism and Comparative Law at the Faculty of Law, University of Ottawa. Professor Fournier is passionate about issues of access to justice. In 2014, the National Assembly of Quebec appointed her as Commissioner to the Quebec Human Rights and Youth Rights Commission (CDPDJ). Her research focuses primarily on family law, criminal law, human rights and comparative constitutional law. The author of more than forty academic publications, she is recognized internationally for her significant contribution to the study of law and gender, especially in the context of religious divorce. Her book Muslim Marriage in Western Courts: Lost in Transplantation was published in 2010, and a French version followed in 2013. Professor Fournier was awarded the Raymond-Blais medal (2008) and the Gloire de l'Escolle medal (2016) from Laval University, the Quebec Bar Advocatus Emeritus (Ad. E.) distinction (2009), the University of Ottawa President's Award for Excellence in Media Relations (2011), the Canada-Arab Chamber of Commerce Award for 'Academic Excellence and Contribution to Humanity' (2014) and the Capital Educators' Award for teaching excellence (2016). In 2014, Professor Fournier was named Fellow of the International Women's Forum and, in 2015, she was named 'one of the Top 25 Most Influential Lawyers in Canada' by the Canadian Lawyer Magazine.

LIST OF CONTRIBUTORS

JENNIFER HENDRY is a lecturer in Jurisprudence at the University of Leeds School of Law. She has an LLB (Hons) from the University of Glasgow (2002), an LLM from the University of Edinburgh (2003), and a PhD in Law from the European University Institute (EUI) in Florence (2009). She has been a visiting scholar at the University of Sydney's Department of Philosophy (2011) and the University of Arizona's James E. Rogers College of Law (2015), and is a principal investigator on a World Universities Networkfunded interdisciplinary international research network focusing on 'spaces of indigenous justice'. She is on the editorial board of the *German Law Journal* and the executive of the UK Socio-Legal Studies Association (SLSA).

RÉGIS LAFARGUE[†] was a Président de Chambre at the Cour d'Appel d'Angers (France). He was also a judge in New Caledonia for many years (from 1989 to 1994 and from 2010 to 2015). He has taught in several French universities (Université Française du Pacifique, Université de Saint-Denis de la Réunion, Université de Paris X – Nanterre, Université de Paris I Panthéon-Sorbonne). After a new period of 5 years and a half in New Caledonia as Judge of the court of appeal of Noumea (2010–2015), he was appointed as President of a division (President de Chambre) of the court of appeal of Angers in 2015.

RENÉ PROVOST, LLB (Université de Montréal), LLM (UC Berkeley), DPhil (Oxford) is Professor of Law at McGill University, where he served as Associate Dean (Academic) from 2001 to 2003. He was the founding director of the McGill Centre for Human Rights and Legal Pluralism from 2005 to 2010. He has written extensively on international human rights and humanitarian law, including International Human Rights and Humanitarian Law (2002), State Responsibility in International Law (2002), International Law Chiefly as Applied and Interpreted in Canada, 7th edn. (2006), Confronting Genocide (2011), Dialogues on Human Rights and Legal Pluralism (2013), and Mapping the Legal Boundaries of Belonging: Law Between Religious Revival and Post-Multiculturalism (2014). He was the principal investigator for an interdisciplinary team, the Centaur Jurisprudence Project, funded by the Social Sciences and Humanities Research Council of Canada examining the construction of culture by legal institutions in a variety of settings. In 2015, he was awarded a fellowship by the Pierre Elliott Trudeau Foundation for his contribution to the advancement of knowledge in the social sciences and humanities.

xiii

xiv

LIST OF CONTRIBUTORS

ERIC H. REITER is Associate Professor in the Department of History, Concordia University, Montreal, and a member of the Barreau du Québec. He has published recently on judicial mediation in Quebec, the uses of history in Aboriginal rights litigation, and the history of nuisance law in Quebec, among other topics.

JUSTIN B. RICHLAND is Associate Professor of Anthropology at the University of Chicago and Research Professor at the American Bar Foundation. His research explores the intersections of culture, language and law in contemporary Native American and US settler colonial governance. He is the author of two books, *Arguing with Tradition*, *The Language of Law in Hopi Tribal Court* (2008) and (with Sarah Deer) *Introduction to Tribal Legal Studies*, *3rd Edition* (2015) as well as articles in various scholarly journals including *American Ethnologist*, *Annual Review of Anthropology, Discourse & Society, Law and Social Inquiry*, and *Law & Society Review*. In addition to his research, he also serves as Associate Justice of the Hopi Appellate Court, the highest court of the Hopi Nation. In 2016, he was named a John Simon Guggenheim Fellow.