
Centaur Jurisprudence

Culture before the Law

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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, when oral traditions are presented as the basis for an Aboriginal land claim, or when the custom of ‘bush marriage’ is evoked as relevant to the prosecution of the war crime of rape?¹ The encounter of law and culture corresponds to a polycentric relation, but these specific 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.

The title to this introductory chapter marries two references to interrogate the troubled relation between a perspective rooted in the law and one rooted in culture. ‘Centaur jurisprudence’ echoes the question raised by Clifford Geertz in his landmark article on law and fact as local knowledge: what do law and anthropology have to learn from each other, and what is the desired outcome of the encounter of these two disciplinary perspectives? Geertz sought to demonstrate that the objective lies not in the creation of a ‘centaur discipline’, but rather in a more diffuse cross-pollination that sees law and anthropology remaining distinct worldviews

¹ *R. v. Humaid*, 81 O.R. (3d) 456 (2006); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Prosecutor v. Brima*, Special Court for Sierra Leone, Appeals Chamber (2008).

enriched by a sensitivity to the insights of the other.² The second reference is to Kafka's parable 'Before the Law', in which a man from the country spends an entire lifetime trying to pass the terrifying doorkeeper to gain admittance through the gates of the Law, eventually dying before getting any further.³ As brilliantly analysed by Jacques Derrida, the title of the story can be taken to mean a range of different ideas.⁴ These all equally apply to culture if, as I have done, we add that prefix to Kafka's title: culture before the law in a chronological or genealogical sense, signalling that the formation of culture precedes the creation of law; culture before the law in a spatial or geographical sense, as in an encounter that might turn into a confrontation; culture before the law in a juridical sense, whereby culture is brought to the law to be judged; and culture before the law in an ideological sense, as a rallying cry for the need to protect culture above and beyond any duty to respect the law. As the countryman lay dying at the end of Kafka's parable, he asks the doorkeeper how come no one else ever sought admission to the Law. The latter responds: 'No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it'. One understanding of this ending suggests that law is not a monistic projection of state power but rather an invitation for every individual to imagine their own path to the law. As such, it reflects the ethos of legal pluralism as one approach to law that answers Geertz' call for mutually reinforcing legal and anthropological perspectives so as to capture the full complexity of the encounter between law and culture as conveyed in Kafka's parable.

Legal pluralism, in rejecting a narrow focus on formal law and state institutions, offers a vision of law as dynamic and inherently open to 'culture'. This volume explores the potential of legal pluralism to account for the varied and dynamic roles of culture within legal discourse: can legal pluralism create a richer model of legal knowledge, one that reflects plural cultural narratives, while still offering a normative foundation for formal legal processes? In short, can legal pluralism bring culture within the domains of law? The chapters in this book suggest that the *métissage* takes place not necessarily in the definition of a new mutant discipline, as

² Clifford Geertz, 'Local knowledge: Fact and law in comparative perspective' in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) 167 at 169; Franz von Benda-Beckmann, 'Riding or killing the centaur? Reflections on the identities of legal anthropology' (2008) 4:02 *International Journal of Law in Context* 85.

³ Franz Kafka, *The Trial* (Knopf, 1992) at 234–236.

⁴ Jacques Derrida, 'Before the law' in Derek Attridge ed., *Acts of Literature* (Routledge: London, 1992) 181.

feared by Geertz, but rather in the mapping of a middle space of encounter in which the vernacular of law and anthropology can intermingle in what could be called a centaur jurisprudence, not wedded to shaping a new discipline but rather to providing richer views from the plurality of sensibilities embodied in these disciplines.

The encounters of law and culture within legal institutions are complex and dynamic, intersecting at multiple sites. Three distinct sites, understood as normative sites in which legal knowledge is produced, can be identified. The volume critically interrogates each of these sites by combining legal and anthropological perspectives. The first site, *translation of cultures*, relates to the process of representing cultures as facts which fall into categories known to law. The second, *acculturation of justice*, centres on the ways in which legal institutions react and adapt 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, *pluralized 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 volume contributes to assessing the *rayonnement* of legal culture beyond the boundaries of legal institutions and, by the same process, explores 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 chapters in this book provide a better understanding of the productive and transformative nature of the encounter of law and culture, making this encounter the primary locus of inquiry.⁵ More specifically, the volume seeks to offer 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; to question a vision of the encounter of law and culture as necessarily asymmetrical, as the subjugation of a given culture by law's own culture; to assess 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 now⁶; and at a more general level, to critically address

⁵ Nicholas Kasirer, 'Legal education as métissage' (2003) 78 *Tul L Rev* 481.

⁶ Brian Z Tamanaha, 'Understanding legal pluralism: past to present, local to global' (2008) 30 *Sydney L Rev* 375.

the interactive process whereby legal and anthropological knowledge is created and labelled as belonging to distinct disciplines, something we hope to achieve without unquestioningly surrendering to the hegemony of either anthropological or legal hermeneutics.⁷

Many of the important works that have explored the interaction of law and culture, including Sarat and Kearns' influential *Law in the Domains of Culture* to which the title of this volume gives a nod, appear rooted in a cultural more than a legal outlook.⁸ The chapters in this book seek to give very significant space to a legal perspective on this complex issue. Law, as with many other disciplines, tends to break down into sub-categories that develop their own variant of the disciplinary discourse. For law, this can be said to include not only the way in which issues are framed and arguments presented, but also more elusively in the way in which the relationship between law and other social practices are represented. To return to the three examples given in the opening paragraph, the interaction of law and culture is painted in quite distinct colours in criminal law (invoking a cultural trait as a defence), Aboriginal law (invoking a traditional practice as a basis for a land claim) and international criminal law (invoking a local custom as a necessary context to the application of international law). Legal analysis not only has tended to focus on the articulation of the 'right' answer that a court ought to give in any one of these or similar contexts, but the conversations mostly occur in silos within each of the sub-disciplines of law without significant transversal attention to a phenomenon that can reveal more systemic features of the interplay of law and culture.⁹ Thus, one animating objective in gathering the authors of the various chapters in this book has been to cut cross the boundaries internal to law, to bring into contact analyses that hail from corners of the discipline that rarely, if ever, meet. Accordingly, the three sites of interaction of law and culture described earlier are explored through essays in four legal fields, providing the structure for the four sections of the volume: the general accommodation of 'minority

⁷ James Clifford, 'Rearticulating anthropology' in Daniel Segal & Sylvia Yanagisako eds., *Unwrapping the Sacred Bundle Reflections on the Disciplining of Anthropology* (Durham: Duke University Press, 2005) 24; Annelise Riles, 'Representing in-between: law, anthropology, and the rhetoric of interdisciplinary' (1994) *U Ill L Rev* 597.

⁸ Austin Sarat & Thomas R Kearns, 'The cultural lives of law' in Austin Sarat & Thomas R Kearns eds., *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 2000) 1, at 7.

⁹ See Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999).

practices’ (chapters by Connolly (‘Legal Pluralism and the Interpretive Limits of Law’, Chapter 2), Fournier (‘Family Law, State Recognition and Intersecting Spheres/Spaces: Jewish and Muslim Women Divorcing in the UK’, Chapter 3), Bellucci (‘Customary Norms vs State Law. French Courts’ Responses to the Traditional Practice of *Excision*’, Chapter 4), Indigenous law (chapters by Anker (‘Law, Culture, Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition’, Chapter 5), Richland (‘On Perpetuity: Tradition, Law, and the Pluralism of Hopi Jurisprudence’, Chapter 6), Hendry (‘Existing in the Hyphen: On Relational Legal Culture’, Chapter 7), Burelli and Lafargue (‘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’, Chapter 8)), alternative dispute resolution (chapters by Reiter (‘Cultures of Conflict: Welcoming and Resisting “Non-Western” Influence in Alternative Dispute Resolution’, Chapter 9), Brigg (‘Rebalancing Power and Culture: The Case of Alternative Dispute Resolution’, Chapter 10), Doughty (‘Grassroots Law in Context: Moving Beyond the Cultural Justification’, Chapter 11)), and law in conflicts (chapters by Provost (‘Cannibal Laws’, Chapter 12), Chandler (‘Beyond the Paradox of Exporting the Rule of Law: Resilience and the War on Drugs in the Americas’, Chapter 13)). I now move to more finely explore each site of normative interaction, using contributions from across these four legal fields to support the analysis.

1.1 Translation of Cultures

Turning to the first identified normative site, a first investigation of the deployment of the concept of culture within formal legal processes begins with the observation that *talking* 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.¹⁰ Kirsten Anker in her chapter (Chapter 5: ‘Law, Culture, Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition’) argues that it is the paradigm of recognition that treats Indigenous law as a social fact

¹⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

rather than as a normative or authoritative discourse that is itself problematic for the responses of legal institutions to cultural claims. Anker notes that critics of the 'politics of cultural recognition' in Aboriginal rights commonly argue for a more robust recognition of Indigenous law and of Indigenous political autonomy, one that takes Indigenous law to be not merely a fact of life in Indigenous communities, but a potential source of norms, standards and criteria for decision-making concerning Aboriginal rights. She observes that the effort to shift the terms of Aboriginal rights from culture to law may be necessary but may well face similar problems if law simply replaces culture as the object of recognition. Instead, Anker promotes a legal pluralist approach to Aboriginal rights that emphasizes the discursive and dialogic nature of law and thereby captures the finitude of the human condition that is 'mis-recognized' in aspirations of true or complete recognition.

The '*pathologie de l'altérité*'¹¹, whereby culture is objectified through empirical means in the courts, is framed by the distinction between fact and law that characterizes Western law.¹² The judicial process is constructed as applying legal rules to a defined set of facts. Within this construction, claims of cultural specificity become viewed as part of the factual context in which legal rules must be applied.¹³ The process whereby a culture becomes reduced to facts is 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.¹⁴ It involves a version of the culture which has been transformed by the parties, packaging their culture in terms comprehensible by courts. Justin Richland argues in his chapter (Chapter 6: 'On Perpetuity: Tradition, Law,

¹¹ Gilda Nicolau, Geneviève Pignarre & Régis Lafargue, *Ethnologie juridique: autour de trois exercices* (Paris: Dalloz, 2007).

¹² Barbara J Shapiro, *A Culture of Fact: England, 1550–1720* (Cornell University Press, 2003); Leroy Little Bear, 'Aboriginal paradigms: implications for relationships in land and treaty making' in K. Wilkins ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon, SK: Purich Publishing, 2004) 26–38.

¹³ Kirsten Anker, 'The law of the other: exploring the paradox of legal pluralism in Australian native title' in Pierre Lagayette ed., *Dealing with the Other: Australia's Faces and Interfaces* (Paris: Sorbonne University Press, 2008); R Provost, 'The international committee of the red widge? The diversity debate and international humanitarian law' (2007) 40:2 *Israel Law Review* 614; Eric H Reiter, 'Fact, narrative, and the judicial uses of history: Delgamuukw and beyond' (2010) 8 *Indigenous LJ* 55.

¹⁴ William Twining, *Rethinking Evidence: Exploratory Essays* (Northwestern University Press, 1990).

and the Pluralism of Hopi Jurisprudence’) for understanding the authority that discourses in law and tradition generate in terms of what he calls their *perpetuity*. He suggests that, to the extent that in the Hopi Court’s Anglo-style processes the discourses of law and tradition often vie to occupy exclusively the mediating time-space between facts and norms, their respective perpetuities can also be understood as a kind of jurisdiction, or juris-dictions: discourses of law that call forth the force and limits of legal authority. Richland argues that the competing legitimacy demands of Western and Hopi laws shape how tradition gets formulated by Hopi tribal court actors – namely judges and Anglo-law trained attorneys – as either *statements of law* or *evidence of fact* in a way that is legible to and in service of the Anglo-style legal authority of the Hopi court, but which is illegible, and illegitimate, to the Hopi parties’ and witnesses’ understanding of tradition. For Richland, the notion of perpetuity operates both as the legitimizing force and the enduring limit of Anglo-American law, revealing how it is perpetuity itself that constitutes the core of all authoritative discourses – whether of tradition, law, inheritance or some other genre – whose legitimacy turns on claiming the exclusive role of being a rule, or *the* rule, that mediates between facts and norms.

As with any translation, cultural translators can never be reduced to mere conduits channelling information in a different form and a different direction, but necessarily affirm their own identity in the process of translation.¹⁵ The contributions to this volume assess, through a critical analysis of key party submissions and court decisions, the physical, symbolic and discursive means by which culture is made to appear as a fact and constructed to meet the needs of the judicial process, including the way individuals become ‘experts’ deemed able to speak for a culture.¹⁶ In his chapter (Chapter 9: ‘Cultures of Conflict: Welcoming and Resisting ‘Non-Western’ Influence in Alternative Dispute Resolution’), Eric Reiter examines the rhetoric used by alternative dispute resolution (ADR) experts to describe and ‘sell’ ADR as a method to heal a ‘sick’ or ‘corrupted’ West either by retrieving the West’s own uncorrupted past or by forging links to a foreign but analogous and also uncorrupted past. For Reiter, such cultural encounters between Western law and exotic viewpoints or techniques raise the essential problem of ‘legal

¹⁵ James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press, 1994).

¹⁶ Adam Kuper, ‘Culture, identity and the project of a cosmopolitan anthropology’ (1994) 29 *Man* 537; *R. v. Nahar*, 181 C.C.C. (3d) 449 (2004).

transplants': exogenous institutions and ways of approaching conflict cannot be 'fit' within the strictures of Western legal systems without some measure translating them into Western categories and ways of thinking. Exotics get framed so as to ease entry into the receiving culture, and this most often means framing them within the dispute resolution enterprise as contributing in an instrumental way to classically Western goals like efficiency or justice. Reiter acknowledges that these exotic imports or resurrections of ancient Western values may well help us achieve better results, or permit wider access to justice, or perhaps even transform Western cultures of disputing, but what we are importing or resurrecting are Westernized images of exotic institutions, domesticated in name and, more importantly, in substance to achieve decidedly Western purposes like efficiency, therapy or justice.

In suggesting that the 'factualization' of culture is necessarily reductive, rendering an essentialized version of culture which denies the constant intercultural exchanges and redefinition which are critical to the continued survival of any culture¹⁷, do we present a concept of culture that is unmanageable by courts? For instance in *Marshall (No. 2)*, a 1999 decision of the Supreme Court of Canada dealing with Aboriginal rights, Justice Binnie writes:

The law sees a finality of interpretation of historical events where finality, according to the professional historians, is not possible. The reality, of course, is that courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.¹⁸

Applying the law is a process in which cultural, as well as historical, narratives are created for the immediate purpose of permitting a resolution.¹⁹ As such, the legal representation of culture is normative and instrumental from the start, reflecting political and cultural assumptions embodied in law and legal practice, clearly serving the epistemic interest in power.²⁰ What seems critical is how that representation is itself

¹⁷ Ronald Niezen, 'Culture and the judiciary: the meaning of the culture concept as a source of aboriginal rights in Canada' (2003) 18 *Can JL & Soc* 1.

¹⁸ *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 507 para. 37.

¹⁹ William Twining, 'Narrative and generalizations in argumentation about questions of fact' (1999) 40 *S Tex L Rev* 351.

²⁰ Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, 2002).

represented to all the actors involved.²¹ The problem invites us to be conscious not only of the fluid nature of culture and law and of the existence of diversity internal to any culture, diversity which is often critical to the protection of marginal groups, but also of the crucially creative character of the process of presenting culture to law.²² Thus, Jen Hendry argues in her chapter (Chapter 7: “Existing in the Hyphen”: On Relational Legal Culture’) that legal culture should be conceptualized in a relational sense, as an operation instead of a place, as a process and not as a unit. Understood as a process, legal culture can be said to exist in the interactive tension between legal rules and social norms. A spatially detached or non-embedded understanding of legal culture frees it from the confines of both jurisdiction and hierarchical (albeit oftentimes interpenetrating) levels of legal institutions and operations, while the inclusion of a temporal dimension provides for the radical openness necessary to a relational procedural conception of legal culture.

The anthropological perspective that ‘*les milieux* are all *mixtes*’, as Geertz puts it, poses a challenge to the ‘factualization’ of culture before legal institutions.²³ Because the ineluctable instrumentalism of the legal process promotes the essentialization of a given culture in order to make it amenable to a final decision, a fundamental precept of legal culture is its ability to affirm its supremacy, leading it to cannibalize any ‘other’ culture it encounters.²⁴ In part, legal pluralism suggests that the normative regime encompassing the official law of the state includes more than the formal sources of law: the 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.²⁵ In addition, legal pluralism sees normative regimes entirely dissociated from any state institution or approval as falling within a broad definition of law.²⁶ These

²¹ See Geertz, *supra* note 2 at 174.

²² Alison Dundes Renteln, *The Cultural Defense* (Oxford University Press, 2004).

²³ Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton University Press, 2000) 68.

²⁴ Stanley Diamond, ‘The rule of law vs. the order of custom’ (1971) 38 *Social Research* 42.

²⁵ Lon L Fuller, ‘Human interaction and the law’ (1969) 14 *Am J Juris* 1.

²⁶ S F Moore, ‘Law and social change: the semi-autonomous social field as an appropriate subject of study’ (1973) 7:4 *Law and Society Review* 719; Boaventura de Sousa Santos, ‘Law: a map of misreading. Toward a postmodern conception of law’ (1987) 14 *Journal of Law and Society* 279; Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farham, Surrey: Ashgate Publishing, Ltd., 2009).

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.²⁷ Culture, in offering an account of a discursive practice, is taken to be inherently normative.²⁸ 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.²⁹ 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.³⁰ This is vividly illustrated in Lucia Bellucci’s study of the way many social actors come into play during *excision* trials in France (Chapter 4: ‘Customary Norms vs State Law. French Courts’ Responses to the Traditional Practice of *Excision*’). Of particular importance are the President of the Court, the prosecutor, the experts, the interpreter, the defending counsel and the associations joining the proceedings as civil parties. Bellucci argues that the conflict between the customary rule of *excision* and the state legal system translates into the legal world the conflict between two normative universes, which are conceptually distant with regard to the priority given to the individual and the group. This conflict demonstrates the way in which some traditional practices that were ignored when perpetuated only in colonized areas came to be considered crimes once ‘imported’ to the West. This situation transposes in the realm of criminal law a situation of legal pluralism³¹: the populations that practice *excision* view it as a binding customary rule with the force of law and practice it

²⁷ Anne Griffiths, *In the Shadow of Marriage: Gender and Justice in an African Community* (University of Chicago Press, 1997).

²⁸ Sally Engle Merry, ‘Human rights law and the demonization of culture (and anthropology along the way)’ (2003) 26:1 *Polar: Political and Legal Anthropology Review* 55; Annelise Riles, ‘Anthropology, human rights, and legal knowledge: culture in the iron cage’ (2006) 108:1 *American Anthropologist* 52; René Provost, ‘Magic and modernity in Tintin au Congo (1930) and the Sierra Leone special court’ (2012) 16:1 *Law Text Culture* 183.

²⁹ Kirsten Anker, ‘The truth in painting: cultural artefacts as proof of native title’ (2005) 9 *Law Text Culture* 91; Benjamin L Berger, ‘The cultural limits of legal tolerance’ (2008) 21:2 *Canadian Journal of Law and Jurisprudence* 245.

³⁰ Bernard S Jackson, *Making Sense in Law: Linguistic, Psychological, and Semiotic Perspectives* (Deborah Charles, 1995); Martha-Marie Kleinhaus & Roderick A Macdonald, ‘What is a critical legal pluralism?’ (1997) 12:02 *Canadian Journal of Law and Society* 25; J Webber, ‘Legal pluralism and human agency’ (2006) 44 *Osgoode Hall LJ* 167.

³¹ Marie-Claire Foblets, ‘Les délits culturels : de la répercussion des conflits de culture sur la conduite délinquante ; réflexions sur l’apport de l’anthropologie du droit à un débat contemporain’ (1998) 35:1 *Droit et cultures* 195 at 200.