

Responsibility, Fraternity, and Sustainability in Law

A Symposium in honour of Charles D. Gonthier

Fraternity and Alternative Conceptions of Law

3:30-5:00, Friday May 20, New Chancellor Day Hall, room 102

Chair: Professor Noura Karazivan, Faculty of Law, University of Montreal, Montreal

Summary

This session brought together speakers offering different ways to conceive and conceptualize law. Professor Guth discussed the intellectual influences that drove Justice Gonthier's judgment writing. Professor Larouche examined comparative law and jurisdictional competition through an economic lens. Professor Koutouki illustrated the differences between legal and political definitions of land claim agreements and the definitions formulated by indigenous populations. Lastly, Ms. Verna discussed the legal framework surrounding the repatriation of indigenous human remains.

Method and Matter in the Gonthier Legacy: Legal History and Judgment Writing 1989-2003

Professor DeLloyd Guth, Faculty of Law, University of Manitoba, Winnipeg

Professor Guth began his presentation by explaining the context in which Justice Gonthier first became a Supreme Court judge. Despite Chief Justice Dickson's best attempts to render decisions quickly, health issues with both Justice Beetz and Justice LeDain caused a backlog to develop. Within three months of joining the Bench, Justice Gonthier was called upon by Chief Justice Dickson to write the unanimous opinion of *Elson v. Elson*. Thanks to his presence, the Court was able to drastically increase the number of decisions it rendered each year from 80 to 140, by 1991. Before Justice Gonthier was appointed to the Supreme Court, he served as a trial judge at the Quebec Superior Court for 14 years. Professor Guth characterized his method as intelligent, formal, modest, and collegial: he preferred substantive content over procedural formality, he did not resort to common sense or equity to resolve cases, he did not claim special merit, and he preferred to work with others rather than seek a career in the spotlight. He greatly admired his maternal grandfather, Charles Joseph Doherty, as well as Pierre Basil Mignault.

According to Professor Guth, one of Gonthier's great achievements was the entrenchment of a structured approach to judgment writing. Gonthier's method, moving transparently and systematically from the facts and the legal issues to key legislation and cases to the positions of each side and the rulings of the lower courts to a brief decision, can be seen clearly in all of his judgments. Professor Guth pointed to *Laferriere v. Lawson* as a prime example of this approach. Justice Gonthier discussed "loss of a chance" liability in the UK, France, Belgium, and the USA before summarizing the concept with nine observations, and finishing with a three line disposition. Professor Guth also felt that though it is impossible to know which justices contributed which parts of the *Secession Reference*, traces of Justice Gonthier's approach can be found in the open way in which the judgment cites international legal authorities. In conclusion, Professor Guth believes that we can learn a great deal from Justice Gonthier's focus on the facts, openness to alternative arguments, and ever-present empathy for the litigants.

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Entre le droit comparé et la concurrence juridique : les pressions endogènes pour un analyse comparative

Professor Pierre Larouche, Faculty of Law, Tilburg University, Tilburg, Netherlands

After relating an anecdote about his time as a law clerk for Justice Gonthier, Professor Larouche opened his presentation by explaining how economic analysis relates to comparative legal analysis. Economics tells us that jurisdictions will select the legal systems, theories, and rules that are best suited for them. Theories of regulatory competition indicate that citizens will move to the jurisdiction that corresponds to their needs and preferences, while Easterbrook's dynamic theory says that economic actors will move to those areas that attract them the most. Termed either the Race to the Bottom or the Race to the Top, this theory suggests that legislatures should adapt their laws to attract the economic actors that they want. Discussing Europe specifically, Professor Larouche mentioned several means of pressure, from the means of production to currents of commercial exchange.

Professor Larouche then moved on to models of comparative law. The classic approach, a static model driven by lawyers, now faces competition from Zweigert and Kotz's functional approach. By comparing legal systems through a scientific lens, they seek to introduce a presumption of convergence and broaden the field of research to include principles and policy issues. After discussing the theoretical and practical difficulties of the top-down harmonization of national laws in Europe in the 1990s, Professor Larouche suggested an alternative. His proposal seeks to take the best elements from both the economic analysis model and the comparative law models, envisioning a dynamic model both open to sources outside law and driven primarily by jurists. Theoretically speaking, by adding choices from foreign systems to those already existing within the domestic jurisdiction, society has both more options to choose from and a larger perspective with which to make the choice. During the question period, Professor Larouche suggested that by a broad perspective in comparative law that includes principles and policy issues in addition to elements of the legal system, one can assess the usefulness of foreign mechanisms or concepts without appearing to 'shop around'.

Defying Definition: Aboriginal Land Claims in Canada

Professor Konstantia Koutouki, Faculty of Law, University of Montreal, Montreal

Professor Koutouki opened her presentation with a quote from Justice Gonthier, who summed up 5 years of work and 350 pages of her doctoral dissertation as "so what you're saying is that we should all be just in our dealings with each other." Aside from the reassurance this gave her that she would indeed get the doctorate, she appreciated the credence he gave to her idealism.

She moved on to discuss four cases—*Caulder*, *Guerin*, *Sparrow*, and *Delgamuukw*—that ensure that the Canadian government develops a committed strategy of resolution of aboriginal land claims. One form of resolution is to attempt to give title of the claimed land back to aboriginals. After embarking on a project examining the impact of climate change in the Arctic on the relationship between the federal government and Inuit land claims, Professor Koutouki and her co-researcher

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Professor Lyons of the University of Calgary realized that for Inuit communities, the land claim agreements are a nexus of community action. After refocusing their research on the Inuit definition of the land claim agreement, they discovered that the land claim agreements give Inuit and other indigenous communities a focal point to rally around, and an opportunity and an infrastructure to present historical and contemporary grievances to government bodies. The land claim agreements give the communities control over their lands and a way to re-establish Inuit priorities from the inside, not the outside, resulting in renewed pride in their culture and language. Hunting quotas, for example, were previously established by the federal government as blanket prohibitions based on endangerment, but are now created through dialogue and consensus with local hunters and trappers.

Professor Koutouki warned that interpreting land claim agreements solely under Western legal theories may not be sufficient to keep pace with changing environmental, economic and social conditions in the north. Inuit communities see these land claim agreements as flexible and evolving documents. Thus, she cautioned, a failure by courts to recognize this flexibility and changeable nature will cause conflicts about these agreements, leading to the continued separation of aboriginal communities from the Canadian nation-state. Professor Koutouki argued that as these agreements have become social documents for Inuit communities, with an importance far greater than that afforded in the political or legal arenas, the Canadian judiciary has a responsibility to incorporate the aboriginal definition of land claim agreements into the existing legal and political definitions. Professor Koutouki closed by reminding the audience that, given the international impact of decisions by the Canadian Supreme Court regarding aboriginals, judicial action in this area was especially important.

Museums and the Repatriation of Indigenous Human Remains

Ms. Mara Verna, Faculty of Law, McGill University

Ms. Verna began her presentation with a discussion of the symbolism of repatriation as recognition of the other. She then characterized museums as institutions that reinforce official societal values by promoting the dominant ones and rejecting the minority ones. Ms. Verna pointed out how the processes of objectification and categorization of the Other that museums engage in deeply impact how members of society view the Other. The repatriation of human remains from museums has been plagued by questions concerning the identity of the body and which community to return it to, as well as questions concerning the legality of proprietorship of human remains.

Ms. Verna's case study examined the story of Sarah Baartman, otherwise known as the Hottentot Venus. Ms. Baartman, an indigenous slave from South Africa, was brought to England, and then France, to be exhibited publicly. After her death in 1815, a French naturalist made a plaster cast of her body and painted it to look like her, dissected her, preserved her skeleton, and preserved her brain and genitals in jars. These items were displayed in Paris from 1820 until 1974. A request from then-president Nelson Mandela of South Africa to have the remains returned to South Africa for burial sparked considerable debate in the French assembly concerning the status of human remains in the Code Napoleon. An agreement was reached, and the Ms. Baartman's remains were finally repatriated in 2002. In closing, Ms. Verna reminded the audience of the fundamental contradictions

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in museums that repatriation issues show. Desires to preserve cultural artifacts and make them widely accessible, as well as to foster cross-cultural inquiry and respect conflict with the colonial practices responsible for the collection of many artifacts and the objectification inherent in their cataloguing and display.

Conclusions

Professor Guth's lecture showed the importance of Justice Gonthier's intellectual approach to judgment-writing. As *Laferriere v. Lawson* illustrates, Justice Gonthier's empathetic, logical, and comprehensive method plays a key role in ensuring that each judgment is as thorough, clear, and just as possible. Looking at law from an economic perspective, Professor Larouche pushed the audience to consider the effect of exogenous economic forces on domestic laws. He argued that by taking a broader perspective to foreign law, one that includes principles and policy ideas, one will be able to make a more-informed decision about which foreign laws or concepts to incorporate at the domestic level. Professor Koutouki took a very different angle to alternative conceptions of law than the previous speakers, focusing on Inuit conceptions of land claim agreements. She suggested that the judiciary has an important role to play in incorporating indigenous definitions of land claim agreements into the existing legal and political definitions, both for the sake of Canada as well as for that of the international community. Ms. Verna ended the session with a detailed discussion of repatriation of human remains from museums. Her case study was significant for illustrating the fundamental conflicts between the desire of museums to preserve cultural artifacts and foster cross-cultural inquiry and the racist colonial practices and objectification inherent in museum cataloguing and display.

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