Which Takes Precedence: Collective Rights or Culture?

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Introduction

One of the paradoxes of common law adjudication concerns collective rights. On the one hand, jurists have sought to identify a collective right in terms of a legal source. The source functions as the referent or object of a justification. This rational justificatory act is thought to render a legal as opposed to a moral character to a collective right. On the other hand, in this effort to identify a justified collective right, the quest for its source proceeds in a linear direction. This justification excludes the cultural phenomena as elements of law. Form displaces substance. The cultural phenomena may be presupposed in the content of the collective right. But it is the relation of the bounded form of a collective right to the referent of justification that renders an identity to a collective right. The paradox is that when courts and scholars have sought to identify a collective right, the quest for the right's source has excluded the cultural phenomena generating the content of the collective right. The exclusionary character of a collective right signals the difference between law and other disciplines. So too, the exclusion of cultural phenomena triggers the difference between law and morals. The justification of a collective right takes for granted that rights take precedence over a culture.

The paradox – the exclusion of the study of the very cultural phenomena generating the legal recognition of a collective right – is manifested in positive and negative contexts. In the positive contexts, affirmative preference has been institutionalized for persons said to be entitled to collective rights. Some countries offer such preference to refugees. Other states only grant citizenship to persons of certain ethnicities or *sanguinis* ('bloodline'). Affirmative preference has also been given to persons believed to be members of a linguistic or racial category. Such a preference has been manifested in the employment practices, admission to law, medical and dental schools, and admission to universities for example. In negative contexts, the boundary of a collective right excludes members of other groups lacking preferential

treatment.[1] To take a recent example, nationals of the UK and USA are assured of constitutional rights. Both states (and there are no doubt many others), though, have recently legislated the exclusion of "alien" residents from legal protections otherwise guaranteed to non-aliens.2 Common law analysis of collective rights has proceeded as if the justified form of collective rights can be identified and understood without examining the cultural phenomena presupposed inside the boundary of the collective right. Put more correctly, the examination of the cultural phenomena has come after the collective right has been identified. At that point, collective rights have then been applied to the cultural phenomena. The cultural phenomena themselves have been identified in terms of the familiar concepts and categories of jurists. This has been so despite the increasing interest in the cultural contexts in which collective rights are identified and elaborated.[3]

Four ultimate referents in the justification of collective rights have been offered in common law jurisprudence: a basic text said to found the legal order, the regularity of behaviour of lawyers and judges, a rationally consistent narrative and some ultimate concept such as dignity. Unwritten customs, habits, assumptions and the like have only been assumed to be 'legal' if they could be justified in terms of one of the sources.[4] Legal history has been understood as a discipline or area of study in terms of the sources rather than the social-cultural content of the justified rules/rights. Even the idea of a 'context' has been understood as a textual, rather than a cultural context.[5] The justificatory act of a

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1 William E Conklin, *Statelessness: the enigma of an international community* (Oxford: Hart, 2014), 96-135.

2 See, e.g., *A and Others v Secretary of State for the Home Department,* HL, 156 December 2006,(2004) UKHL 56, HL; *Case of A and Others v UK,* Application No 3455/05, (2009) 49 EHRR 29, European Ct Human Rights (Grand Chamber); *Hamdan v Rumsfeld ,* 126 S.. Ct. 2749 (2006).

3 See eg, Austin Sarat & Jonathan Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving beyond Legal Realism* (Durham & London: Duke University press, 2003).

4 Peter Hogg, *Constitutional Law of Canada,* 5th ed. supplemented (Toronto: Carswell, 2007), at 1-28.

5 See Elmer Driedger, *Construction of Statutes* 2nd ed. (Toronto: Butterworths, 1983), 149-64. Also see Ruth Sullivan and Elmer Driedger, *Sullivan and Driedger on the Construction of Statutes* 5th ed. (Toronto: LexisNexis, 2002), 277-81, 352-58. This most recent editions is preoccupied with the "sources of law" (at 351-52) and the gleaning of the purpose of a statute from the text. However, this most recent edn does acknowledge that "the mischief of a

jurist has usually taken the basic text as the referent of the act. In this act of justification, the focus upon the text has left the content of the collective right to the side. Even when one turns to Anglo-American theorists who elaborate an alternative to the isolation of cultural phenomena, a shadow-box with written sources has risked characterizing the alternative. [1]

My question is 'why?' Why have collective rights analytically trumped social-cultural phenomena even though the phenomena constitute the content of the rights? By justifying rights in terms of the three sources, jurists have claimed that they are describing the practice of law.[2] One comprehensive study of cultural perspectives on law has asserted, for example, that "no substantial body of work demonstrating the methodological commitments, theoretical premises, and political convictions that characterize the interdisciplinary field of cultural studies has yet appeared with respect to law."[3] This has been so, it has been said, because legal pedagogues and other jurists have been seeped in a culture which rarely stands outside its own discipline.[4] Put differently, we have assumed a boundary to our discipline.

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statute concerns the social assumptions and values at the time of enactment of the state *ibid. at* 177. Even In this context, though, the trace of the legislative evolution is crucial (at 2B0-81).

[1] Paul Kahn notes how this characterized Critical Legal Studies (at least the American version) and the 'law and economics' movement. See his "Freedom, Autonomy and the Cultural Study of Law" in Sarat & Simon *supra* note 3, 154-87, at 161, In *Statelessness* supra note 1, I explain and document how, in the quest for the identy of a national, the international community has been considered empty of social-cultural experiences of claimants to an effective nationality.

[2] As an example, see Jules Coleman, *Practice of Principle; In Defence* of *a Pragmatist Approach to Legal Thaory* Oxford: Clarendon, 2003); Ronald Dworkin, *Justice for Hedgehogs* (Cambridge Mass: Harvard University Press, 2011); *Law's Empire* (Cambridge Mass: Harvard University Press, 1986); *Justice in Robes* (Cambridge Mass: Harvard University Press, 2006).

[3] Rosemary Coombe, "Is there a Cultural Studies of Law?" in Toby Miller (ed), *A Companion to Cultural Studies* (Oxford: Blackwell, 2001), 36-62,

[4] See TobyMiller (ed), *A Companion to Cultural Studies* (Oxford: Blackwell, 2001); Paul Kahn, *The Cultural Study* of *Law: Reconstituting Legal Scholarship* (Chicago: University of Chicago press, 1999).

Again, my question is why the justification of collective rights – indeed, of any rights – has been considered analytically prior and exclusive of cultural phenomena in adjudication. Why are cultural phenomena, put differently, not considered elements of a law? I shall argue that such a priority has naively ignored the analytic importance of culture in identifying collective rights. In an effort to make this claim, I shall highlight in Section 1 how a collective right has been considered radically different from a culture. Section 2 briefly explains how legal analysis has usually portrayed the exclusionary character of a collective right. I shall exemplify such a character with respect to peremptory norms in international law and affirmative discrimination in domestic constitutional law. Section 3 then explains the importance of understanding a collective right and a culture in terms of language. The language of a collective right is written. The language of a culture is unwritten. Section 4 proceeds to highlight the conditions making for the unwritten language of a culture. I shall conclude that a collective right exists by virtue of the analytically unwritten character of a culture's unwritten language.

The Presupposed Disjuncture between Collective Rights and a Culture

We tend to think our job finished as a lawyer, judge, law professor or law student if we have identified a right. Once a right is identified, state institutions are believed to possess a duty to protect the individual or group possessing the right. A right, though, is a concept. It is the product of an act of intellectualisation. The right is believed to exist 'out there' in a metaphysical world separate from the bodily experiences of the individual or group. In the quest for the identity of a right, such a metaphysical world displaces the shared experiential world constituting a culture. We gain an experiential knowledge. Such an experiential knowledge is constituted from assumptions and expectations shared by members of the group possessing the collective right. But in our preoccupation with justifying a concept/rule with reference to some ultimate source, we exclude the experiential knowledge from what we take as 'legal'.

A collective right, such as signified in Sections 15(1), 19 and 35 of Canada's *Constitution Act, 1867* for example, may be recognised in a basic text. If the collective rights of this or that group are signified by

the basic text, a social group is identified and defined. This group may well not be the same in-group culturally or politically dominant in a society. It is the *legally* recognized in-group that I have in mind. The point is that some inhabitants may lack a sharing or social-cultural bonding with the affirmed group. For example, a group's identity may be generated from such cultural factors as the religious practices of its members. And yet, an individual member may not share the practices. Similarly, the legally affirmed group may be identified because of the historical disadvantage of the members of the group generating the social-cultural content of the affirmed group. The group members' ancestors, for example, may have been enslaved or the object of racial or ethnic discrimination. And yet, an individual member of the group may lack such a disadvantage. Or her/his ancestors may not have in fact experienced ethnic or racial discrimination. The criterion of historical disadvantage, for example, may be economic. And yet, the individual member of the racial or ethnic category may be economically well-off or her/his ancestors may have been well-off. Why does the quest for an identifiable collective right leave social-cultural phenomena to the side until the right Is analytically identified and applied to the phenomena? The problem is that a collective right begs an enquiry into the nature of legal obligation rather than the quest for the identity of a collective right.

Now, a culture differs from such a structure of collective rights. How so? Collective rights, I noted above, are concepts. A culture's identity, in turn, is constituted from assumptions and expectations shared by members of a social group. Such assumptions and expectations are unwritten. The assumptions and expectations are taken for granted. The assumptions and expectations constitute what I have called experiential knowledge. Such assumptions and expectations are not the objects of reflection, deliberation or inscription as are collective rights as concepts. We only know the identity of a collective right, we have been led to believe, because it is a concept and, more, a concept justified in terms of some ultimate referent such as a basic text. Such an act of intellectualization takes a direction very different from the genealogy of the social-cultural phenomena presupposed in the content of the collective right or its justified source.

Collective Rights as Concepts

Let us delve alittle deeper into the identity of a collective right. The usual justification of a collective right is authoritative by justifying the right in terms of the text and by doing so arguing in a very different direction than would a cultural study. This linear direction to some text even trumps the very social-cultural phenomena generating why this group, rather than that group, is entitled to the right. A right is a concept as opposed to experiential knowledge. A basic text signifies right as concepts.

The role of concepts plays out in a context where a text is presumed to represent rights (that is concepts) 'out there' separate from the jurist. In the second, by justifying one's starting-point in terms of the text, what starts as a subjectivity is analytically transformed into a structure of concepts in a legal objectivity. This transformation even characterizes the claim that the justificatory act begins with a value – better understood as an intuition, as I shall address in another effort.[1] The justification is directed towards concepts. The justified referents are a *priori* concepts. An a *priori* concept is prior to phenomena, including the phenomena constituting a culture. The rights, as concepts, intellectually supersede the experiential world. And so, we can claim to 'know' the original intent of the framers of a basic text from an external standpoint. What might be taken as subjective is transformed into a concept situated in a legal objectivity. Once recognized as a concept, the basic text becomes the referent for the validity of any justified right or rule. Our analytic methodology, so institutionalized in Anglo-American legal thought, seems to reinforce the analytic priority of concepts over a context-specific, experienced event.[2] The concept is general in that it is content-independent. An experienced event comes into play after the right is identified as a legal concept and after the identifiable right is then applied to a context-specific experience. The big question is whether content-independent concepts can displace the embodiment of the content of the concepts with cultural phenomena. Before I challenge such a possible

[1] For such a starting point of intuition and its transformation into concepts and theories, see esp Ronald Dworkin, *Justice for Hedgehogs* (Cambridge Mass: Harvard University Press, 2011).

[2] Kant, *Metaphysics of Morals,* ed Mary Gregor, intro Roger J Sullivan (Cambridge: Cambridge University Press, 1996), I. 435-36.

displacement, Iwish to exemplify how the identity of a collective right is content-independent in two contexts: peremptory international norms and affirmative discrimination in constitutional legal discourse.

Conflict with Peremptory Norms

In the context of a peremptory norm, the identity of a collective right concerns a norm recognised in public international legal discourse. By Article 53 of the *Vienna Convention on the Law of Treaties,* which most states on the globe have ratified, a peremptory norm is uaccepted and recognized by the international community of States as a whole from which no derogation is permitted" and, secondly, the norm may be umodified only by a subsequent norm of general international law having the same character."[1] By Article 64 of the *Vienna Convention,* any emerging 'new peremptory norm of general international law' renders any conflicting treaty norm uvoid".

It remains unclear, however, what norms are peremptory or why they are peremptory.[2] The International Court stated in *Barcelona,* for example, that peremptory norms include "the basic rights of the human person, including protection from ... racial discrimination."[3] Other cultural factors, such as discrimination of the grounds of ethnicity, language, political or other opinion, national or social origin, descent, and property, have been considered proscribed by peremptory norms.[4] *Non-refoulement* has been proscribed as a peremptory norm as well.[5] If the content of a treaty provision is

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1 *Vienna Convention on the Law of Treaties,* 1155 LINTS 331, entered Into enforce 27 January 1980.

2 However, an effort has been made in Conklin, "The Peremptory Norms of the International Community" in *European J Int'J L* 23 (2012), 837-61: "The Peremptory Norms of the Internalfonal Community: A Rejoinder to Alexander Orakhelashvilli" in *European J Int1 L. European J Int'/ L* 23 (2012),869-72.

3 *Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain),* 1970 ICJ Rep. 3, paras 33-34, at 32.

• *Intemational Covenant on Civil and Political Rights,* 999 LINTS 171, entered Into force 23 March 1976, Art 2, 26. *International Convention on the Elimination of All Forms* of *Racial Discrimination,* 660 LINTS 195, entered intoforce 4 January 1969, Art 1(1).

5 See Art 702 of the *Restatement (Third) of Foreign Relations Law of the United States* v. 2 § 702, at 161 (1987); Jean Allain, "The Jus Cogens Nature of Non-refoulement" in 13 *Intemational Journal of Refugee Law* (2001) 533, at 533-58; Lilf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?" in 18 *European Journal of International Law* (2008) 853, 853-71.

conditioned by such proscribed culturally constructed categories, the categories are considered legally invalid. No state may derogate from a peremptory norm proscribing cultural factors as one's national origin or ancestral descent.[1] Peremptory norms have been extended to invalidate customary international norms and general principles of international law as well as treaty provisions.[2]

Although a collective right may be legislated or recognised by the judiciary of a state, a peremptory norm exists by virtue of a culture. There is something about a peremptory norm which addresses why an international community – itself a collectivity – exists. Unless one examines the cultural phenomena generating a peremptory norm, the norm exists as if in the air. It is reified from the social-cultural existence conditions for the very possibility of an international community.[3]

The dependence of the identity of a peremptory norm upon the culture of an international community may be extended further. A community protected by a collective right possesses a culturally constructed boundary. That boundary defines 'who are the community's members?'. The boundary also excludes non-members from entitlement to the collective rights attached to the community. The 'community' and its rights may be considered universal in terms of the boundary of the community. This line of argument also extends to a group affirmatively protected by a basic constitutional text. The universality, however, only extends to members inside the boundary of

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1 J. Starke, *Introduction to International Law* (th ed. (London, Butterworths, 1972), at 59; Human Rights Committee, *General Comment 31,* para 2, U.N.Doc. CCPR/C/21/REV.1/ADD.13 (May 26, 2004). In United Nations Economic and Social Council, *UN International Human Rights Instruments: Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies,* UN Doc HRI/GEN/1/Rev.9, vol 2 (27 May 2008). Also see *Restatement (Third) of Foreign Relations of the United States* 2 § 702 crnt. o, at 161 (1987); Macdonald, 'nternational Community', In *Towards World Constitutions/ism: Issues in the Legal Ordering of the World Community,* Ronald St. John Macdonald & Douglas M. Johnston (eds.), (Leiden: Martinus Nijhoff, 2005), 273, 296-99.

2. This point is developed by James Crawford, *Creation of States in International Law* (Oxford, Oxford University Press, 2006), at 102; Crawford, "Introduction" lo Crawford, The *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002). For conflicts with treaty provisions see Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, Art. 45.

3 This term is examined in Conklin, *Statelessness*, 30-64, 271-301.

the community as defined by the collective rights. The boundary demarcates the group worthy of protection by a collective right. Such a view takes for granted that, once the right is justified in terms of a concept, a collective right is analytically content-independent of the in-group's culture and the cultures of the excluded groups. The members of the community may well be considered equal before the law, for example. So, for example, members of the out-groups may be categorised as aliens or foreigners or 'not us'. The boundary of a collective right, as an a *priori* concept, may well possess an exclusioary as well as a universal character. A collective right, again, is a concept. Rules, principles, doctrines and legal tests are other concepts. The exclusionary character triggered by the boundary of a right/concept – as with the boundary of an international community or of a constitutionally protected social group – impacts upon the cultures of the community or intra-state group as well as the cultures of the excluded communities or groups.

A culture **is a** radically different phenomenon than **is a** concept. A culture is embodied with shared assumptions and expectations experienced by individual human beings and/or as a people as a whole. A culture generates, that is, from the experiential knowledge of members of a group rather than from a jurist's knowledge about concepts. A culture, I shall note in a moment, lacks an author. A parliament, for example, does not and cannot author a culture. Without examining how context-specific experiential knowledge generates the content of a concept, the content is presupposed or posited. Our starting-point is a basic text. Without examining such experiential knowledge, the exclusionary character of a community's boundary is posited as a 'given'. The boundary exists in a metaphysical world of concepts. And yet, with the force of the state behind the community's priority over other cultural groups, the boundary is enforced against those excluded from membership of the in-group. Any belief is na'ive to the extent that it takes for granted that the collective rights a group represent social reality. Much like a unicorn or a half-human creature for which we may observe its 'existence' in a painting or sculpture, a collective right exists in a metaphysical world unless we can link the social-cultural content of the right to the social culture from which it is generated and in which it is nested. In sum, a naivety colours the

character of peremptory norms just as it does of other collective rights. Peremptory norms end up dwelling in the air unless one examines the cultural factors making for the boundary of each norm as well as the excluded collectivities protected by the boundary.

Affirmative Discrimination

In the second context, the seeming analytic priority of a collective right over culture, also dissolves in favour of cultural phenomena. I have in mind here, 'affirmative discrimination'. At first sight, discrimination is considered morally and legally invalid if the discrimination exists on the basis of ethnicity, language, religion, race or other criteria set out in the non-discrimination clauses of human rights treaties. But governments not infrequently take it upon themselves to constitutionally and legislatively discriminate affirmatively in favour of the members of a particular group believed to be in need of legal protection. Issues need to be addressed. [1]

To take an example, one justification for an affirmative discrimination program may rest upon the perception that members or ancestors of the group actually possessed the territory before the state claimed title to the territory. Another justification might be that members of the affirmed group have been historically disadvantaged by the state institutions. A further justification may concern that members of the affirmed group were harmed in the past by private social and economic organizations independent of the state. Once identified as a group worthy of affirmative action, individuals and other groups may be excluded from the affirmative discrimination.

To take Canada as an example and only as an example, collective rights have been inscribed in basic constitutional and quasi-constitutional texts of the state.

i) Affirmative discrimination programs

Affirmative discrimination is expressly entertained by Section 15(2) of the Canadian *Charter of Rights and Freedoms, 1982,* for example. Section 15(1) guarantees an individual's "equality before and under the law", "equal protection" and "equal benefit of the Jaw".

[1] An excellent study in this regard is Kent Greenawalt, *Discrimination and Reverse Discrimination* (New York: Alfred A Knoff, 1983), 52-70.

Section 15(1) also guarantees that no law will discriminate on the basis of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". Section 15(2) then entertains the prospect of future affirmative discriminatory programs aimed to benefit members of particular socially distinct groups. According to Section 15(2), the legislative intent of the program must have as its object "the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.n This discriminatory intent may be considered constitutionally valid. This may be so despite the text's guarantees of equality before and under the law, equal protection and equal benefit of the law, and such equality "without discrimination ..." inscribed in Article 15(1). The question which I am posing presses the legal issue further than the wording of a basic text: 'are the collective rights of the affirmatively discriminated group analytically prior to the cultural content of the collective rights presupposing the identity of such an affirmed group?' For that matter, are collective rights of the affirmed group analytically prior to the cultural identity of excluded groups? Both Canadian and American courts have encountered this issue.[1]

ii) aboriginal rights

To take another example of the issue, the dependence of collective rights to cultural phenomena is also exemplified if one turns to Section 35(1) of the *Canada Act, 1982.* Section 35(1) provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." But who is a member of "the aboriginal peoples of Canada" without examining the anthropology of the diverse cultures of Canada? Section 35(2) states that "aboriginal peoplesn include "the Indian, Inuit and Me is peoples of Canada". But does that help the jurist without examining the prior cultural phenomena generating such "peoples"? A substantial number of persons from an aboriginal culture are said to live in Canadian cities,

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t For the American examples see *Bakke v Regents of the University of California,* 438 US 265 (US Sup CI, 1978); *Grutter v Bollinger,* 539 US 306 (US Sup Ct, 2003). For a Canadian example, see *Lovelace v Ontario,* [2000) 1SCR 950 (SCC).

not on reservations. Once again, we are left with the question, what is the criterion of identifying the collective right of the identifiable group if the territorial locus of the group is indeterminate? How can the members be identified without examining the extent to which the members have been culturally assimilated into or excluded from the legal in-group(s)? What are the criteria of cultural assimilation – language? religious practices? the extent of culture-specific education to members? the extent to which a group is culturally excluded from state-centric education programs? And on it goes. Is membership based upon those born on a particular territorial reservation or those whose parents had once inhabited a reservation in the past? Must both parents have been considered aboriginal persons? Is it left to the individual to say s/he is 'aboriginal'? How far back in history must we turn in order to be confident that one is an aboriginal person?

If we must turn backward into the history of a society in order to ascertain whether members of a group were disadvantaged, do we turn to a time prior to the founding of a state by a basic text? For that matter, which text represents the beginning of the Canadian legal order: 1763 (the Royal Proclamation), 1841 (the Constitution Act), 1867 (the British North America Act, UK), 1931 (the Statute of Westminster, UK), 1980 (the Constitution Act including the Charter of Rights and Freedoms) or any other number of dates when various Provinces were added to the legal order and territory of the state? Each date represents a different source of justification of a collective right. Does the backward-looking examination of a rule's justification in terms of some basic text incorporate nomadic groups who may have been indigenous to the territory now claimed by the state of Canada? Unable to resolve such issues, do jurists leave it to each inhabitant or group to declare whether s/he/it shares the culture of the affirmatively discriminated group?

iii) linguistic and religious affirmative discrimination

To take another example of the dissolution of a collective right into cultural issues, Section 16(1) of the Canadian *Constitution Act, 1867* recognizes English and French as the Official Languages of Canada. The two languages are guaranteed as having equal legal status, rights and privileges in all institutions of Parliament and of the Canadian government generally. Article 16(2) of the *Act* has extended

this collective right to a province, New Brunswick. Article 16(3) reserves the legal authority of any province "to advance the equality of status or use of English or French." Article 133 of the *Constitution Act, 1867* guarantees the use of either English or French in national and provincial legislative proceedings. Except for the province of Quebec (according to Article 93A of the *Constitution* Act), Article 93 of the *Act* protects denominational schools, "separate schools" of "Roman Catholic subjects", and "Dissentient schools" of Protestant and Roman Catholic subjects.

The necessary incorporation of cultural issues into constitutional reasoning is apparent. Can one understand why other groups are excluded from affirmative discrimination without addressing their social history and social identity? How can a French-speaking or Roman religious group be justified as deserving of affirmative discrimination without giving more weight to the social and political history of the groups to, say, the social history of the larger numbers of non-French and non-Roman churchgoers today? And why does the past trump the present? Why may the French-speaking or Roman religious group be discriminated affirmatively, say, in education even though funding is from the state and other groups' funding is lacking from the state. What are "separate schools" of "Roman Catholic subjects" when the funding of the schools is substantially from the state. What is a "dissentient school" without examining the context-specific cultural phenomena concerning religious clashes at present and in the past? The basic text lacks meaning without the prior study of cultural phenomena.

ii) *the problematic of the content-independence* of *collective rights in affirmative discrimination*

Now, when one studies how the higher courts of Canada have addressed the above collective rights, the analysis of the collective rights proceeds as if the content of the collective right exists independent of the cultural context impacting both included and excluded groups. Put differently, a legal formalism has characterised the identity of a collective right and its applicability in any so-called set of facts. Canadian courts have been quick to exclude the incorporation of cultural phenomena as possessing "insufficient legal content", "theory", "history", "social science", "a socio-political discourse", "social

policy", matters of a "purely political in nature", "disconnected from reality", insufficiently "ripe" to be considered law, "inappropriate to answer", "subjectivity", and "outside its [the judiciary's] area of expertise".[1] As the Canadian Supreme Court explained in the *Secession Reference* (1998) "if the Court is of the opinion that it is being asked a question with a significant extra-legal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question."[2] The *Secession Reference,* a unanimous landmark judgement outlining whether and when a province may secede from Canada, has been affirmatively quoted in legal judgments of other states. According to the *Secession* Court, all constitutional rules are said to exist if justifiable in terms of "sources" independent of the content of the rules.[3]

Consistent with such a point of view, published teaching materials for students of Canadian law have justified the exclusion of studies and evidence of a culture as 'political' or 'extra-legal'.[4] One treatise, *Constitutional Law* of *Canada* for example, begins with a "definition" of constitutional law as if constitutional rights existed 'out there' in a metaphysical objectivity distinct from any particular culture which may have generated the rights.[5] Other treatises have followed suit.[6] Only 'written' sources, something examined in a moment, have

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[1] See esp. *Chaoulli v. Quebec (Attorney General),* [2005] 1 SCR 791 at paras. 85-89 per Deschamps & para. 183 per Binnie & Lebel dissenting; *Ref re Same-sex Marriage,* [2004] 3 SCR 698 at paras. 10, 62, 64 (unanimous); *Ref re Secession of Quebec* (1998) 2 SCR 217, 161 DLR (4[1]) 385 at paras. 25-30; *Ref re Canada Assistance Plan (BC),* [1991) 2 SCR 525 at 545.

[2] *Ref re Secession of Quebec* [1998) 2 SCR 217; 161 DLR (4[111] 385 at para. 28.

[3] Hogg, *Constitutional Law supra* note 4, at 1-1 to 1-31. Also see his 1-1 to 1-2; *Constitutional Law* of *Canada* 2012 Student ed. (Toronto: Carswell, 2012), 1-1 to 1-31.

[4] See Leonard Rotman, Bruce Elman, & Gerald Gall eds., *Constitutional Law: Cases, Commentary and Principles* (Toronto: Thomson/Carswell, 2008). esp. at 109-111; Magnet, *Constitutional Law of Canada fl' ed.* (Edmonton: Juriliber, 2007), vol. 1 at 1; Constitutional Law Group, *Canadian Constitutional Law* 4th edn (Toronto: Emond Montgomery, 2010).

[5] Hogg, *Constitutional Law of Canada supra* note 4, at 1-1 to 1-2; Student ed. *supra* note 24, at 1-1 to 1-2.

[6] Bernard W. Funston and Eugene Meehan, *Canada's Constitutional Law in* a *Nutshell* 3"' ed. (Toronto: Thomson/Carswell, 2003), at 15-16. Also see Patrick J. Monahan, *Constitutional Law* 3"' ed. (Toronto: Irwin Law, 2006), 4-10. In his *Politics and the Constitution.: The Charier, Federalism and the Supreme Courl of Canada* (Toronto: Carswell, 1987), 83-4 where Monaghan writes as if a constitution is a document.

been considered judicially enforceable.[1] Unwritten habits and rituals have been considered extra-law and therefore not laws, at least until relatively recently.

The Content-independence of Collective Rights Exemplified

The prior analytic issues concerning cultural phenomena are exemplified in the relatively recent Canadian Supreme Court judgment of *Lovelace* (2000).[2] The background to the *Lovelace* case was as follows. Members of a particular "band" of indigenous inhabitants were the object of affirmative discrimination. By a 'band', a left-over of the colonial heritage, the state has legislatively defined and superimposed the concept of "band" upon the social events of indigenous peoples. The boundary of the affirmatively discriminated group excluded other groups, especially aboriginal members of any indigenous groups which had not been registered as a "band". A non-band group would exist, for example, if its members or leadership refused to be categorised as "Indians" under national legislation. Some groups refused to be registered as 'Indians' because registration might undermine legal claims arising from treaties signed and ratified by the colonial state a century or so earlier.

Now, *Lovelace* exemplifies an occasion when courts had to address the affirmative discrimination by a provincial government. The cause of the discrimination was the construction of a casino in a territory inhabited by the band. The state conferred legal authority to the band to establish a casino and to employ only members of "the band", Ms Lovelace claimed that such an affirmative discrimination would cause harm to herself and to other members of non-band groups. The harms, interestingly, concerned cultural harms: the vulnerability of her group to cultural assimilation, the absence of rules from an independent source of livelihood, a compromised capacity for her group to protect its traditional homelands, a lack of access of her members to culturally-specific health, educational and social service

[1] As Hogg puts it, "because they [unwritten conventions] are not enforced by the law courts, they are best regarded as non-legal rules, but because they do In fact regulate the working of the constitution, they are an important concern of the constitutional lawyer Hogg, *Constitutional Law supra* note 4, 1-22.1.

[2] *Lovelace v Ontario,* (2000) 1SCR 950 (SCC).

programs, and a chronic pattern of her group being ignored by both the national and provincial governments. Now, the Court admitted that it should examine the "substantive", rather than the "formalistic", language of collective rights. The Msubstantive" language would suggest an examination of the cultural content of the rights. When pressed to identify why the boundary of band Indians could exclude all other aboriginal inhabitants, however, the Court turned to the abstraction, "the perspective of the reasonable individual". This standpoint, infused as it is with the colonial legal culture of the UK, marks the superimposition of such a *legal* culture *onto* the indigenous traditions of both the affirmatively discriminated in-group and the excluded out-groups.[1] Put differently, a legal concept, 'the reasonable man', is superimposed upon the cultures although the legal concept itself is peculiar to a particular culture, the legal culture of the colonial authority. On the surface, the 'collective right' of the state is superimposed upon buried cultural phenomena. The Canadian Supreme Court concluded that the claim of Lovelace for recognition of her band's collective rights could not be justified in terms of some basic text.[2] Indeed, the Court concluded that the cultural contexts effectively constituted affirmative action. Under the authority of Section 15(2) of the *Charter,* just noted, the complainant's 'band' dissolved in favour of the group conferred affirmative discrimination.[3] But the judgment is remarkable for the absence of context-specific anthropological evidence concerning either the affirmed or excluded groups. No social history, no study of the cultural harm caused by favour the one group over the other, no context-specific empirical evidence concerning employ6ment levels of members of either group, and on it goes. Legal formalism trumped the social-cultural phenomena presupposed inthe content of the in-and out-groups. The collective rights institutionalised in the above affirmative discrimination program were ultimately analysed as if the form of a collective right

[1] *Lovefsce v Ontario,* [2000] 1 SCR 950 (SCC), **para** 90.
[2] *Lovelace v Ontario,* [2000] 1 SCR 950 (SCC), para 89.
[3] *Loveface v Ontario,* 12000] 1 SCR 950 (SCC), para 92.

was analytically and factually prior to the cultures of the included and excluded groups.

The dissolution of the analysis of collective rights into cultural studies

One approach to a collective right entitling an individual to affirmative discrimination is to ask whether members of the discriminated group or their ancestors were in fact the object of actual social-cultural discrimination by the state. That question, in turn, asks whether the affirmative discrimination in favour of a particular group can be resolved without first understanding the social-cultural conditions constituting the group's distinct culture *vis-a-vis* the distinct cultures of the out-groups.

As an example, affirmative discrimination raises the issue, 'what is the criterion of the identity of the historically previous out-group to be rendered the object of contemporary affirmative discrimination?' If a collective right is attributed to a group and if discrimination is based upon the historical disadvantage of the group, is there discrimination if some members of the group have not in fact been disadvantaged? Can that issue be resolved without addressing the role of economics in the culture of the discriminated group? If the culture is that of a traditional group (or 'people' or 'society') for example, is the culture or has the culture been characterised by a sharing of property? Is it just that a criterion of the identity and boundary of a social group is the market economy or is it a more traditional exchange economy? After all, the criterion of past discrimination may exist by virtue of how a colonial state assimilated members of the group or destroyed the exchange economy prior to the founding text of the state. A state, one needs reminding, possesses radical title to the territory. Such a title justifies the state's claim to authority over all objects on the territory.

If economic criteria did not or have not characterised the culture of the affirmatively discriminated group, is the criterion of 'historical disadvantage' that of, say, massive atrocities against members of the affirmatively discriminated group? If not physical harm such as the massive atrocity of ancestors of the group, then is the group itself the object of a cultural violence by the present laws or officials? If the harm was not caused by a state, is affirmative discrimination justified if the harm has been caused by para-military

groups? Was the state legally obligated to protect members of the discriminated group?

More, what length of time of being disadvantaged must one incorporate into a contemporary claim for affirmative action? One generation? Two generations? Three generations? Or may we consider the economic, physical or cultural violence of centuries ago? As such harm recedes into the past, is it not more difficult to claim an injustice against present individual members of a social group? How can we be certain, for example, that an existing member of the social group has been economically, physically or culturally harmed because of such collective harm to her/his ancestors? Even if we were certain that ancestors of present members of a group were economically, physically or culturally disadvantaged, the category of membership in the discriminated group may be both over-inclusive and under-inclusive. So, for example, if we take economic, physical or cultural harm as the criterion and if we affirmatively discriminate in favour of first- (or second-) generation refugees to one's state, some refugees, compared to other refugee members in the refugee group, may be very economically well-off or have lacked physical or cultural harm. Conversely, the boundary of the discriminated category may be under-inclusive because non-refugee members may also be the object of economic, physical or cultural harm. The boundary of the categorised social group does not fit with the suffering that needs to be compensated or with any criterion of distributive justice.

To complicate matters, if cultural phenomena of, say, ethnicity or religion or race are considered the basis of affirmative action, how does a jurist determine whether an individual is a member of such a group? Is a shared language the key? If so, does an individual of the discriminated group remain deserving of a collective right if s/he has assimilated the official language of a state? If not language, then is a shared religion the basis of being protected by a collective right? And which sect of an institutional religion? What religion or religious sect exists without theological differences or interpretations of the shared basic texts? If not language or religion, do the cultural phenomena of ethnicity satisfy the very possibility of a collective right? But what distinguishes an ethnicity? Does an ethnicity exist by virtue of a shared national origin? A shared social origin? A shared origin on a certain

territory? Again, how long ago need one's family have originated on such a territory?

The cultural context of a collective right is still more complicated. This is so because the boundary of the social out-group now entitled to affirmative discrimination excludes other groups whose cultural identities from that of the out-group now entitled to affirmative discrimination. The exclusionary character of reverse discrimination is all the more complicated when one appreciates that the criterion of membership in the affirmed group may well, say, be economic but the criterion of the excluded groups may well be non-economic criteria. Indeed, the excluded groups may be characterized by physical violence by the state in the one group's ancestors and by cultural violence by the state with another group's ancestors. In sum, the affirmative discrimination in favour of any social group requires an examination of the cultural identity of excluded groups. The analytic priority of concepts – that is, of collective rights – over culture is suspect just as it was with peremptory norms.

The point is that when push comes to shove, the quest for the identity of a collective right by reference to a basic constitutional text dissolves into the deeper issue pertaining to the obligatory character of the identifiable right. The obligatory character of a right, in tum, begs an enquiry into the nature and boundary of the dominant, supplementary and excluded cultures in a state-controlled territory. And how can these issues be resolved without examining the cultures of the in- and out-groups of affirmative discrimination? Something more is needed in order to understand, clarify and elaborate the identity of those groups entitled to collective rights. Something more is needed in order to determine the identity of the excluded groups as well as the alternative ways to institutionalize a collective right in a particular society. Such a quest for the identity of a collective right requires a study of the cultures composing a larger society, the social factors generating each culture, and the role of the state in recognising and institutionalising the protection of the members of the diverse culture(s). The starting-point of such issues addresses the boundary of legal knowledge which has heretofore separated collective rights from cultural phenomena.

The Languages of Collective Rights and of a Culture

It may now be apparent that the language of a collective right radically differs from the language of a culture. A collective right, justified by a textual source, is signified by a written language. By a written language, the objects of the language are authored. Such objects are the product of reflection and deliberation. Officials of a state institution self-consciously reflect and deliberate about a right, as a concept, before they represent the right as a configuration of written signs. The author may be an historical agent, such as a legislature, or a constructed agent, such as 'the original intent of the founding fathers'. The writing represents or signifies a rule, principle, or doctrine, each of which is a cognitive object.

A culture, in contrast, is constituted from acts of meaning drawn from the interpreter's experiential knowledge. Such acts of meaning embody (that is, give experiential body) to an interpretation of a text's signs. Acts of meaning are not found in some dictionary or statute or treaty even though, in English, one might use the term 'meaning' as if it can be found in a dictionary. A meaning is internal to one's consciousness. One draws from memories and expectations which s/he has experienced through time and space. Such acts of meaning lack a mediating text. A statute, treaty, court's judgment, or *opinio juris* exemplifies such a mediating text. A mediating text intercedes between an interpreter and the collective right. And so, if a collective right recognizes a social group, an individual falls either inside or outside the boundary of the affirmed group. The excluded individual may well be a stranger to the identity of the affirmed group.

An incident of the written language is that time and space are measureable. Legal time begins, for example, with texts of a written language. Collective rights are assumed to exist once inscribed in the basic text or some interpretive act towards that text. The birthday of the basic text is even celebrated (the 'birthdate' of Canada is ironically celebrated on a different day from the signing of the foundational text). The existence of any culture prior to "the critical daten of the basic text is excluded as "pre-legaln or "politicain. So, for example, treaties between the state and various (actually, many) traditional societies

have until recently been considered unenforceable.[1] Why? Because indigenous societies have been considered lacking state-like institutions at the time of the signing of the treaties. Even legal history has been considered a history of concepts, not of cultures, and then only after the calendar birth-date of the state's legal order. With such a calendar time, the structure of concepts, of which collective rights are now units, becomes reified from the experiential knowledge shared by members of a culture.

In the same way that time has been quantified in terms of a year, month, day and even hour rather than a time experienced by insiders and outsiders of collective rights, space too has been presumed to be quantifiable. In this context, space has had a territorial character. It is not just that the state and the state's *domain reserve* has been defined in terms of a territorial border. Even a right has a territorial-like space inside the boundary of the right. The right to property, whether private or public, has connoted a similar territorial-like space. Similarly, a social group has been considered 'free' if it possessed a territorial-like space as opposed to extra-legal phenomena external to the boundary of the legal space. Property also has a humanly constructed boundary within which one has what Kant called "intelligible possession".[2] In like vein, a collective right is constructed by an act of intellectualizati on as if the boundary of the collective right protects a territorial-like space owned by a 'people' or 'social or ethnic group'.

A culture, in contrast, draws from a sense of space experienced by individuals. The boundary of such an experienced space is embodied from an horizon of assumptions and expectations

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• *Guerin v The Queen,* (19841 SCR 335; 13 DLR (4[111]) 321. One Canadian Supreme Court judge has described Article 19(2) collective rights, noted above, as "political compromise rights" with the consequence that they are not "seminal" or "rooted in principle" **as are** "legal rights" (such as due process, right to council, and the like). Societe *des Acadiens du Nouveau-Brunswick Inc. v Association* of *Parents for* Faimess *in Education* [1986] 1 SCR 460; 27b DLR (4[h]) 406 (SCC).

[2] Immanuel Kant, *Metaphysical Elements of Justice,* John Ladd (trans), 2"" ed (Indianapolis: Hackett, 1999), 42, line 245.

through which one reads texts.[1] One is bonded to a culture by virtue of experiential time and space. Experiential time and space constitute objectivity, an objectivity that is meant rather than a measurable abstraction. The meant objectivity is peculiar to those bonded to a culture.

By way of example, Sophocles' *Antigone* raised the prospect of an experiential knowledge of time and space. The king had called his council together as a legal process. His council 'enacted' an edict that no one should bury the deceased body of Polyneices. The king's proscription against burying the corpse of Polyneices was a cognitive object - that is, a concept. The edict was publicly known by citizens, by the chorus, and by Ismene and Antigone. All citizens of Thebes were excluded from burying the body of Polyneices. Although no doubt lacking inscription in a text as one associates with a law today, the king's edict was the consequence of thought and deliberation before the council. The edict was 'written' in that it was authored. The polis of Thebes authored the edict. The authored edict manifested reflection and deliberation on the part of officials of the polis about the possible crime and the sentence of stoning to death.

Such a 'written' law contrasted with the unwritten laws of Antigone's culture. When charged with having violated the edict, Antigone responded through a filter of experiential or unwritten knowledge. Such experiential knowledge drew from the experiences of her mother having married her brother, her loss of her two brothers on the same day, her sister aligning with the men, and, more generally, her having experienced right and wrong from the unwritten traditions of her clan or extended family. Such experiential knowledge constituted the culture of a clan with which she identified. The language of her culture, in contrast with the language of the king, was unwritten. As Antigone exclaimed when charged with violating the collective rights of the one social group (the city), her laws were uunwritten laws". The assumptions and expectations of an unwritten language of her culture

[1] The effort to contrast measureable time and physical space with experiential lime and space is extended to legal analysis in my "A Phenomenological Theory of the Human Rights of the Alien" in *Ethical Perspectives* 13 (2006): 245-301,

were "buriedn in a written language about legal obligation, as one leading Anglo-American jurist once suggested of the nature of legal obligation generally. [1]

That is, two senses of a law were at issue. The one was the King's edict proscribing the burying of the body of Polyneices with a sentence of stoning to death. The second involved unwritten conventions lacking the quantifiable time and space when and where the King had authored his edict. This second sense of a law had been experienced by members of Antigone's clan. The crucial issue for her laws concerned a legal obligation drawn from an experiential time and space. As Antigone exclaimed, These laws weren't made now Or yesterday. They live for all time, And no one knows when they came intothe light.2

One scholar translates the culture to which Antigone appeals as "the great unwritten, unshakable traditions".[3] And another translates laws of her culture as "unwritten and unfailing".[4] Antigone felt bonded with the unwritten language of her clan's culture. In contrast with the King's edict, her laws lacked a discrete and assignable author. She had not self-consciously reflected nor deliberated with others about their unwritten language. She had felt obligated, as required of the eldest surviving member of the clan, to venture out to the battlefield and to bury the body of her brother. Like the king, she felt that she had no choice in the matter. She just had to follow the unwritten law despite the protestations of her little sister and despite the consequences of contravening the King's edict.

Against the contrast between a written and unwritten legal language, one would be remiss if one took for granted that only some intermediate social group, such as a clan, family, organisation or ethnic

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[1] This may be what HLA Hart meant when he wrote that a "bond" was "buried" Inthe term "legal obligation". Hart, *Concept of Law* 3n1 edn (Oxford: Clarendon, 2013), 87.

[2] *Antigone* (trans by Paul Woodruff; Indianapolis: Hackel, 2001), line 450-58.

[3] Sophocles, *The* Three *Theban Plays* (trans by Robert Fagles; New York: Penguin, 1982), line 505.

• Sophocles I (ed by David Grene and Richmond Lattimore; trans by Elizabeth Wyckoff; Chicago: University of Chicago Press, 1954), line 455.

group, possessed collective rights. For today, a state itself possesses collective rights *vis-a-vis* other states and an international community as a whole. The state, as with any entity with collective rights, has an identifiable beginning by virtue of a basic text. The legal 'existence' of such a state, though, begins and ends with self-consciously authored writing.

In contrast, the unwritten language of Antigone's culture constituted what others have called 'pre-legality'. Antigone's unwritten laws existed before the law as we have understood the sign 'law' – that is, law as statutes, treaties, precedents, international customary norms and *opinia juris.* We jurists are trained to exclude such cultural conditions as matters for anthropology or philosophy, not for law. As HLA Hart insisted, "[nJo doubt as a matter of history this step from the pre-legal to the legal may be accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unwritten rules."[1] Again, writing signifies (that is, re-presents) concepts. The writing is authored.

But because collective rights are cognitive objects identified in a structure of cognitive objects, the boundary between law and culture is cognitively constructed. We construct a boundary between the collective rights, as cognitive objects, from the unknown and unknowable pre-legality. This boundary is ours, that of us legal knowers (of concepts). We posited the boundary between law and extra-legal. By positing such a boundary, we claim to know what is extra-legal. How else could we differentiate law from extra-law? And yet, because we insist that legal knowledge only incorporates concepts as opposed to the extra-legality of experiential knowledge (of an unwritten legal language), we exclude from 'law' an enquiry about the cultural conditions. Legality depends upon what is excluded from legality although we are excluded from knowing the excluded cultural phenomena. The excluded cultural conditions experientially and analytically precede the collective rights of legality. This is so even though we exclude the cultural conditions as 'relevant' to law. The externality is posited as lacking a language because we have

[1] Ibid 94-95.

understood a legal language as necessarily authored. Only a written language can represent the rights of a social group. Rights themselves are concepts represented by basic texts.

In contrast with the unwritten cultural phenomena, a collective right is considered a unit of legal objectivity. Identification of a collective right, we observed above, rests in the justification of the collective right with reference to a basic text. The identity of a collective right rests in a source. The juristic role is to rationally trace any alleged collective right to its source. As HLA Hart states, "what is crucial is the acknowledgment of reference to the writing or inscription as *authoritative* i.e. as the *proper* was of disposing of doubts as to the existence of the rule [sic concept]."[1]

The language of a culture is unwritten. An unwritten language is constituted from assumptions and expectations. To be sure, an unwritten language may be evidenced by treaties, statutes and other written sources. But such sources are *indicia* of unwritten legal obligations. Aside from written sources as *indicia,* bodily gestures may constitute an unwritten language. The gestures are not of a biological body but of an experiential body.[2] The written language of collective rights, along with statutes, precedents, treaties and customary international norms, signifies the rights as concepts prior to experience.

As such, the written language cannot exist as a source of meaning without the unwritten language of the culture in which the written language is immersed. The unwritten language analytically (as well as experientially) precedes the collective rights as concepts. I say 'analytically' because the written language cannot identify collective rights without the 'pre-legal' social-cultural assumptions and expectations. I say 'experientially' because jurists experience judicial habits and rituals before they analyse collective rights signified by a basic text. And so, the basic texts are not 'givens' or starting-points of legal analysis as often assumed by jurists. The texts are obligatory

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' Hart, *Concept* of *Law supra* note 36, 95.

[2] This is examined in Conklin, *The Phenomenology of the Modem Legal Discourse* (Aldershot: Dartmoulh, 1998), 28-34,144'63.

because of the pre-intellectual assumptions and expectations. The priority of collective rights over culture has heretofore foreclosed such assumptions and expectations from legal analysis. We are left, then, with the problematic that the analytic methodology excludes from legal analysis the very conditions generating the content of the collective rights. Only concepts signified by signs of a state-centric authorial institution are assumed to be knowable by lawyers.

The Conditions Constituting an Unwritten Legal Language

Let us delve deeper into the nature of the unwritten language of a culture. The most important factor generating a culture is the collective memory of the group. A collective memory is not something personally experienced in a concrete event. A personal memory can be recovered through self-reflection, therapy or 'flash-backs' because the memory had been personally experienced. The individual may reflect about the personal experience or even write about the experience. A collective memory, however, incorporates the memories of the group independent of one's personal experiences.[1] A collective memory is shared amongst members of a group before one becomes a member of the group. The collective memory lacks a distinct origin in time as one personally experiences an event. A collective memory is not written down although writing may offer evidence of the collective memory. Collective memories, preceding birth, are subtly transferred through bodily rituals, formal and informal education, social relationships, religious practices, and day-to-day experiences. Pierre Nora describes a collective memory as constituted from "gestures and habits, unspoken craft traditions, intimate physical knowledge, ingrained reminiscences, and spontaneous reflexes."[2] A collective memory is involuntary and unintentional in the sense of being the object of self-conscious action. That is, a culture's assumptions and expectations embody the relation of texts to their signified concepts which we have taken as collective rights. Even a personal memory

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[1] Karl Jung, 'The Concept of the Collective Unconscious' in Walter K Gordon **(ed),** *Literature in Critical Perspective* (New York, Appleton-Crofts, 1968) 504-0B.

[2] Pierre Nora (ed), *Realms of Memory: Rethinking the French Past,* Eng translations edn, ed & forew by Lawrence D Kritzman, trans Arthur Goldhammer, 3 vols (New York: Columbia University Press, 1996-9B), vol 1,B.

from a personal experience is embodied with one's collective memories.[1] A collective memory constitutes a pre-intellectual or experiential knowledge.

Accordingly, the context-specific social experiences constituting a culture, not texts, bond individuals together. This may be so of members of a state as much as of a social group. Indeed, early 19th century European jurists such as Hegel believed that such a social bonding would culminate in the nation-state. Hegel himself, however, recognised that intermediate organisations between individual and state also possessed a social bonding. Such organisations were exemplified by the family, corporations *(Korporationen),* an economic class (or 'estate'), and charitable institutions.[2] Today, one might add such intermediate social organisations as trade unions, religious groups, and other groups generally described as having an ethnic character although one might be unclear as to what it means to be a member of an ethnic group.

The critical point is the sense of one's belonging to such a group. The member shares unquestioned assumptions and expectations shared in the group. In this context Article 27 of the *International Covenant on Civil and Political Rights* [ICCPR] considers a culture as synonymous with religion or language. *General Comment 23* of the UN Human Rights Committee expresses that the kef to a recognised collective right is just such a sense of belonging. This *'belonging'* is said to address one's 'enjoyment of a *particular culture'* or *'a way of life'.*[4] Such a social belonging draws from one's collective memories and personally experienced memories.

Let us identify the several features of a collective memory, features which contribute to generating the alleged "pre-legal" culture.

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[1] See esp M. Sturken, "Narratives of Recovery: Repressed Memory as Cultural Memory" in Mieke Bal, Jonathan Crewe & Leo Spitzer (eds), *Acts of memory: cultural recall in the present* (Hanover & London: University press of New England, 1999), 231-48.

[2] See generally Conklin, *Hegel's Laws: the legitimacy of a modem legal order* (Slanford: Stanford University Press, 2008), 215-19.

[3] HRC General Comment 23: Article 27 (Rights of Minorities) In *UN International Human Rights Instruments* supra note 17.

• HRC, General Comment 15 in *Compilation supra* n 17 (1994), para 3.2.

For one thing, one generating condition of a culture is a "habit memory". Rituals and ceremonies constitute habits. Such rituals and ceremonies are bodily experienced. We do not stop and think as to which habits are material to our actions. We do not deliberate about them except as re-presented as signs representing concepts about the habits. We do not think nor deliberate about the habits. Indeed, if we insisted upon debating whether the habit should be replaced by a different habit, we might meet with ostracism.

There is a second feature characterizing the role of a collective memory in a culture. The collective memory may retain the signs and symbols of the group's past – the ritual of standing at attention upon hearing one's national anthem or buying a 'poppy' on veteran's day (at least in North American states), the annual march by veterans on Remembrance Day (at least for the winning side) or consternation upon observing the national flag at half-mast. Any such gestural expression is a symbol with which one is immediately bonded without thinking about the habit. Paul Ricoeur used the term 'symbol' to connote such a felt immediacy in contrast with a sign which represents a concept.[1] One identifies immediately with a symbol without the mediation of concepts.

Any such symbol, though, may fade or become stronger through time.[2] A collective memory may suddenly become culturally important. The collective memory subtly fluctuates. With such a flux of collective memory, the composition of the in- and out-group may vary through time. Individuals subtly and slowly assimilate into the group. Even a university group, better institutionalised as a faculty or a department, may radically change because of a reappraisal of the members of the in-group. Although the analysis of the relation of sign to a signified object is rich and complex, the sign/signified relation

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1 Paul Ricoeur, *Time and Narrative,* trans. by Kathleen Mclaughlin & **David** Pellauer , 2 vols.? (Chicago: University of Chicago Press, 1988), 58, 221, 243n6; *Conmcts of Interpretations: Essays in Hermeneutics* ed. by Don Ihde (Evanston: Northwestern University Press, 1974), 134.

2 Maurice Halbwachs, *The Collective Memory,* trans Francis J. Ditter & Vrzdi Ditter, into Mary Douglas (New York: Harper & Row, 1980), 82.

misses what Ishall describe as 'meaning'.[1] The shared memories of a group may displace one culture with another group's culture. A civil war is only one situs of cultural struggle.

A third way that collective memory generates culture concerns the experiential space associated with the collective memory. Maurice Halbwachs (1877-1945) highlights how social groups "enclose and retrieve remembrances" within a spatial structure.2 A group's experienced identity with a physical site – say, a marbled wall in Washington with the names of veterans from a war, a flag imprinted in the lawn of a park, a flag at half mast, a museum – may be crucial to constitute a collective memory. One bonds immediately with the symbol without a second thought about whether to do so. Territorial knowledge represents just such a sense of immediacy in legal culture. Whether a right, property, jurisdiction or a reserved domain of the state, we take for granted that the unit of law manifests a territorial-like space inside a boundary.[3] Its manifestation in territorial control transcends an experiential sense of space. A family or ethnic group experiences a space which may not necessarily connote territoriality. Experiential knowledge of space works to bond individuals into a social group. A physical *situs* may take on different collective memories for different groups. The experiential knowledge about space may shift in time and vary in depth from group to group. As Nora states, "memory is blind to all but the group it binds."[4] A self-consciousness of such symbols of a collectivity buried deep in the consciousness embody a culture. The abstraction and reduction conquers and annexes the lived acts of meaning generating the collective memory. The latter lived meanings set the background to such a territorial sense of legal culture.

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1 See Husserl, *Ideas* sect. 96, p.257.
2 Halbwachs above n 50, 157.
3 Conklin *Statelessness*, 220-34.
4 Nora, :"Between memory and History: *Les Lieux de Memoire"* (trans by Marc Roudebush), In *Representations,* No 26, Special Issue: Memory and Counter-Memory (Spring 1989), 7-12 as reprinted In Michael RossIngton & Anne Whitehead (eds), *Theories of Memory: A Reeder* (Baltimore: Johns Hopkins University Press, 2007), 144-49, at 146.

A final way that a collective memory helps generate a culture is a group's forgetting of past experienced events.[1] Pierre Nora's re-reading of the French past has highlighted how the past has been interpreted by 'Frenchmen' with presupposed interpretative archetypes or structures of thought. Such archetypes contrast with concrete events experienced by individuals and groups in the past.2 Along a similar line, judgements of the Canadian Supreme Court have idealised the Canadian past by forgetting our dark moments – the colonizing of traditional (sc. tribal) communities, governmental efforts to assimilate indigenous inhabitants into the social life of the UK/Canadian states, the poll tax imposed upon Asian immigrants, the forcible removal of children from indigenous homes in order to assimilate them into the state-centric legal culture, the internment for several years of Canadian citizens of Uthe Japanese race", the imposition of parliamentary closure after two days of debate regarding the constitutionalising of a charter of rights and freedoms, the imposition of emergency legislation for much of the 20th century, and on it goes.[3] The forgetting may paradoxically transpire by the public forgiveness of a past dark event in the social group's past. This forgetting suggests that a collective memory is greater than the sum of particular experienced events of the group. Acts of forgetting reinforce a group's cultural identity. Perhaps we had best describe the collective memory as an image, rather than an actuality, of the past.

Now, instead of gazing outward and backward from the jurist towards texts, the juristic study of a culture turns one inward towards the shared assumptions and expectations of personal and collective memories. The methodology of becoming conscious of legal culture is genealogical rather than justificatory. Such assumptions and

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[1] Paul Rlcoeur, *Memory, History, Forgetting* (trans by Kathleen Blarney & David Pellauer; Chicago: University of Chicago Press, 2004), 412-56.

[2] See Nora, "Reasons for the Upsurge in Memory" in *Transit* 22 (2002): 1-8. Translated in JK Click et al, *The Collective Memory Reeder,* 437-41:"Between Memory and History: *Les Lieux de Mmoire"* above n 14.

[3] Such a forgetting is highlighted in what jurists consider the landmark judgement, *Reference re Secession of Quebec* [1998} 2 SCR 217; 161 DLR, (4[1]) 385, paras 33-54.

• Ricoeur Memory, *History, Forgetting above*, 455.

expectations impact upon how one observes an event experienced by another.[1]

Against the background of collective memories, we can now appreciate one cultural element of the generation of a collective right. The social bonding, inculcated though collective memories, confers body into the content of a culture. That embodiment of a culture is buried inside the citation or argument about a collective right. In contrast with a right which, after all, is a mere concept or form, cultural phenomena embody the content of the concept/right. Such a concept/right is otherwise content-independent. Although the unwritten assumptions and expectations generating a social bond may defer to a structure, the structure is meant rather than posited from concepts. The meant structure is constituted from acculturated meanings rather than re=presented from concepts emptied of social-cultural phenomena. The legal bond is unwritten and experientially prior to the written language of state organizations such as legislatures and courts. Such pre-legal phenomena, as Werner Marx indicates, may be recreated imaginatively in contrast with the analysis or intellectual decomposition of collective rights as concepts.[2] The legal bond is pre-intellectual. Antigone's unwritten laws embodied how she experienced Creon's laws. Although Hegel argued that members of indigenous traditional communities of Africa in his day could develop into self-conscious individuals, the indigenous peoples of North America could not do so.[3] The jurist of the modem legal order, he claimed, had to

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[1] See generally, Edward S Casey, *Remembering: A Phenomenological Study,* 2nd edn (Bloominglon, Indiana University Press, 2000); Ricoeur, *Memory, History, Forgetting supra* note 55, 93-132. See also Jung, 'The Concept of the Collective Unconscious' above n 43; Halbwachs, *The Collective Memory* above n 50; Pierra Nora, Arthur Goldhammer (ed), *Realms of Memory,* trans by Arthur Goldhammer (New York, Columbia University Press, 1996); Nora, 'Between Memory and History' above n 50. A concurring opinion by Higginsin *T K v France* continues this point of view with the assertion that the existence of persons belonging to a minority is 'afactual matter'. *T K v France,* HRC, Communication No 220/1987, UN Doc CCPR/C/37/D/220/1987 (1989).

[2] Herbert Marx, *Towards* a *Phenomenological Ethics: Ethos and the Life-World,* forew by Tomas Nenon (Albany: State University of New York, 1992), 6.

[3] Conklin, "The Legal Culture of European Civilization: Hegel and the Indigenous Americans" In *Identity of European Civilization,* ed by Margot Irvine and David MacDonald (Walerloo: University of Waterloo Press, in press, scheduled to appear in early 2014).

completely break from the *ethoi* of tribal societies before a modem ethos of self-consciousness could develop.[1]

The social bonding in a culture draws from family, religious associations, the experienced place of one's children's schooling, experiences at work and the like. Such shared experiences are not identifiable in the intellectualisation about concepts. Collective rights are not observable as empirical events by some outside psychologist or jurist. They cannot be retrieved by a therapeutic assessment of an individual. Indeed, they may never have been actually experienced by natural persons. The social belonging of a culture may hinge upon a myth or the fictitious military outcome of a battle centuries-ago or upon a symbol such **as a** flag or national anthem. The traditional analysis of collective rights does not recover such shared experiences as elements of law. Rather, the traditional analysis applies such rights to experiential knowledge.

Accordingly, the experiential knowledge constituting a culture analytically exists prior to the acts of intellectualization in a written language of collective rights. The collective rights are only concepts. The language about such concepts, representing rights as they do, *generalise* about legal persons. Such general categories are indifferent to context-specific phenomena from which a culture emerges. If we remain confined in our analysis to collective rights as concepts, collective rights are analysed after the pre-intellectual sense of belonging constituting the unwritten language of a culture. Such unwritten time and space cannot be quantified. The social bonding manifested by cultural phenomena constitutes the obligatory character of an identifiable law. When Aristotle elaborated the nature of the constitutions of Sparta, Crete, Carthage and Athens, he addressed *indicia* of such an unwritten ethos: social practices, political practices, the distribution of wealth, economic obstacles to the access to office, qualifications for judicial and deliberative office, the *de* facto relation of one institution to another, and the consequences of legislation. Despite Plato's preoccupation in the *Republic* with empty concepts as

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[1] This is documented and argued in ibid,.
[2] See *Statelessness supra* note 1, chaps 2, 6.

constitutive of 'reality', his last work, *The Laws,* highlights the importance of the pre-intellectual assumptions and traditions. The unwritten language of a culture provided "the connecting lengths between all the enactments already reduced to writing", Plato writes *(Laws* 7.793b, 8.832.e). Cicero similarly makes a big thing of such a legal bond.[1] And that social bonding constituted the obligatory character of the identity of a law. Cicero insisted that a "law was not thought up by human minds ... it is not some piece of legislation by popular assemblies ... ." *(Leg.* 2.8). And again, through the voice of Marcus in *De Legibus,* "the legislation that has been written down for nations in different ways and for particular occasions has the name of law more as a matter of courtesy than as fact" *(Leg* 2.11). Hegel follows up with his emphasis that discrete written laws are nested inside a *Sttlichkeit.* The role of the jurist, he argues, is to become self-conscious of the unwritten ethos. Even the Supreme Court of Canada has required trial judges to address pre-contact indigenous cultures with oral evidence.2 Collective memories have also been material for the recognition of an effective nationality.[3] An effective nationality, as opposed to a formal de jure nationality, draws from the social relationships.[4]

The International Court in *Nottebohm* outlined this redirection of the nature of a legal bond from a relation of a natural person to the state to the social relationships of natural persons.[5] Social relationships are manifested inside intermediate groups between the individual and the state. The groups, again, may be familiar, religious, linguistic, educational, professional, labour and the like. Indicia of

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1 Conklin, *Statelessness*, 177-219; Conklin, "The Myth of Primordlalism in Cicero's Theory of *Jus Gentium* - In *Leident J Int'/ Law* 23 (2010) 479-506, at 491-92.

2 See, eg, *R v Marshall* [1993] 3 SCR 456, paras 15-17, 22-35, 41-44. There are many recent examples of this. By way of example and only as an example, see *Delgamuukw v Province of British Columbia* [1997] 3 SCR 1010; 115ILR 446, paras 85-87;

3 Case *No 0903639* [2009] RRTA 971,para 186; *MA (Ethiopia) v* Secreta,y *of State for the Home Department* [2009] EWCA Civ 289, paras 78-83,per Justice Stanley Bumton: *KK and Others (Korea) v Secretary of* State *for the Home Department* [2011] UKUT 92 (IAC), para 67. 'See Conklin, *Statelessness*,65-95, 177-219.

5 *Nottebohm (Liechtenstein v Guatemala)* (second phase) ICJ Rep1955, p 4 at 23; also reported In 22 ILR 349, at 360. Available at: http://www.refworld.org/docid/3ae6b7248.html .

social bonding draw from one's family ties, participation in public life, attachment to his children and, more generally, in an "attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.n[1] The International Law Commission [ILC] has described such social relations as embodying a "personaln "emotional attachment to a particular countryn.2 The ILC has added such social factors as the individual's place of residence, the unity of family, military obligations, and the entitlement to pensions (1997).[3] The ILC *Draft Articles on Diplomatic Protection* has added a further series of *indicia* of a social bond:
[t]he authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e. the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life;use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service.[4]

The decisions of contemporary refugee and human rights tribunals have added that social bonding draws from one's relations with her/his synagogue, mosque, church or other place of worship as well as expectations gained during years of employment, place of habitation and other factors. The ILC has explained that a legal bond involves a "personal" "attachment" and "genuine linkn involve an individual's "emotional attachment to a particular country."[5] As the ILC has

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1 *Nottebohm (Liechtenstein v Guatemala)* (second phase) ICJ Rep 1955, p 4 at 23; also reported in 22 ILR 349, at 360. Available at: http://www.refworld.org,docid/3ae6b7248.html.

2 ILC, "Report of the 47th Session", UN Doc A/CN.4/SER.A/1995/Add.1(Part 2), *ILC Yearbook 1995,* vol 11(2), para 186.

3 Mikulka, 'Third Report on Nationality' V Mikulka (ILC Special Rapporteur), 'Third Report on Nationality in Relation to theSuccession of States', UN Doc A/CN.4/480 & Corr 1 and Add 1 & Corr 1-2, 12 (Art 5 {Comm 4), */LC Yearbook 1997,* vol 11(1).

4 ILC, 'Draft Articles on Diplomatic Protection, with Commentaries' */LC Yearbook 2006,* vol 11(2), UN Doc A/61/10, Art 8 (Comm 5).

5 ILC, Report 47'h Session *supra* n 70, para 186.

indicated, the relation of a natural person to a territory constitutes "a *social reality* in the link between people and territory."[1] The legal bond represents pre-intellectual assumptions and expectations constituting one's culture, not the a *priori* concepts such as collective rights. The identity of collective rights depends upon such a legal bond as a social relationship. Accordingly, the identity of a collective right is nested in cultural phenomena analytically and experientially prior to any text that represents a collective right.

Conclusion

A culture analytically and experientially pre-exists the analysis of collective rights. Collective memories are attributes of cultural phenomena. Cultural phenomena, not collective rights as concepts, determine the boundary of knowledge about collective rights. So too, cultural phenomena factor into the constitution of the identity of the group entitled to collective rights. The same concerns the identity of excluded groups. Each group has its own collective memories. Unless the jurist becomes self-conscious of a culture, including her/his own legal culture, the jurist is fooled into believing that her/his legal opinion rests upon a conceptual objectivity of rules, principles, rights, doctrines and other concepts. The jurist proceeds as if a *priori* collective rights can change a culture without addressing the cultural conditions generating the collective rights.

The content of collective rights is not intellectually constructed from the analysis of concepts. Nor is the content of collective rights constructed by justifying a right in terms of a basic text. The group entitled to collective rights becomes a generalised empty category so long as collective rights are analysed without an examination of the cultural phenomena generating the social group so entitled. What is crucial to legal knowledge is its dependence upon the priority of

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[1] ILC, 'Nationality in Relation to Succession of States', record of the 2481st meeting, A/CN.4/SER.A/1997, *ILC Yearbook 1997,* vol 11(1), 52, para 9. See also V Mikulka (ILC Special Rapporteur), 'Third Report on Nationality in Relation to the Succession of States', UN Doc A/CN.4/480 & Corr 1 and Add 1& Corr 1-2, 12 (para 9), *ILC Yearbook 1997,* vol 11(1).

experiential knowledge, a knowledge embodying a culture.[1] Indeed, a crucial feature of the embodiment of identifiable collective rights rests in the collective memories shared by members of a group before the members are assimilated into the social group. Such memories inculcate unwritten assumptions and expectations which provide the background conditions generating our knowledge about collective rights. Although we tend to accept that the boundary between collective rights and the prior cultural phenomena is itself intellectually constructed by the *post facto* representations in a written language, there cannot be a knowledge about collective rights without pre-intellectual experiential knowledge. Such pre-intellectual knowledge constitutes the legal bond of any group, including the alleged nation of a state. The pre-intellectual knowledge is not drawn from a *priori* concepts but from the social experiences constitutive of social bonding.

The problem is that the collective memories of 'the social group' have been pictured by jurists from the standpoint of the present, not from the standpoint of a past isolated and distant from the jurist. And so, past experiential knowledge remains concealed inside the present of which the texts about collective rights are best representative. If we strive to unconceal the collective memories of any affirmed social group, our own present standpoint – one that takes a pyramidal governmental structure, private property, individualism, rights, and the like for granted – reinforces a cultural violence. We jurists may believe that the founding fathers of our state's written constitution actually intended the scope of a collective right to be such and such. And yet, we may fail to appreciate that what is really at issue is the cultural generation of such a belief in the state's written language. In order to understand why collective rights are legally obligatory we need to pry behind the cultural conditions constituting such collective rights. The misconceived priority of the rights/concepts

[1] The distinction is made by George Mead per Maurice Natanson, *Phenomenology, Rofe and Reason: Essays on the Coherence and Deformation of Social Reality* (Springfield Illinois: Charles C Thomas, 1974), 83.

of the written language forecloses jurists from trying to understand the analytic and experiential priority of culture.