Introduction to "Culture and Identity in the Courtroom"

Patricia HUGHES*

An integral element in the dialogue about justice involves knowledge about the culture and identity of the participants in lawsuits, whether the parties or the decision maker. To achieve "justice", judges and other decision makers must recognize how law defines and affects members of our various communities, whether based on gender, disability, sexuality or racialized identity, for example. For the last quarter century, many legal actors and commentators have acknowledged the importance of including "difference" in our laws and in the operation of law. Nevertheless, questions about realizing the objective of inclusion have yet to be satisfactorily answered. Our legal system needs to pursue solutions to some complex queries, a process which does not remain static, but which evolves as our understanding of these matters becomes more sophisticated. Failure to resolve these issues raises serious implications for the legitimacy of law in the broadest sense of the term. A sense of exclusion often leads to a rejection of the authority of law, at best a disdain and at worst a deliberate flauting of legal authorities, both statutory and individual. Finding solutions requires decision makers and framers of the legal systems to be informed by the realities of how members of marginalized groups interact with our legal system from their first contact. Dr. Emerson Douyon presents the experience of one community, Haitians in Montreal, as underlying the need to change our legal system if we are to achieve a just legal system. Other issues to be addressed include the following:

What does "*difference*" *mean?* We, whether in the mainstream or not, are all "different" from each other even though we share qualities, experiences and aspirations not only with those with whom we might feel

* Dean, Faculty of Law, University of Calgary, Calgary, Alberta.

kinship (because of our ethnicity or sex, for example), but also with people with whom we take an oppositional stance.

Which forms of difference are to be recognized? What principles apply in "selecting" those characteristics which are allowed into the circle of recognition? And who makes this determination? We must also confront the very difficult question of whether there is a critical point at which the search for a common standard of justice (incorporating difference) becomes a system of fragmented specialization. And we must accept that some practices and expectations are antithetical to the claims of others.

How should the tension between the individual and the group be understood and addressed? Our discourse has centralized the concept of "community": we are said to belong to various communities based on our race, sex, sexuality, religion, our degree and type of disability and to be characterized by how these various identities intersect in our lives. On the one hand, "those in power" have imposed an artificial meaning on these identities which they have then deemed to be "natural", thus justifying oppression; on the other hand, the phenomenon of homogenizing the experiences of members of our various communities has blurred the reality of differences within and not only between communities. In either case, the individual has been lost, smothered by the claims of or experiences said to characterize the community identity. How does the individual make his or her own claim? How does the individual reconcile the reality that all of us sit on the boundaries between and among communities, that nearly all of us are both powerful and powerless?

Should we pursue integration or separation? "Integration" here implies changes in the norm, as well as or instead of changes in our notion of self and community. Some of those who have been excluded are prepared to accommodate themselves to belong to the mainstream; others seek to maintain significant elements of their identity and challenge the very nature of the norm, not merely to be accommodated, but to define the standard by which difference is measured; yet others reject the majority world. There is no single answer to the question: integration or separation? The answer will vary with time and place. Nor is there a single answer for any given community. For the judicial system, this query becomes: should there be a separate legal system for particular communities, should the system adapt to acknowledge difference or should it remain steadfast and expect those who come within its purview to accommodate themselves to its assumptions? This last answer has, for the most part, been rejected by most of those responsible for the operation of the legal system, but as

between the first two options, the appropriate choice is far from clear. Mr. Justice Patrick Sheppard explains how a specific response to acknowledging difference—the *Gladue* (Aboriginal Persons) Court in Toronto—arose and how it operates. This response is premised on the conclusion that aboriginal needs may not be met simply by changes within the mainstream system.

What is the impact of the public in legitimating acknowledgement of difference? Whether through interventions in lawsuits, popular and academic articles, judicial education, there is no dearth of "experts" willing to explain the experiences of various communities and the implications of these experiences for the interaction of the members of these communities with the judicial system, including their participation in the courtroom. Experts are not the only actors whose views matter, however. Public response may influence whether and in what ways the legal system responds to the challenge of inclusion. Mr. Jack Jedwab discusses, in part, public opinions about multiculturalism which may sway decisions about how we change the legal system.

What is the significance of criticism of judges and other decision makers? While judges must be held accountable through public critique of their rulings or sometimes conduct in the courtroom, the sub-text of much of the current, sometimes vociferous, criticism today must be understood as a challenge to the emergence of hitherto marginalized groups through jurisprudence mainly, but not exclusively, under the *Canadian Charter of Rights and Freedoms*. At the same time, decision makers must understand the impact of their own backgrounds on how they receive and interpret evidence and make other decisions in the course of adjudicating a matter before them. Professor France Houle addresses one aspect of this issue in her discussion the role of culture in the determination of facts and reasoning by judges and tribunals.

The contributions which follow provide a real and conceptual background against which to assess the options available to us to ensure that marginalized identities are acknowledged in the courtroom. They encompass a number of ways in which the issue of culture and identity in the courtroom may be addressed: the experience of exclusion, the majority response to inclusion, the way in which culture frames—often unwittingly—judicial response and a particular response to exclusion based on a separate system.