

# Behind the “Culture” Lens

## Judicial Representations of Violence Against Minority Women

SIRMA BILGE

*L'article propose un examen critique de la production et de l'utilisation de l'information culturelle par les tribunaux canadiens dans des affaires de violence envers les femmes issues des minorités racisées. Derrière l'apparente bienveillance des pratiques judiciaires qui se veulent sensibles à la différence, diversité ethnoculturelle, se dessinent des représentations de l'autre femme modelées par l'articulation du sexisme et du racisme.*

This article deals with the issue of culture in the context of law, precisely with the use and the abuse of cultural information in criminal courts while processing cases involving violence against racialized<sup>1</sup> minority women. It questions how seemingly well-intentioned practices of cultural sensitivity may lead to aggravate the vulnerability of the least powerful segments of minority groups, thereby producing a contradictory situation coined as “the paradox of multicultural vulnerability” (Shachar 3).

This questioning brings to the fore a serious dilemma with which policies of multiculturalism is confronted: how to accommodate ethnic and religious minorities and secure at the same time the respect of fundamental rights and freedoms within their boundaries? This dilemma is particularly relevant in regards to vulnerable segments within minorities, such as minors, women, and homosexuals. First identified by Leslie Green more than a decade ago in his article, “Internal Minorities and Their Rights,” the problematic social location of these groups, currently designated as “minorities within minorities,” has since been the object of an increasing number of articles by legal and political theorists. A notable contribution to this debate within the legal field is Ayelet Shachar’s perceptive analysis of the tensions between the accommodation of cultural differences and the respect of women’s fundamental rights, especially as they occur at institutional level. Yet, we know little about the microsocial and discursive levels—the relational and symbolic processes—through which cultural otherness is

constructed in a way that is detrimental to the weakest members of minorities.

Hence, my aim in this paper is to examine the microsocial and symbolic processes through which cultural difference makes its way into the court processing of interpersonal violent crimes involving minority women complainants, and to understand the extent to which this use of culture by judicial agents as a background factor to be taken into account to exonerate or mitigate one’s criminal responsibility lies upon racialized and gendered representations discrediting women complainants.

Although the view that the law is not a power-neutral and objective system for conflict resolution, but a site of production and reproduction of social inequalities, finds increased support among socio-legal theorists, in fact we know little about the social processes through which racialized, gendered, and classed identities are conferred to offenders and complainants.

While taking a critical position toward this misuse of culture, often influenced by the dominant Canadian *doxa* of cultural sensitivity, I do not plead, nonetheless, for the abandonment of all multicultural considerations while seeking justice. Instead I suggest an exploration of alternative avenues for a readjustment of the culture lens—the *multicultural lens*—by taking into account both intra-group and inter-group power relations that are shaped not only by cultural differences but also by social processes of racialization, gender, and class domination.

My argument is developed in four steps. First, I propose to deconstruct the Canadian *doxa* of harmonious racial relations and present at the same time my theoretical orientations. Second, I define what the “cultural defence” is and why it is regarded as a problem. Third, I examine a selection of criminal cases invoking cultural evidence within the recognized formal defences and demonstrate how this invocation discriminates against women victims. Finally, I explore possible avenues for gendering and decolonizing the cultural sensitivity approach.

## Deconstructing the Canadian *Doxa* of Diversity

There is a widespread *doxic*<sup>2</sup> representation in Canada that the country has a history of harmonious “race” and ethnic relations, and is, unlike its southern neighbour, relatively untroubled by racism or assimilationist pressures (Li). The worn and torn metaphor of the Canadian mosaic has been replaced in public discourses by the term “Canadian diversity,” which suggests an unproblematic and power-neutral multiplicity of cultural co-existences (Bannerji xviii). As anticipated by Homi Bhabha in his seminal work, cultural diversity discourses depoliticize what is at stake in social differentiation and overlook cultural domination (32). Hence, the emphasis on *horizontal diversity* obscures both in-group and inter-group asymmetrical power relations that produce and reproduce social inequalities and hierarchies. Hegemonic representations based on ethnic and religious differences, as well as on race, class, gender, and sexual orientation, rely strongly on these asymmetrical power relations that give limited access to material and symbolic resources and opportunities to those on the wrong side of the matrix of domination. Here, I use Antonio Gramsci’s insightful conceptualization on ideological hegemony as it discloses the extent to which the success of the dominant classes lies in their ability to present their definition of reality—their view of the world—in a way that will be accepted by other classes as “common sense,” as the only possible way things should be, in short as a *doxa*.

By critically analyzing current trends in the legal field to show “ethnocultural sensitivity,”<sup>3</sup> I will argue that judicial agents’ interpretations of cultural otherness, made in the name of “accommodating diversity,” often involve racialized, gendered, and classed understandings/representations of minorities. In so doing, I draw on critical socio-legal theorists for whom the law is not a power-neutral and objective system for conflict resolution but a value-laden site of production and reproduction of prevailing social inequalities and hierarchies, which is likely to be biased along racial, gender and class lines (Comack and Balfour).

The role of judicial agents in discursive construction and interpretation of cultural otherness is at the core of my analysis. Drawing on Pierre Bourdieu’s work, the legal field is regarded as a “site of competition for the control of the right to tell the law, i.e., the rightful distribution and the lawful order, a site in which agents whose indivisibly social and technical competence is to *interpret* ... a corpus of texts that sanctify the legitimate, rightful vision of social world” (15, my translation).

### The “Cultural Defence”

The term “cultural defence,” which surfaced in American law journals in the mid 1980s, was coined by jurists and legal scholars in the wake of a number of cases where

defendants have invoked their culture to exonerate or mitigate their criminal conduct.<sup>4</sup> It is important to keep the quotation marks while using this term since there is no established, formal “cultural defence” in Canada, nor in the United-States or any other western country under British common law. This means that cultural beliefs, values, and practices cannot be used as a distinct defence category to exonerate the defendant or to mitigate his or her criminal intent. Yet, this lack of formalization does not mean that cultural evidence is not raised during trials, either in processing or in sanctioning. Culture may be invoked by defence lawyers through pre-existing defence categories (such as provocation defence, duress, self-defence, mental alienation, diminished capacity, partial responsibility, etc.) or considered by judges as a mitigating factor. The rationale behind the “cultural defence” is that persons socialized in a minority or foreign culture should not be held fully accountable for a conduct that is considered an offence by the legal system of the dominant culture if that conduct conforms to the prescriptions of their own culture (Magnarella 67).

In the absence of a formalized legal defence category based on culture, namely a cultural defence, culture is used through the discretionary spaces of the law. Indeed, the Canadian legal system, like its American counterpart, provides discretionary procedures that permit defence lawyers to proffer cultural information, and prosecutors and judges to take account of cultural factors (Wong). In liberal democracies, the law’s discretionary spaces and implicit rules, rather than its explicit doctrines and procedures, constitute the site where hegemonic representations based on gender, race, and class are prescribed to offenders and complainants (Comack and Balfour). Consequently, it is my contention that the use of culture constitutes, among other things, the means through which racialized, gendered, and classed identities are conferred to offenders and complainants—marking them as normal or pathological, worthy or unworthy, right or wrong—hence determining who deserves to be recognized as a genuine victim and who should be disqualified, who is a typical criminal and whose crime is likely to be downplayed.

Before examining cases where the use of cultural information discriminated against minority women and young girls, it is worth noting that the use of culture in the criminal justice is a very divisive issue. For some, allowing cultural evidence lies in a desire to ensure a fair application of the law to all citizens. Here fairness does not mean identical treatment but rather lies on the idea of equity: if members of majority benefit from a judiciary system built upon their own values and their dominant culture, members of minorities should also be given opportunities to bring evidence from their own cultural norms when it is relevant to explain their criminalized conduct. For the opposite side, admitting cultural defence is breaking the universality of the law, the principle of equality before law, where equality is understood as identical treatment.

Moreover, the fact that culture is generally invoked as a partial defence often against charges of rape or the murder of a supposedly adulterous wife causes an understandable public outcry. In some cases, as I will show, the use of cultural background of the accused has led to shockingly light sentences, drawing media coverage and controversy. Since the victims of these violent crimes are mostly women and children, the use of a “cultural defence” has rapidly come to be seen as a way of condoning male violence against women in minority groups, and thus become a major concern for feminist activists and scholars. Some

that because of the common cultural background shared by the accused and the abducted woman, the defendant failed to recognize that the abducted and raped woman was showing genuine resistance. By arguing that the accused’s cultural upbringing led him to this misunderstanding, the defence successfully raised reasonable doubt on the accused’s criminal intent. After negotiating a guilty plea down to a charge of false imprisonment, the accused served four months in jail and paid a \$1,000 fine, of which \$900 went to the victim as reparation. This was a much lighter sentence than that the state prison term the accused

---

**The rationale behind the “cultural defence” is that persons socialized in a minority or foreign culture should not be held fully accountable for a conduct that is considered an offence by the legal system of the dominant culture if that conduct conforms to the prescriptions of their own culture.**

---

liberal feminists, such as Susan M. Okin, Doriane L. Coleman, have pointed out that this use of culture in criminal courts epitomizes the incompatibility between the political goals of feminism and multiculturalism—one seeking gender equity, the other cultural equity. I have argued elsewhere, drawing mainly on critical race theory and Black feminism, that Okin’s highly influential formula of “multiculturalism versus feminism” creates a false dilemma, which operates through “white solipsism” (Rich)—i.e. a tunnel vision taking the white perspective as universal—and the erasure of minority women’s viewpoints and interests (see Bilge 2006). Positing gender justice and cultural recognition as irreconcilable issues, as does the dominant feminist assessment of multiculturalism, fails to address the intersection of gender and culture—i.e. both majority and minority cultures (Phillips)—in the process of production and reproduction of social identities and inequalities.

**1985, Fresno County, California: *People v. Kong Moua*—Cultural Defence Applied to Rape through a Mistake-of-Fact Defence**

In 1985, a Hmong man (a minority ethnicity in Laos) was tried in a California criminal court for kidnapping and raping a young woman from the same ethnic origin. The defence argued that in the defendant’s culture this practice was not a crime but a “marriage by capture” (*zij poj nam*) and was considered an acceptable way of obtaining a bride. The defence argued that, since it was culturally expected that the abducted bride-to-be show some resistance to prove her chastity, even when she *does* consent to the marriage, the accused misinterpreted the resistance shown by the abducted woman. Thus, the case-building strategy of the defence was a mistake-of-fact defence, which argued

might have served had he been found guilty of kidnapping and rape. Commenting on the sentence, the trial judge declared that “he would have difficulty excluding any cultural testimony or information that could help him understand the man’s behaviour” (cited in Rimonte 1311).

**1988, New York City: *People v. Dong Lu Chen*—Cultural Defence Applied to MURDER Through a Diminished-Capacity Defence**

In 1989, in a non-jury trial a New York Supreme Court reduced the charge against the defendant, Dong Lu Chen, and mitigated his sentence after concluding that the defendant’s Chinese background affected his mental state and, therefore made it impossible for him to form the criminal intent necessary for the second-degree murder of his wife. The defendant, Chen, was a Chinese immigrant who had arrived in the United States two years before committing the murder. He was sentenced to five years’ probation, the lightest sentence possible for the hammer-beating death of his supposedly adulterous wife.

The original charge of second-degree murder (with its obligatory 25 years of jail time) was reduced to second-degree manslaughter. The defence succeeded in using the defendant’s cultural background to explain and partially excuse the crime. The defence strategy was based on diminished capacity with a cultural twist: the accused lacked the requisite state of mind to prove second-degree murder because of his cultural background. In order to support this explanation, the defence called in expert testimony. A white, male anthropologist testified that in traditional Chinese culture a woman’s adultery would be considered an enormous stain on the husband, adding that the accused would be unable to remarry if he divorced his wife for adultery because he would be viewed

as a “pariah” among Chinese men and women, someone unable to “maintain the most minimal standard of control on his woman” (Volpp 70). This “expert” testimony on Chinese family values convinced the Supreme Court judge who justified his reception of cultural evidence by stating that “Chinese culture helps explain why Dong Lu Chen became temporarily deranged upon learning his wife’s extra-marital affair” (cited in Rimonte 1311). Although during the cross-examination by the District Attorney, the expert could not substantiate with facts his portrayal of an essential, monolithic Chinese culture, nor

lying. The mother never believed her daughter, even after she complained about physical pain and a doctor confirmed that she had several cuts in the anal area. The victim was placed in a foster home. The accused did not testify at his trial and showed no remorse, which was an aggravating factor. Arguing that the victim fabricated the evidence, the accused refused treatment. The probation officer concluded that under these circumstances there was a risk of recidivism with other children of the household. Though the Quebec court Judge Raymonde Verreault found the accused guilty on four counts, instead of imposing the

---

**Some expressions used by Judge Dubreuil to describe the aggressors’ behaviour as “two young roosters craving for sexual pleasure,” as well as her reference to “their pride of young males” are at best unfortunate, and at worst trivialize the rape of a Black woman by Black men.**

---

his own scientific credentials (he could not remember the title of his own article), the trial judge was persuaded and concluded that the accused was “driven to violence by traditional Chinese values about adultery and loss of manhood.” In an attempt to combine into his sentencing this freshly acquired “knowledge” on Chinese culture, the judge uses various cultural clichés at the probation hearing:

And I must have a promise from the defendant on his *honor* and the *honor* of his family he will abide by all the rules and conditions that I impose.... And if he does not obey and he violates any of these conditions, not only does he face jail, but this will be a total *loss of face*. (Manuscript p. 311, cited in Volpp 73, emphasis added)

**1994, Montreal: R. v. N. A.—Cultural Defence Applied to the Rape of a Minor**

In January 1994, the accused, a 37-year-old man of Algerian background and Muslim was found guilty on four charges: sexual touching of a person under the age 14, invitation to sexual touching of a person under the age 14, engaging in anal intercourse, and sexual assault.

The victim was his stepdaughter, also from Algerian and Muslim background. The assaults started in July 1989 when the victim was nine years old and terminated in January 1992, when she was eleven years old. Over a period of two years on a monthly basis, more than 20 assaults occurred. The accused used psychological pressure and threats to coerce the victim to participate in sexual activities. On one occasion, when the victim told her mother that her husband was sexually assaulting her, he slapped her in front of her mother and said she was

maximum term of imprisonment for the sexual assault of a minor—ten years—she imposed a concurrent sentence of 23 months imprisonment and one year of probation. According to this judge, the fact that the accused did not have “normal” vaginal intercourse with the victim was a mitigating factor. The judge took into consideration the fact that the accused had preserved the victim’s virginity and declared:

The mitigating factors are ... the fact that the accused did not have normal and complete sexual relations with the victim, that is to say, vaginal sexual relations, to be more precise, so that he could preserve her virginity, which seems to be a very important value in their religion. We can say that, in a certain way, *the accused spared his victim*.<sup>5</sup>

This declaration provoked a public outrage. Montreal’s Muslim communities, as well as women’s groups, human rights groups, and journalists denounced the racism and the sexism embedded in this reasoning.<sup>6</sup> After nine complaints were filed against her regarding the grounds upon which her judgment was delivered, Judge Verreault was ordered to appear before the Quebec Judicial Council. However the Council ruled that no disciplinary sanctions should be imposed and concluded that what mattered was that the judge acted in “good faith.”

This decision was taken regardless of the fact that Judge Verreault cast a doubt over the innocence of the victim by declaring that the victim “seemed to have experienced at a certain moment all kinds of attitudes towards the accused, which can lead to the conclusion that she acted out of hatred towards her mother, because she intended to keep the accused away from her mother or because she wanted to take her place.” (cited in Fournier 109). This

declaration, as well as other declarations made by the judge, pointing out “mixed feelings of the victim for the accused” and “her desire to put her mother aside” effectively sexualized the nine-year old victim and rendered her implicitly responsible for what happened to her.

Judge Verreault’s sentence in the case was subsequently overruled by the Quebec Court of Appeal. The accused was sentenced to 42 months imprisonment (instead of the original 23), and the probation order was quashed. The Appeal Court did not mention anything about the cultural prejudice prevailing in the first judgment.

### **1998, Montreal: *R v. Lucien*—Cultural Factors Raised by the Judge in a Case of Collective Rape**

In this case, the accused men, Patrick Lucien and Evens Sannon, respectively 23 and 22 years old at the time of the offence, were from Haiti and Black. Lucien had been living in Quebec for eight years. Sannon came to Canada in 1991 after having spent eleven years in United States. They shared a one-bedroom apartment in Montreal. The two men were found guilty of sexually assaulting an 18-year-old Black girl visiting Montreal from Quebec City one night in July 1996. The accused men met the victim at a bar who was there with a friend. The victim danced with Sannon for most of the night. When the bar closed, Sannon asked the victim if she wanted to come to see his place before driving her home. She accepted. Once in his apartment, Sannon refused to drive her home and the two men sexually assaulted her in turn.

After finding the two defendants guilty of sexual assault, Judge Monique Dubreuil of the Court of Québec sentenced them to 18 months, served in the community, and 100 hours of community service. The judge used her discretionary powers to make the sentence conditional, which means that the two accused could serve their 18 months at home as long as they respected a curfew and fulfilled the imposed community service hours. This sentence is appallingly lenient given that under the Criminal Code of Canada sexual assault is subject to maximum imprisonment of 14 years. Generally, a standard conviction for this kind of offence will bring with it significant jail time, generally four years or more.

Furthermore, neither of the accused regretted the sexual assault. Lack of remorse is normally considered an aggravating factor; surprisingly, the judge came to the conclusion that this lack of repentance did not matter since the issue was cultural. She justified her decision as follows:

In this case, the absence of remorse of the two accused seems to me to arise more from a particular cultural context with regard to relations with women than a real problem of a sexual nature.... Considering their age, their social integration, the fact that they have no previous criminal record, and the special circumstances of the case, I believe that by making an order

for a conditional sentence served in the community, the safety of the community would not be endangered. The follow-up of a security agent will allow them to change their mentality towards women and thus gain a better sense of responsibility.<sup>7</sup>

The question of what qualifies Judge Dubreuil to draw conclusions regarding the presumed specificity of the cultural context of the accused Haitians remains open. What exactly does Judge Dubreuil know about Haitian culture and Haitian sexual mores? Moreover, some expressions used by Judge Dubreuil to describe the aggressors’ behaviour as “two young roosters craving for sexual pleasure,” as well as her reference to “their pride of young males” (cited in Fournier 93) are at best unfortunate, and at worst trivialize the rape of a Black woman by Black men.

This declaration on the particular cultural context and the leniency of the sentence was strongly denounced by Haitian community organizations,<sup>8</sup> the Canadian Bar Association, women’s groups, and Quebec Council for Intercultural Relations. Complaints were filed with the Quebec Judicial Council asking the Council to determine whether Judge Dubreuil’s remarks represented a breach of the code of ethics (Fournier 101). But Quebec’s Justice Minister, Serge Ménard, was dismissive, declaring to journalists that: “judges are expected to take into account cultural circumstances; we even encourage them to do so.”<sup>9</sup> Hence, the Quebec Justice Minister echoes the *doxa* of cultural sensitivity also found in various government-mandated reports that raise the issue of diversity in the Canadian justice system.<sup>10</sup>

Dubreuil’s decision was overruled by the Quebec Court of Appeal and the conditional sentence of 18 months was changed to a sentence of the same length to be served in jail.<sup>11</sup> But the appellate ruling did not mention anything on the use of the controversial cultural information during the sentencing by the trial court. Also, the Quebec Judicial Council dismissed charges filed against Judge Dubreuil on the basis of the ethics. The Council ruling declared that:

The judge as well as the other people participating in the trial did not have racist considerations or remarks. However all members agree that the remarks at stake were ambiguous and can give rise to different interpretations. (cited in Fournier 102)

### **Snapshots of Sexual Assaults Trials in Northern Canada**

In the northern regions of Canada, the judicial system is dominated by non-Inuit male judges. In the context of alternative justice models such as healing and sentencing circles, judges in Canada’s northern territories favour lenient sentences to be served in the community, whereas Indigenous women’s organizations are demanding that

THAT sexual abuse to be treated as a serious crime (see Nahanee, Nightingale). For instance, Pauktuuit, the Inuit Women's Organization of Canada, states that the:

two major concerns respecting the administration of justice in the territory north of the 60th parallel ... [are] lenient sentencing and use by some judges of "cultural defence" for Inuit men accused of sexual assaults on women and children. (cited in Nahanee 193)

The Native Women Association of Canada similarly

ready to engage in sexual relations. That is the way life was and continues in the small settlements.... These men were living their lives in a normal acceptable fashion in the way life is lived in the High Arctic. (*R. v. Curley et al.* 1984 cited in Nahanee 196)

In this case the assaulted girl was 13 years old and mentally impaired. The assaults took place on different occasions, but within a short period of time. Counting three weeks spent in custody as equivalent of two or three months in jail, the trial judge imposed a further term of

---

**These dichotomized representations create racialized geographies where a lesser justice may be served to "Others." While the white girl ("the dainty, delicate co-ed") is perceived to be a genuine victim of sexual assault, the Indigenous woman is represented as a drunken "pair of hips" who deserves what she gets.**

---

denounces the fact that behind the discourse of sensitivity to Native "traditions," sentencing practices rely on racist and sexist stereotypes on Native women (NWAC; see also LaRocque).

A 1991 study conducted on a sample of 69 sexual assault cases involving Aboriginal complainants, most of them having occurred in the Northwest Territories, showcases an array of derogatory comments made by judges about victims, casting doubt over the authenticity of their suffering and victimization. By highlighting various examples of bias and discriminatory comments made by trial judges in court processing or sentencing, this study shows that in many cases the injury sustained by the victims was minimized by the judges who stated that the victims suffered little or no lasting injury. Furthermore, deprecating comments made about Aboriginal complainants who were intoxicated or asleep when they were sexually assaulted imply that the victims somehow deserved the assault (see Nightingale).

Another study focusing on judicial sentencing practices in sexual assault cases involving Inuit women victims brings striking evidence of judicial leniency. For instance, in 1984, a father who sexually assaulted his daughter with violence over a period of years has been imposed a six-month sentence. While condemning the incest, the trial judge noted the absence of previous criminal record and declared: "I have nothing before me to indicate that he is anything but a good hunter and a competent provider for his family" (*R. v. W.U.* 1984 N.W.T.R. 135-136, cited in Nahanee 196).

In another case of the sexual assault of an underage Inuit girl by three Inuit men, the trial judge declared:

The morality or values of the people here are that when a girl begins to menstruate she is considered

one week of imprisonment followed by eight months probation, based on the cultural arguments and the so-called "Inuit values" mentioned earlier. For the judge, it was an appropriate sentence, since "the law and the morality it reflects [must] walk hand in hand with people" (cited in Nightingale 93).

Other characteristics of the judicial treatment of sexual violence against Native women are the frequency of the comments on the intoxication of the victims and thus on the presumed absence of violence on the part of the rapist. Because some of the victims were intoxicated at the time of the assault, they are assumed to not suffer; their rape is regarded as something *less* than the average rape. Statistically, cases involving "passed-out" victims constitute approximately one-seventh of the sexual assault cases (Nightingale 88). But judges often hold the belief that these cases constitute the majority of rapes in the northern regions and reinforce this misrepresentation in their decisions and declarations, such as in the following assertion:

The majority of rapes in the Northwest Territories occur when the woman is drunk or passed out. A man comes along and sees a pair of hips and helps himself.... That contrasts sharply to the cases I dealt with before (in southern Canada) of the dainty co-ed who gets jumped from behind.... My experience with rape down south is different from the reality of rape up here. In most cases down south, there is violence apart from the rape that's involved. Up here you find many cases of sexual assault where the woman is drunk and the man is drunk.<sup>12</sup>

These dichotomized representations of down there/up here, South/North, create racialized geographies where a lesser justice may be served to "Others," seen as less worthy

human beings. While the white girl (“the dainty, delicate co-ed”) is perceived to be a genuine victim of sexual assault, the Indigenous woman is represented as a drunken “pair of hips” living in a pathologized community who deserves what she gets.

### Concluding Remarks

Beneath the contemporary common-sense use of the notion of “culture,” within a multicultural context such as Canada, lie the notions of difference (racial, ethnic, religious) and hegemony. The way the judiciary constructs cultural difference leads to the reification of minority cultures viewed as a-historical, static sets of practices and values, implicitly inferior to western ways. This demonstration of the construction of cultural evidence used by the judiciary brings to the fore unequal power relations embedded in social structures and institutions, and discloses how those inequalities are intersecting for some groups that face multiple forms of domination based on gender, race, and class.

Although lenient sentencing due to the acceptance of cultural background as a mitigating factor in court processing of cases involving violence against minority women is not systematic (there are cases in which judges do not allow the invocation of cultural arguments), issues pertaining to the use of cultural evidence, its construction through expert testimony as a defence strategy, and its interpretation by judicial agents who detain the power to criminalize, and the power to interpret, deserve our full consideration. For, the construction of cultural evidence in courtrooms constitutes a critical site of reproduction of prevailing social hierarchies, gender, racial, and class biases. A critical assessment of this process helps us to reveal, besides the law’s authoritative and legitimizing effects, the ways in which the legal system conceals the power relationships and social conflicts through which it is shaped.

*Sirma Bilge is Assistant Professor in Sociology at the Université de Montréal (Canada). Her research interests are feminist intersectional theorizing, gendered ethnicity and racism, ethnosexual boundaries, and majority understandings of minority agency. Her major current research projects deal with the reproduction of émigré ethnicity through matrimonial practices and the issue of “arranged marriage”. She has published a monograph, Communalisations ethniques post-migratoires: les cas des ‘Turcs’ de Montréal (Sorbonne nouvelle, 2004) and several articles in scholarly journals.*

<sup>1</sup>My use of “racialized women” encapsulates two racialized categories referring to distinct social and historical experiences within the Canadian context: Aboriginals and Visible Minorities. I take a critical stance from an all-encompassing use of “racialization” found for instance in Sherene Razack’s otherwise perceptive work. For Razack, the term “racialized women” refers to “women whose

ethnicity, as indicated by skin colour, accent, religion, and other visible markers, denotes that they are of non-Anglo-Saxon, non-French origin. In the eyes of the dominant groups such women are raced” (896). My contention is that the raced social system in the contemporary Canada affects the two afore-mentioned categories (Aboriginal and visible minorities), although in the past, minorities from European descent such as Irish, Italians and Jews were raced as well as in Canada and in United States (see Brodtkin). It is crucial to keep a conceptual distinction between social processes of ethnicization, that may affect all ethnocultural minorities in varying degrees, and the processes of racialization.

<sup>2</sup>*Doxa* is a self-evident “truth,” a common perception or shared belief, that is taken for granted, hence rarely questioned (see Bourdieu).

<sup>3</sup>Over the last two decades substantial political and scientific attention has been paid to the effects of race on criminal justice processing and sanctioning. There have been several attempts to address ‘the challenge of diversity’ in the justice system; many government-mandated reports had put the issue of cultural diversity as a priority. For instance, Ab Currie and George Kiefl point out that the “requirement of cultural sensitivity in the administration of justice and the provision of justice-related services is at the core of the equal access to justice. Treatment with fairness, dignity, and respect by a powerful institution is the *sine qua non* of justice. It is the symbolic core of the concept of justice” (xi).

<sup>4</sup>The first usage of the term “cultural defence” was in an article written by the editorial committee of *Harvard Law Journal*, “The Cultural Defense in the Criminal Law (*Harvard Law Journal*, 99, 1986: 1293-1311). I offer a more detailed analysis of cultural defence (see Bilge 2005).

<sup>5</sup>*R. v. N.(A)*, 13 janvier 1994, Cour du Québec, p. 4. See also Fournier for a detailed discussion of this case.

<sup>6</sup>Cf. «Le jugement Verreault indigne les musulmans», *La Presse*, 16.01.1994; «Sodomie et interculturalisme», *La Presse*, 18.01.1994; «Women outraged by judge’s remarks», *Montreal Gazette*, 15.01.94; Protection de la jeunesse du Québec, «La justice est dure pour les enfants», *Le Soleil*, 02.03.1994.

<sup>7</sup>*R. v. Sannon et Lucien* (1988), A.Q. no 8 (Cour du Québec), paragrph 15.

<sup>8</sup>«Affaire Dubreuil: des Haïtiens déposent une plainte», *La Presse*, 31 janvier 1998, p. A6.

<sup>9</sup>«Ménard vole au secours de la juge Monique Dubreuil», *La Presse*, 29.01.1998, A1. See also, «Ménard de nouveau à la rescousse de la juge Dubreuil», *Le Soleil*, 06.05.1998, A10.

<sup>10</sup>A report of Justice Canada urges that: “cultural distinctiveness be recognized, respected and, where appropriate, incorporated into the criminal justice system ... that differences between members of various groups be considered by police, Crown prosecutors, defence lawyers, judges, legislators, and all other participants in the criminal justice

system, and indeed at times that the structure of the criminal justice system itself be adjusted to allow greater recognition of these differences” (Etherington 7).

<sup>11</sup>*R. v. Sannon et Lucien* (2000), J.Q. no2 (QCCA), <http://www.canlii.org/qc/jug/qcca/2000/2000qcca10002.html>

<sup>12</sup>This controversial declaration, as reported in the *Edmonton Journal*, 20 December 1989 (p. A1), was made by a Territorial Court Judge, Michel Bourassa, in the course of a sexual assault sentencing (cited in Nightingale 73 ; Nahanee 194).

## References

- Bannerji, H. “Popular Images of South Asian Women.” *Returning the Gaze: Essays on Racism, Feminism and Politics*. Ed. H. Bannerji. Toronto: Sister Vision Press, 1993. 144-152
- Bhabha, H. *The Location of Culture*. New York: Routledge, 1994.
- Bilge, S. “La ‘culturalisation’ de la violence faite aux femmes minoritaires dans le discours judiciaire canadien.” in *Délinquance des jeunes et justice des mineurs. Les défis des migrations et de la pluralité ethnique*. Eds. N. Queloz et. al. Berne: Éditions Stämpfli, 2005. 693-722.
- Bilge, S. “Le dilemme genre/culture ou comment penser la citoyenneté des femmes minoritaires au-delà de la *doxa* féminisme/multiculturalisme?” Paper presented at *Colloque du Conseil du Statut de la Femme : Diversité de foi, égalité de droit*, March 23-24 2006, Montréal. Online: [http://www.csf.gouv.qc.ca/fr/2006femmesreli gion/?F=textes\\_conf](http://www.csf.gouv.qc.ca/fr/2006femmesreli gion/?F=textes_conf)
- Bourdieu, P. “La force du droit. Éléments pour une sociologie du champ juridique.” *Actes de la recherche en sciences sociales* 64 (1986): 3-19.
- Brodin, K. *How Jews Became White Folks and What that Says about Race in America*. New Brunswick, NJ: Rutgers University Press, 1998.
- Coleman, D. L. “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma.” *Columbia Law Review* 96 (5) (1996): 1063-1166.
- Comack, E. and G. Balfour. *The Power to Criminalize. Violence, Inequality and Law*. Halifax: Fernwood Publishing, 2004.
- Currie, A. et G. Kiefl. *Ethnocultural Groups and the Justice System in Canada: A Review of the Issues*. Ottawa: Department of Justice Canada, 1994. Online: <http://canada.justice.gc.ca/fr/ps/rs/rep/wd94-5a-f.pdf>
- Etherington, B. *Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform*. Ottawa: Department of Justice Canada, 1994.
- Fournier, P. “The Ghettoisation of Difference in Canada: Rape by Culture and the Danger of Cultural Defence in Criminal Law Trials.” *Manitoba Law Journal* 29 (1) (2002): 81- 119.
- Green, L. “Internal Minorities and Their Rights.” *Group Rights*. Ed. J. Baker. Toronto: University of Toronto Press, 1994.101-117.
- Gramsci, A. *Selections from the Prison Notebooks*. London: Lawrence and Wishart, 1971.
- LaRocque, E. “Re-examining Culturally Appropriate Models in Criminal Justice Applications.” *Aboriginal and Treaty Rights in Canada. Essays on Law, Equality, and Respect for Difference*. Ed. M. Asch. Vancouver: University of British Columbia Press, 1997. 75-96.
- Li, P. *Cultural Diversity in Canada: Social Construction of Racial Differences*. Justice Canada, Strategic Issues Series rp028e, 2000. Online: <http://canada.justice.gc.ca/en/ps/rs/rep/RP2002-8.pdf>
- Magnarella, P. J. “Justice in a Culturally Pluralistic Society: The Cultural Defense on Trial.” *The Journal of Ethnic Studies* 19 (3) (1991): 65-84.
- Nahanee, T. “Sexual Assault of Inuit Females: A Comment on ‘Cultural Bias’.” *Confronting Sexual Assault. A Decade of Legal and Social Change*. Eds. J. V. Roberts and R. M. Mohr. Toronto: University of Toronto Press, 1994. 192-204.
- Native Women’s Association of Canada (NWAC). *Proposed Amendments to the Criminal Code under Bill C-49. The Perspective of Aboriginal Women*. May 1992.
- Nightingale, M. “Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases.” *Ottawa Law Review* 23 (1) (1991): 71-98.
- Okin, S. M. “Is Multiculturalism Bad for Women?” *Is Multiculturalism Bad for Women?* Eds. J. Cohen, M. Howard and M. Nussbaum. Princeton, NJ.: Princeton University Press, 1999. 9-24.
- Philipps, A. “When Culture Means Gender: Issues of Cultural Defense in Criminal Courts.” *Modern Law Review* 66 (4) (2003): 510-531.
- Razack, S. *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms*. Toronto: University of Toronto Press, 1998.
- Rich, A. “Disloyal to Civilization: Feminism, Racism, Gynophobia.” *On Lies, Secrets, and Silence*. New York: W. W. Norton, 1979.
- Rimonte, N. “A Question of Culture: Cultural Approval of Violence against Women in the Pacific-Asian Community and the Cultural Defence.” *Stanford Law Review* 43 (1991): 1311-26.
- Shachar, A. *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*. Cambridge University Press, 2001.
- Volpp, L. “(Mis)Identifying Culture: Asian Women and the ‘Cultural Defense’.” *Harvard’s Women’s Law Journal* 17 (1994): 55-101.
- Wong, C. “Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada.” *The Criminal Law Quarterly* 42 (1999): 367-396.