

# Parameters for action in a context of legal pluralism



PRESENTED BY

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In this presentation, Jean Leclair suggests that Borrows' choice to focus on the sources of Indigenous law (a strategy adopted knowingly, since Borrows wants to persuade a non-Indigenous audience of the existence and relevance of Indigenous law) gives less visibility to the relational component of Indigenous law, derived from a legal tradition in which actors and processes nevertheless count for far more than the standards themselves. Leclair emphasizes that this is just an impression left by the book, since Borrows has also demonstrated the importance he assigns to processes and actors. However, it is enough to launch Leclair on a review of the importance of actors and processes, taking as his starting point the idea that law is inseparable from conflict and that the production of law always occurs against a background of dissent.

Adopting a Hartian distinction between primary and secondary rules, Leclair emphasizes that it is the secondary rules (the rule of recognition, the rule of change and rule of decision) that define the question of power within a legal order. A failure to emphasize the secondary rules enough sometimes leads jurists to ignore the question of power. It is not that Borrows is not concerned with the question of power within communities—it is just that if he had focused more on actors and processes, his criticism of the destruction of sources by the colonial state would have been strengthened, since this institutional destruction was the main tool used to destructure the Indigenous legal orders.

In addition, the existence of primary and secondary rules in a legal order raises the question of legitimacy. Although Borrows is interested in the legitimacy of the mechanisms used for interactions between Indigenous law and state law, he does not deal directly with the multiple bases for the legitimacy of the legal systems themselves. However, the question of the legitimacy of power (or rather, or its legitimation) in a plural legal context has a major impact on the selection of possible ways to articulate Indigenous rights and state law, and on their chances of success. Highlighting the fact that the actions of the actors are parametrized by factors of mobility, cognition and capacity, Leclair points out that legitimacy is connected with the foundations of reciprocal relationships that unite the authorities of a given community and the community itself. When two legal systems are in competition with each other, the ability of the operators (state or non-state) to meet expectations influences decisions made by individuals to opt for one system or the other. In addition, the sources themselves often intervene in the decision by operators (and individuals) whether or not to join an articulatory dynamic. It is important to recognize the complexity of the sources of legitimacy for the rights concerned in order to ensure the social anchoring of Indigenous legal orders and the mechanisms used to manage legal pluralism.



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