

From Emergence to Evolution: Practices in Cultural Expertise

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This introduction provides a snapshot on cultural expertise as an emergent concept in the socio-legal studies and evolving practices in the formulation of rights and the resolution of conflicts in and out of court. It starts with the definition of cultural expertise and the need for an integrated and broad conceptualization that includes all the arrays of socio-legal instruments that use knowledge from the social sciences to assist decision-making authorities in the settlement of conflicts. It then mentions the wide span of fields of cultural expertise going from the recognition of the rights of autochthone minorities and the First Nations to the politics of cultural expertise in modern reformulations of customs, vis-à-vis gender rights, including the revisitation of socio-legal instruments such as the cultural test and the scrutiny of psychiatric evaluation in criminal trials. It concludes by offering short descriptions of the papers included in the Special Issue, which include judicial practices involving cultural experts and surveys of the most frequent fields of expert witnessing that are related to the culture. In addition, it interrogates who the experts are; how cultural expert witnessing has been received; how cultural expertise has developed across the sister disciplines; and finally, it asks whether academic truth and legal truth are commensurable.

Keywords: socio-legal studies; anthropology of law; law and society; multicultural societies; cross-cultural dispute resolution; cultural expertise; cultural defense; cultural test; Sweden; Italy; Sami; First Nations

Cultural expertise in the form of expert opinions formulated by social scientists appointed as experts in court and out of court for dispute resolution and the claim of rights is not different from any other kind of expertise used for the facilitation of dispute resolution. In specialized fields of law, such as native land

titles and First Nations' rights in America and Australia, the appointment of social scientists as experts, especially anthropologists, dates back to the 19th century. Social scientists have played an active role in policymaking in the United Kingdom and America for more than 200 years. In the contemporary management of migration fluxes, the appointment of anthropologists as country experts has become increasingly frequent in common law and civil law countries for immigration proceedings. On the one hand, doubts and concerns exist regarding the usefulness and appropriateness of social sciences, and in particular anthropology, for dispute resolution; while on the other, existing conceptual tools do not allow an encompassing analysis of the use of socio-anthropological knowledge in the legal field, especially for what concerns the usefulness of social scientists as expert witnesses. A first definition of cultural expertise described it as "the special knowledge that enables socio-legal scholars, or, more generally speaking, cultural mediators—the so-called cultural brokers—to locate and describe relevant facts in light of the particular background of the claimants and litigants and for the use of the court" (Holden 2011). However, this definition is too restrictive today because it does not account for the broader range of out-of-court procedures in which the knowledge of the social sciences is applied to the resolution of conflicts, litigation, and the formulation of rights—hence, the need for an integrated definition of cultural expertise that takes into account both in-court and out-of-court conflicts and connects with the current debates on the impact of social sciences in society (Holden 2019). Hence, I propose a newly formulated definition of cultural expertise as special knowledge that enables socio-legal scholars, experts in laws and cultures, and cultural mediators—the so-called cultural brokers—to locate and describe relevant facts, in light of the particular background of the claimants/litigants/accused and for the use of conflict resolution or the decision-making authority (See also Holden 2020). Although this definition of cultural expertise is new, the practices that this concept describes are not and the socio-legal literature has already developed articulated reflections on specific aspects, concepts, and practices that refer to the use of cultural knowledge in law.¹ This Special Issue focuses on the contemporary evolution and variation of cultural expertise as an emergent concept providing a conceptual umbrella to a variety of evolving practices, all of which include the use of the special knowledge of social sciences for the resolution of conflicts. It surveys the application of cultural expertise in the legal process with an unprecedented span of fields going from the recognition of the rights of autochthone minorities and the First Nations to the politics of cultural expertise in modern reformulations of customs, vis-à-vis gender rights, and also includes the revisitation of socio-legal instruments, such as the cultural test and the scrutiny of psychiatric evaluation in criminal trials. This Special Issue stresses in particular the development and change of culture-related expert witnessing over recent times, culture-related

adjudication, and the resolution of disputes, criminal litigation, and other kinds of court and out-of-court procedures.

This Special Issue offers descriptions of judicial practices involving cultural experts and surveys of the most frequent fields of expert witness that are related with culture. In addition, it interrogates who the experts are and outlines their links with local communities and that with the courts and the state power and politics; how cultural expert witnessing has been received by judges; how cultural expertise has developed across the sister disciplines of history and psychiatry. Finally, it asks whether academic truth and legal truth are commensurable across time and space, in order to argue for a closer intersectoral collaboration among socio-legal experts and the legal profession and a greater transparency in the practice of cultural expertise.

It opens with “The Cactus and the Anthropologist: The Evolution of Cultural Expertise on the Entheogenic Use of Peyote in the United States” by Aurelien Bouayad. This paper explains the role of anthropologists acting as cultural experts during trials concerning the First Nations and the use of peyote. Bouayad explores historical sources to highlight that anthropologists were not only experts but also political actors, in that some of them took a stance to counterbalance the demonization and prohibition of the medicinal and sacramental use of peyote by First Nations. This paper shows that anthropologists who were experts on the use of peyote among First Nations were deployed as mediators assisting lawmakers and lawyers for their understanding of cultural and religious practices, as well as a advisors of the First Nations for the formulation of rights in legal terms. Bouayad argues that his in-depth study of the peyote controversy highlights the complexity and the articulation of the role of anthropologists as experts, which goes well beyond the role of expert witness in court. He also highlights how the notion of neutrality in court is potentially dangerous and describes the historical instances in which neutrality has, in fact, concealed a bias that enforced and perpetuated discrimination against First Nations. Bouayad concludes by suggesting that the scope of the conceptualization of cultural expertise should be much wider than the court setting in order to also include the role of anthropologists out of court and in the political setting.

“Cultural Expertise in Italian Criminal Justice: From Criminal Anthropology to Anthropological Expert Witnessing” by Anna Ziliotto highlights the differences between the concept of cultural expertise and the psychiatric evaluation in criminal trials developed by Cesare Lombroso at the end of the 19th century. The psychiatric evaluation of the School of Criminal Anthropology looked at criminal behaviors as the result of organic causes that undermined any kind of individual autonomy in the appraisal of legal responsibility. Ziliotto sees the pitfall of Lombroso’s theory in its close embedment in the Positive School of Penal Law which inspired the Rocco Penal Code, on which Italy’s current penal code is largely based. Ziliotto reminds us that the overvaluation of the psychiatric

assessment along with the concomitant disregard of cultural knowledge and individual autonomy was consolidated by the racial ideology of the country's fascist dictatorship. She argues, therefore, for the need of new instruments that are conceptually and methodologically adequate to take into account today's social diversity and highlights the link between law and culture within a framework of intersectoral collaboration between lawyers and anthropologists.

"Cultural Expertise in Sweden: A History of Its Use" by Annika Rabo presents a survey of the practices and a compact case study of cultural expertise in Sweden. Rabo's article shows that the concept of cultural expertise adapts well even in a country that tends to perceive itself as homogeneous yet displays an important variety of pragmatical instruments to integrate the knowledge of the social sciences into the resolution of disputes and the formulation of rights. Rabo has conducted qualitative interviews with cultural experts and lists expert witnesses in court, academicians, interpreters, and mediators. She also includes her own reflections on her experience of acting as an expert witness in court. Rabo shows that there is little awareness in Sweden of all the instruments that fall into the notion of cultural expertise and links this with the limited acknowledgement of Swedish society toward diversity. Yet her data also show an important potential for the application of the concept of cultural expertise within the framework of the experience of experts, lawyers, prosecutors, and courts. The article includes cases concerning the Sami, the Roma, and also recent migration flows from Africa and Asia. Swedish case law ranges from land rights to ethnic discrimination but also includes criminal and asylum cases. Rabo concludes that the widespread ideal of homogeneity and sameness in Sweden leads to the undermining of cultural differences or to interpret differences in a negative way, eventually leading to discrimination. She argues for the need for a cultural expertise that feeds into the judicial practice in the form of interdisciplinary collaboration.

"The "Cultural Test" as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges" by Ilenia Ruggiu analyses the cultural test as a creative legal transplant in Italy. The author was inspired by the North American cultural test for legal matters that involve an appraisal of culture and designed a variation thereof to be applied in the context of diversity, following recent migration flows to Italy. The cultural test formulated by Ruggiu is a sequence of questions that judges would ask themselves in order to establish whether culture is relevant to a certain matter and whether so-defined cultural behavior would deserve legal protection. This article also delves into the debates generated in Italy concerning the proposal of the adoption of the cultural test. Ruggiu concludes by reformulating the cultural test as a form of standardized cultural expertise that does not necessitate the appointment of cultural experts because it provides judges with the capacity to become experts themselves.

"The Bondo Society as a Political Tool: Examining Cultural Expertise in Sierra Leone from 1961 to 2018" by Aisha Fofana Ibrahim closes this Special

Issue by providing insights into the political backgrounds of cultural expertise in the highly debated topic of FGM/C (Female Genital Mutilation/Circumcision) in Sierra Leone. Ibrahim outlines how women secret societies in Sierra Leone have been concomitantly used by advocates of women's rights and elite male politicians who have instrumentalized women's rights for a personal political agenda. She argues that although this instrumentalization is evident now with the controversy raised over FGM/C, it dates back to pre-independence and is deeply embedded in the Bondo society. Hence, expertise cannot be easily separated from political agendas because each social group competes for political control by supporting their own experts. Ibrahim concludes her paper by arguing that the role of cultural expertise in FGM/C is irretrievably embedded within politics and it is impossible to separate the two in the Bondo society. Hence, when using cultural expertise concerning the topic of FGM/C in Europe, she argues, it is necessary to also delve into the complexity of political alignments in the countries where these practices originate, such as Sierra Leone.

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