# Cultural Expertise and the Legal Professions: Introduction

Livia Holden

*Naveiñ Reet: Nordic Journal of Law and Social Research (NNJLSR) No. 11 2021, pp. 7-14*

# Cultural Expertise and the Legal Professions: Introduction[1]

*Livia Holden (CNRS – Institut de Sciences Juridique et Philosophique Paris Sorbonne)*

*Cultural Expertise and the Legal Professions* offers a selected sample of first-hand experiences about the use and usefulness of cultural expertise by a pool of legal professionals and expert witnesses in various jurisdictions ranging from immigration and asylum to Indigenous rights and including family law, international human rights and criminal law. Although the use of anthropological knowledge in court dates back to at least the 19th century, cultural expertise is a relatively new concept which was formulated for the first time in 2009 at a workshop convened in France on the role of experts in matters decided before European jurisdictions and involving South Asian laws and socio-cultural contexts. The first definition of cultural expertise was published in *Cultural Expertise and Litigation* (Holden 2011: 4), a collected book that proposed an epistemological differentiation between cultural expertise and the then better-known concept of cultural defence. In fact, whilst cultural expertise and cultural defence are cognate, cultural expertise is broader in scope and acts as umbrella concept for all the socio-legal instruments that use cultural arguments in the legal processes. According to its current and updated definition, cultural expertise is the use of socio-legal and cultural knowledge for assisting the resolution of conflicts and the claim of rights in court and out-of-court (Holden 2019). Even though cultural defence and cultural expertise are cognate, cultural expertise features the following distinctive components: procedural neutrality and broad application to all fields of law including also out-of-court conflict resolution (Holden 2021).

In the anthropology of law, the link between law and culture is one of long date (among others see Geertz 1973 and Rosen 1977), but, in the socio-legal studies and in the wider panorama of social sciences, debates have recently emerged about the existence, the extent and the usefulness of cultural expertise as well as the appropriateness of the

1 This special issue is a primary output of the European Research Council funded project titled Cultural Expertise in Europe: What is it useful for? (EURO-EXPERT) led by Livia Holden at the CNRS, Paris Sorbonne. The papers published in this special issue were first presented at a workshop convened by the same project at Trinity College at Oxford on the 3-4 October 2019. Heartfelt thanks go to the anonymous reviewers who have helped us in improving the contributions and to Joshua Bishay who has assisted the guest editor of this special issue.

engagement of social scientists in court (Holden 2019, Campbell 2020, Loperena, Mora, and Hernández-Castillo 2020, Rosen 2020). The compatibility of the scientific and legal domains have been interrogated from a perspective of sociology of sciences (Jasanoff 2006) and legal anthropology (Good 2007). Jasanoff's analysis of the use of scientific expertise in court shows that the conflicting internal logics of both science and the law routinely generate misunderstandings over the appropriate interpretation and utility of scientific evidence for dispute resolution (Jasanoff 2006). Good (2008) suggests that lawyers and anthropologists think outrightly in different ways. When cultural knowledge becomes relevant in the legal process, law courts may be perceived to validate, or invalidate, not only scholars' professionalism but also disciplinary fields. Hence, the use of cultural expertise in court can have far reaching consequences and social scientists feel often torn between engagement and abstention (Holden 2021 and Bringa, Bendixen, and Synnøve 2016).

Whilst academia has been involved in theoretical debates, the legal professions have been creative in developing new instruments for addressing social diversity. EURO-EXPERT has endeavoured to systematically record the many practices of cultural expertise that are observable in the everyday practice of law without being necessarily perceived or theorised as cultural expertise.[2] This special issue wants to be a tribute to the creativity and the daily engagement of the legal professions and the anthropologists who have engaged with cultural expertise, by offering an overview of the variety and the articulation of their responses for a more inclusive justice in diverse societies. This special issue includes papers written by judges, experts and academicians involved with cultural expertise to different extents, but all engage with the concept of cultural expertise from a pragmatic perspective aiming at solving everyday issues. The authors' styles are also varied and include self-reflection pieces, commentaries of policies and law-making, studies of case law, and ethnographic case studies.

The special issue opens with "Experts and the Judiciary: Reflections of an Anthropological Expert in The Field of Asylum and Migration Law" by John R. Campbell, an anthropologist with twenty-three year experience as a cultural expert and two decades of ethnographic fieldwork on asylum and immigration law in the United Kingdom's Immigration and Asylum Tribunal (IAT) and in the English Court of Appeal. Campbell positions his experience in the history of applied anthropology

2 See the maps of in-court and out-of-court cultural expertise at https://culturalexpertise.net

and shares his own experience and criticism of the ways in which British courts have constrained the role of cultural experts. His contribution expands on the challenges confronted by the experts whose testimonies are challenged in the legal process and denounces the incongruences of a legal system which features structural inequalities. John Campbell concludes with a plead for engagement to social scientists, who, he argues, can contribute to secure protection for vulnerable groups and refugees.

The second paper of this special issue titled "Intercultural Justice in France: Origins and Evolution" is authored by Martine De Maximy, former president of the assize court in France. She narrates that in the 1990s with her colleague Thierry Baranger, she felt extremely concerned by the difficulty of the courts to successfully communicate with the increasing number of migrant families in France. Such a communication gap prompted her and her colleagues to appoint ethno-psychiatrists, ethno-psychologists and cultural experts to assist juvenile courts for better understanding education and social disadvantage. These experiences of close collaboration between the decision-making authorities and the cultural experts have consolidated with time into institutional appointments in France which see the experts as integral part of the legal process and have now become a potential model for neighbouring countries.

The third paper of this special issue titled "Cultural Expertise: Substantial and Procedural Framework" by Gualtiero Michelini, judge with long term experience at various Italian jurisdictions and abroad, offers an overview of the potential for the systematic adoption of cultural expertise in the legal procedure. The paper argues that both substantial and procedural stakes must be taken into consideration when contemplating the inclusion of cultural expertise in the legal process. Michelini surveys the great variety of the use of cultural expertise in Italy which has generated case law on the practice of wearing the *kirpan*, or the Sikh dagger; the *kafalah*, or sharia compliant guarantee in the interest of minors; the Islamic veil; the earthquake of L'Aquila. The author outlines the stakes of ongoing interactions among the members of the legal professions and social scientists in Italy for advocating a fuller integration of cultural expertise into the legal process.

The fourth paper of this special issue titled "Indigenous Expertise as Cultural Expertise in the World Heritage Protective Framework" is authored by Noelle Higgings who is an academician who engages with the protection of the rights of minorities and Indigenous peoples. The paper focuses on the role of Indigenous peoples in the protective

framework of world heritage. She argues for a better implementation of the inclusion of Indigenous peoples as experts in matters of world heritage including also law making in order to overcome the eurocentrism that has affected the legal regime of world heritage so far. The paper concludes with a call for the explicit recognition of the role of cultural experts that the Indigenous people should play in all the matters concerning international heritage law.

The fifth paper of this special issue titled "Cultural Expertise in Civil Law in Italy" is authored by Giuliana Civinini, the President of the Tribunal of Pisa. Civinini draws from her daily experience in court to describe how law is closely linked with culture at all stages of the legal process including not only expert testimonies but also the judges' cultural backgrounds, the production of documents and the court interactions. Her paper argues that cultural expertise is most significant in those proceedings where vulnerable groups and minors are involved because these matters require a background knowledge that exceeds the ordinary set of references with which the courts are usually familiar with. This paper also examines whether judges could acquire appropriate knowledge that would substitute the appointment of cultural experts and assess the pros and cons of the informal practices of cultural expertise in Italy. The author concludes by advocating the need for adequate training and action in order to institutionalise the use of cultural expertise through the systematic appointment of cultural experts in Italy.

The sixth paper of this special issue titled "Cultural Experts at the International Criminal Cout (ICC): The Local and the International" by Joshua Isaac Bishay focuses on the potential use of cultural expertise at the International Criminal Court of The Hague. As a junior lawyer in the The Hague, Bishay felt strongly on the structural unbalance between the lawyers and judges' community, often belonging to dominant majorities, and post-conflict communities usually appearing in their dockets. By drawing on research on cultural expertise in national jurisdictions, Bishay, identifies specific difficulties that hinder the work of cultural experts at the ICC: namely the isolation of cultural experts, the stereotypisation of cultural knowledge, and the difficulty of ICC to accept and adequately assess cultural expertise provided by the members of the communities affected by the conflict.

The seventh paper of this special issue titled "The Judge and the Anthropologist: Cultural Expertise in Dutch Courts" by Hermine Wiersinga, judge at the criminal court of appeal in The Hague, challenges the usefulness of cultural expertise for judges and

aims to find common grounds between anthropologists and judges. Her paper argues that although cultural knowledge is not per se useful in a criminal court, there are three common grounds on which anthropologists and jurists could develop a fruitful collaboration: cultural knowledge linked to particular social groups, cases in which the cultural context is relevant, and culturally relevant notions. The paper continues with an unprecedented reflexive commentary on the cultural expertise provided by Dr Martjin De Koening in the well-known Dutch "context case" in which Wiersinga was part of the deciding panel. Wiersinga shares her own expectations as judge and the expert's position in court and vis-à-vis the defendants and reflects on the ethical position of the expert. Then she describes how the expert testimony was used by the courts for supporting conclusions that were virtually opposite to the ones of the expert. Eventually she admits that a deeper understanding of the cultural context of the case is useful in court.

The special issue concludes with "An Anthropologist in Court and Out of Place: A Rejoinder to Wiersinga" by Martijn de Koning, the anthropologist and expert of Islam, who acted as expert witness in the "context case" discussed by Wiersinga. De Koning agrees with Wiersinga about the ethical issues which are inherent to the position of the anthropologist acting as expert in court, not only in his specific experience with the Dutch "context case" but more in general for cultural expertise in court. De Koning describes his own sense of alienation when providing cultural expertise in court, his frustration about being unable to fulfil his promise of anonymity to his research participants, and the unexpected feeling of being distrusted or misinterpreted in court in what he terms as appropriation of academic knowledge. It appears evident that De Koning and Wiersinga agree to disagree and as editor of this special issue I am grateful to both for choosing this venue for sharing their own experiences. However, this unprecedented written dialogue between the judge and the expert, appears also as the perfect example of the different degree of authority between the discourse of the law and the discourse of social sciences: the former can claim priority for the public good and in doing so can easily undermine the deontology of the social sciences.

## Bibliography

Burawoy, Michel. 2005. For Public Sociology, American Sociological Review 70(1).

John R. Campbell, 2020. Interrogating the Role and Value of Cultural Expertise in Law. Laws, 9(29), p.29.

Bringa, Tone, and Synnøve Bendixsen. Engaged Anthropology: Views from Scandinavia. Cham: Palgrave Macmillan, 2016.

Clarke, Kamari M. 2020. 'Toward Reflexivity in the Anthropology of Expertise and Law'. *American Anthropologist* 122 (3): 584–87.

Fraas, Arthur Mitchell. 2012. "Legal Databases: A Comparative Analysis" Center for Research Libraries.

Geertz, Clifford. The Interpretation of Cultures: Selected Essays. Alexander Street Anthropology. New York: Basic Books, 1973.

Good, Anthony. Anthropology and Expertise in the Asylum Courts. Abingdon: Routledge Cavendish, 2007.

Jasanoff, Sheila. 'Just Evidence: The Limits of Science in the Legal Process', Journal of Law, Medicine & Ethics (2006, Summer): 328-341.

Holden, Livia. 2011. Cultural Expertise and Litigation, Routledge.

Holden, L. 2020. 'Cultural Expertise and Law: An Historical Overview', Law and History Review 38, 1:29-46.

Holden, Livia. 2021. 'Anthropologist as experts: Cultural expertise, colonialism, and positionality', Law and Social Inquiry.

Loperena, Christopher, Mariana Mora, and R. Aída Hernández-Castillo. 2020. 'Cultural Expertise? Anthropologist as Witness in Defense of Indigenous and Afro-Descendant Rights'. *American Anthropologist* 122 (3): 588–94.

Rosen, Lawrence 1977. 'The Anthropologist as Expert Witness', American Anthropologist 79, 3: 555-578

Rosen, Lawrence, Expert Testimony in the Social Sciences: A Historical Overview of Contemporary Issues, Law and History Review 38 no. 1. 2020: 123-142.