



Cultural Expertise and Socio-Legal Studies

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CULTURAL EXPERTISE AND SOCIO-LEGAL STUDIES: INTRODUCTION

Livia Holden

This special issue is the outcome of the *Cultural Expertise in Socio-legal Studies and History* conference held on December 15–16, 2016, in Oxford, at the Centre for Socio-legal Studies and Maison Française. It was the inaugural conference for the project titled “Cultural Expertise in Europe: What is it useful for?” (EURO-EXPERT) funded by the European Research Council. This special issue includes contributions by scholars specializing in law and culture in civil and common law traditions both in and outside of Europe. Although the stress of EURO-EXPERT is on the European context, the inclusion of contributions from non-European contexts suggests the necessity for a global understanding of cultural expertise. The aim of this special issue is to explore in-country socio-legal approaches revolving around the use of cultural expertise whose threshold definition was formulated as follows: “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, p. 2). This definition is scrutinized in this special issue against a variety of contexts and socio-legal approaches in view of fine-tuning, updating and a recontextualization within legal theories, and legal precedents in all those contexts where areas of cultural studies and socio-legal studies are used to solve conflicts or support claims. The authors have explored the applicability of the definition of cultural expertise in a variety of legal systems. All chapters of this special issue adopt a socio-legal approach for the focus on the relationship between law and society. However, depending on the academic background of the authors, different components of socio-legal

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approaches have been chosen. The reason for such a purposeful variety is to foster a debate that is diverse, inclusive, constructive, and innovative in order to lay the basis for evaluating the use and impact of cultural expertise in modern litigation both in and out of court. In this introduction, I will shortly recall the genesis of the conceptualization of the notion of cultural expertise and its relationship with the well-known concept of cultural defense; I will then briefly outline the positioning of EURO-EXPERT regarding notions of power and culture to which most of the authors in this special issue refer as variables in the social phenomena dealt with by cultural expertise; and eventually, I will introduce the contributions to this special issue.

CULTURAL EXPERTISE AND CULTURAL DEFENSE

The first formulation of the concept of cultural expertise, reported above, was generated in 2009 from the need to better understand an activity that anthropologists have been engaged with since the very beginning of their academic discipline, especially in North America and in Australia, but increasingly during decolonization processes and big migration flows in Europe (Holden, 2011). This is nothing but a threshold definition and the result of a compromise among the different perspectives of the contributors to the collected volume titled *Cultural Expertise and Litigation* (Holden, 2011). As a socio-legal definition that exceeds legal technicalities, the term “cultural expertise” is designed to account for the specific but complex contribution that anthropology, and by extension social sciences, can provide to the construction of legal truth in the legal process, policy-making, and out-of-court dispute resolution.

Cultural expertise does not aim to directly impact legal outcomes. Importantly, and also in light of the scholarship on cultural expert witnessing, the concept of cultural expertise allows for a necessary distinction to be made with regard to cultural defense. Not differently from any other form of expertise in court, the purpose of cultural expertise is to apply special knowledge to a definite set of circumstances submitted to the expert whose considerations must be elaborated irrespectively from the legal outcome of the case. Similar to any other kind of legal expertise but different from cultural defense, cultural expertise ought to be neutral, no matter whether it is requested by the court or by the parties. Cultural defense, instead, is the use of cultural arguments by the defense lawyer, even though cultural defense has also the scope to provide the judge with supposedly neutral information on culture (Renteln, 2004). Although cultural expertise and cultural defense are often linked and in some cases overlap, it is important to see that cultural expertise differs epistemologically from cultural defense: It precedes it temporally within the proceeding and exceeds it in scope, because it can be requested for a wider range of cases than those of the typical cultural defense which plays a role mainly in criminal law. Very often, cultural defense develops with the assistance of a cultural expert, who can even provide the defense with arguments that will integrate the cultural defense and as such influence the legal outcome of a case. But, as this special issue demonstrates, cultural expertise – be it adequate or not is another matter – does not depend on

the actual appointment of a cultural expert. Several chapters in this special issue show that lawyers and judges themselves engage in an activity that can be defined as cultural expertise when they use socio-legal instruments that imply an assessment of culture: The most evident cases in North America are the culture test (Eisenberg, 2006) and cultural defense (Renteln, 2004). Eventually, I suggest that whilst various forms of cultural expertise have been studied in-depth, cultural expertise has remained undetected so far because of the lack of an adequate conceptual formulation.

POWER AND CULTURE

In order to proceed toward an assessment of cultural expertise as a theoretical formulation that applies to a variety of contexts, it is important to position our approach with regard to notions of power and culture in anthropology, even though both concepts evidently elude an adequate treatment here. The history of human rights shows quite clearly that discrimination and abuse have been justified both by egalitarian and discriminatory agendas. Regrettably, anthropology has known both these phenomena and has thus been associated with both. However, it is hoped here, that the initial interest in similarities – intended as subjection and assimilation – which characterized some anthropological and socio-legal scholarship of colonial Europe, should have been abandoned by now. This is how I interpret the widespread reluctance of anthropologists to become involved with applied sciences. This absence is, however, particularly painful to the ones who genuinely engage today in societal problem-solving. In my chapter, I hint at the fact that anthropology and anthropologists have sometimes been on the wrong side of history but have seldom been powerful. More than 20 years ago, Lucas (1996) and more recently Colajanni (2014) and Grillo (2016) have pointed at a widespread pessimism within the discipline itself regarding the ability of anthropology to influence institutional decision-making and to set the agenda in the public domain.

Yet, there is increasing scope for social sciences to contribute to the resolution of conflicts in multicultural settings. Practices of law that travel alongside various kinds of diasporas and mass migration are now routinely scrutinized by the decision-making authorities in Western countries. Euro-American authorities are formally invested in the prerogative to evaluate the legality of migrants' actions and the authenticity of their accounts. The validity of informal or polygamous marriages can become relevant in migration procedures when people travel to Europe and, after their deaths, inheritance and taxes may need to be decided upon. Through the development of private international laws and international and bilateral treaties, European countries have each found different ways to deal with cross-border litigation and the legal statuses of migrants both inside and outside the European Union. Some jurisdictions deal with these new situations thanks to the assistance of country experts, translators, mediators, and academicians; other jurisdictions engage directly in argumentations revolving around culture. The treatment of culture in a legal setting is nevertheless elusive regarding its role in litigation and impact on justice. It is unclear, in

particular, if cultural expert witnessing can contribute to a better application of human rights and for that matter to redress power imbalances. In this vein, I argue that the notion of cultural expertise could be of help to further scrutinize the discourse of human rights in terms of engagement with substantial inclusion and substantial equality. Accordingly, one thread of this special issue, albeit differently developed in each chapter, is the consideration of power as a significant component of the discourse on cultural expertise.

The second positioning of this special issue concerns the notion of culture that promises to be crucial to the integrated definition of cultural expertise. In North America, at the start of the twentieth century, anthropological studies focused on the notion of culture based on general patterns of behavior, distinct from biological determinations and associated with diffusionist theories taking into account contact and history. In England, the dominant paradigm, influenced by Emile Durkheim (1919), was rather one of social structure, studied with long fieldwork immersions and according to a synchronic perspective. The two schools developed almost independently and several generations of researchers reasserted and emphasized the importance of culture on both sides of the Atlantic. British anthropology has tended to see culture as a marginal and contingent by-product of society while American anthropology has stressed the uniqueness and diversity of societies. The second half of the twenty-first century witnessed an increased influence of American anthropology leading to a consolidation of the concept of culture. With Clifford Geertz (1973) the focus of anthropology shifted from the social sciences, which objectively described measurable aspects, to the humanities, which rather subjectively and interpretatively accounted for social phenomena. The wave of criticism produced by the post-modern schools of thoughts to the cultural determinism of Geertz brought a reflexive stance where no objective account of culture is deemed to be possible anymore.

Whilst the role of the cultural expert witness appears as consolidated in American socio-legal studies (Sarat & Rodriguez, 2018), this special issue shows that European scholarship is cautious but highly interested. Several studies on law and culture re-evaluate the importance of social anthropology in dispute resolution especially if combined with other approaches that emphasize the role of ethnicity, immigration, and political debates. Scandinavian scholarship argues the need for a renewed engagement of social sciences with society, precisely through cultural expert witnessing in a great variety of contexts and situations ranging from international tribunals to civil litigation and including war (Bringa & Synnøve, 2016). By reviving the attention to the link between law and culture, this special issue also takes up the challenge launched by Ulf Hannerz in *Diversity is Our Business* (2010) where he argues that in spite of all the pessimistic predictions, anthropology is alive and well thanks to its consistent emphasis on diversity. I suggest that an integrated definition of cultural expertise is possible with the help of an ethnomethodological perspective in which culture is not defined ontologically but rather pragmatically in a mundane framework (Pollner, 1987) and that theories such as the actor-network theory (Latour, 2005, 2010) might be particularly appropriate to grasp the role of culture in the

legal process seen as being connected or associated with everyday life. Rosen shows in *The Judgement of Culture* (2017) that law is, after all, not as certain as it is supposed to be and that such an uncertainty is connected with its dependence on cultural contexts. This is the challenge that this special issue takes up when engaging in an interdisciplinary dialogue between lawyers and social scientists.

THE CONTRIBUTIONS TO THIS SPECIAL ISSUE

This special issue is organized into five sections: Cultural Expertise With(out) Cultural Experts, the Sites of Cultural Expertise, Comparative Perspectives on Cultural Expertise, Cultural Expertise in Non-European Contexts, and Conclusions for a Way Forward.

The first section titled *Cultural Expertise With(out) Cultural Experts* takes us to Finland and Italy to explore cultural expertise irrespective of cultural experts and to scrutinize the ambiguous role and status of cultural experts in a legal praxis that rarely acknowledge their existence. Both chapters of this section adopt an anthropological approach to note that cultural arguments in court risk undermining claims and recommend a certain level of professionalization in cultural expertise. These chapters include mention of the legislative framework allowing or disallowing cultural expertise but also analyze the gaps and silences in which de facto cultural expertise develops in spite of institutional disregard. This section opens with “From Invisible to Visible: Locating ‘Cultural Expertise’ in the Law Courts of Two Finnish Cities” by Taina Cooke. Here, she unravels an informal typology of cultural expertise in a process that she defines as a trajectory going “from invisible to visible.” Cooke shows that although Finnish courts do not appoint cultural experts systematically, interpreters and eyewitnesses can be used as cultural experts informally. Her data collected through ethnographic fieldwork in court indicate that social actors involved in litigation are often aware of the unfavorable impact of culture and tend to conceal it. Cooke argues that such an informal treatment of culture, instead of ensuring justice in the name of equality, carries the risk of perpetuating social stereotypes. Cooke concludes that cultural expertise is a challenge that not all social scientists are ready to confront. She maintains that being more open to talk about culture and cultural expertise in Finnish courts would have the advantage of addressing dangerous oversimplifications by non-experts.

The second chapter of the first section, “Cultural Expertise in Italian Courts: Contexts, Cases and Issues,” continues the reflection on the informal role of cultural expertise. Ciccozzi and Decarli describe the paradoxical situation in which Italian cultural experts provide various types of assistance to courts but, regrettably, without or only marginal institutional acknowledgment. Their chapter is divided into two parts: the first part is a survey of the extraordinary variety of cases in which social scientists provide cultural expertise in Italy, while the second focuses on the controversial case of the 2009 earthquake in L’Aquila. In the first part, Decarli laments the absence of anthropologists in the registers of experts in Italy, which is contradictory to their informal assistance as mediators,

interpreters, social workers, and witnesses in family law and criminal law cases. In the second part, Ciccozzi tells of his own experience of acting as a cultural expert when he argued that natural scientists by specifically predicting only a mild seismic activity in 2009 hindered the capacity of local inhabitants to perceive the risk and to act sensibly as a consequence. Both authors describe a situation of extraordinary informality, which has the merit to allow for interdisciplinary experimentation, even though it virtually annihilates the credibility of cultural anthropologists.

The second section entitled the *Sites of Cultural Expertise* highlights the variety of sites of cultural expertise within state and non-state jurisdiction, NGOs, and other sites of conflict resolution, that is, mediation, adjudication, and alternative dispute resolution. The first chapter of this section is “Assessing Cultural Expertise in Portugal: Challenges and Opportunities” by João Teixeira Lopes, Anabela Costa Leão, and Lígia Ferro who take us to Portugal. The authors of this chapter argue for a broader definition of cultural expertise that includes cultural arguments in legal reasoning pointing at the fact that state law is not culturally neutral per se. They refer to academic controversies concerning the definition of culture and, as all the other authors of this special issue, express preoccupations regarding the risk to perpetuate essentialized concepts of culture. However, they also argue that it is the duty of the state to respect and protect cultural identity and lament the low level of professionalization of cultural mediators. This chapter connects with both Cooke, and Ciccozzi and Decarli whose papers show that certain experts provide their assistance outside the typical sites of dispute resolution. However, Lopes, Leão, and Ferro go further to suggest a typology of cultural expertise whose sites are surprisingly varied in spite of the overall lack of institutional recognition of cultural expertise in Portugal.

The second chapter of this section is “Cultural Expertise in Asylum Granting Procedure in Greece: Evaluating the Experiences and the Prospects” by Helen Rethimiotaki. This chapter also suggests a broader definition of cultural expertise and includes several sites of cultural expertise whilst focusing in particular on mediation processes out of court. Helen Rethimiotaki reminds us that cultural mediators were introduced in Greece and other European countries by the European Fund for the Integration of Third-country Nationals with the aim to facilitate communication between Third-country Nationals and the Greek administration, in respect of minorities’ rights and their integration in the long term. This chapter provides compelling information about how legal professionals deal with notions of culture on an everyday basis and how they would like to be assisted in order to deliver better justice. Rethimiotaki’s conclusions are clearly favorable to an extended use of cultural expertise whose definition might include not only court but also out-of-court settings in order to help the Greek state to implement a multiethnic political community and a cosmopolitan legal order.

The third section of this special issue entitled *Comparative Perspectives on Cultural Expertise* draws from the comparative methodology that has historically developed almost as an inherent ingredient of anthropology. Whilst comparative law has conventionally involved the comparison of legal systems, the

comparison in anthropology has been used to compare different elements within the same culture as well as different social groups across different periods of time. This section opens with “Court Cases, Cultural Expertise, and ‘Female Genital Mutilation’ in Europe” by Ruth Mestre and Sara Johnsdotter, whose comparative approach is closer to conventional comparisons among legal systems, and which tackles the controversial topic of female genital mutilations (FGMs) in Europe. On the basis of data collected in 11 European countries, the authors show that it is not the lack of cultural knowledge that damages the individuals involved in FGM; but rather, it is the assumption that cultural expertise, in the form of cultural defense, should necessarily condone cultural practices even when, as in the case of FGM, these constitute violence against women. The authors conclude that much remains to be investigated regarding the prevention of violence against women whose circumstances may be better addressed by culture-focused approaches.

The second chapter of this comparative section entitled “Between Norms, Facts, and Stereotypes: The Place of Culture and Ethnicity in Belgian and French Family Justice” by Caroline Simon, Barbara Truffin, and Anne Wyvekens focuses on similarities between French and Belgian family litigation which both feature an unsatisfactory treatment of cultural arguments. The authors uncover the paradoxical coexistence of the statutory refusal of cultural arguments in the name of equality before the law with a *de facto* recurrence of cultural components in the everyday discourse of judges, lawyers, and litigants. Simon, Truffin, and Wyvekens argue that a praxeological approach to law is necessary to understand the relationship between law and culture without falling into the widespread stereotypes propagated by the virtual absence of satisfactory cultural expertise. Similar to Cooke, the authors’ findings are that cultural arguments are likely to disadvantage litigants mainly in connection with the reification of culture used for undermining ethnic minorities. Hence, the authors express a wish toward a more fluid and dispassionate formulation of cultural diversity. The chapter’s conclusions flag up the need for training in cultural expertise that may facilitate the communication between judges and litigants in multicultural settings.

The last section of this special issue entitled *Cultural Expertise in Non-European Contexts* engages with cultural expertise in Australia and in South Africa. The reason for this section in a special issue whose primary focus is Europe is a theoretical one with concrete ramifications regarding the applied outputs of EURO-EXPERT. I argue, in fact, that cultural expertise in Europe can hardly be discussed in isolation and that Europe would benefit from greater academic contamination. The first chapter of this section is “Cultural Expertise in Australia: Colonial Laws, Customs, and Emergent Legal Pluralism” by Ann Black, who traces the contribution of social sciences in redressing the dispossession of First Nations’ land rights and connects cultural expertise with legal pluralism. She argues that although *de facto* legal pluralism has been increasingly recognized in Australia, cultural expertise is necessary to ensure the passage toward *de jure* legal recognition. Black also tackles more recent cultural expertise in Australia, which is used for settling family law litigation among non-European diasporas. Evidently, much of her discussion resonates with

many of the issues and concerns that are also felt as pressing in the European context: the relationship between cultural expertise and cultural defense, or the use of social sciences for the claim of mitigating circumstances in criminal law; and the requisites that an expert should fulfill.

The second chapter of this section is “Cultural Expertise in Litigation in South Africa: Can the Western World Learn Anything from a Mixed, Pluralistic Legal System?” by Christa Rautenbach. Her chapter deals with the flexibility of the South African legal system, which skillfully navigates common and customary law, broadly designating both local and imported customary laws. Rautenbach focuses, in particular, on the processes of ascertainment of customs which are treated as foreign law by the legal system. Hence, according to the law of evidence, experts are appointed to assist the judges when special knowledge is needed. This chapter provides a fascinating typology of experts ranging from formal to more informal appointments. The author has no qualms in attesting to the usefulness of cultural expertise that does not need minimal requirements and professionalism and warns Europe that “one shoe does not fit all.” Her chapter concludes with an explicit offer for collaboration with multicultural Europe in order to look at cultural diversity from a global perspective in which the case of South Africa can be of help.

The last section of this special issue *Suggestions for a Way Forward* includes a chapter authored by myself and titled “Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise.” It seems to me that the widely shared skepticism toward reified notions of culture and the danger of its perpetuation through damaging stereotypes might be productively addressed by a scrutiny of what I propose to call “cultural expertise.” In the first part of my article, I propose a synthetic historical overview of cultural expert witnessing and its reception. The second part of my chapter outlines the theoretical approaches that have characterized the scholarly treatment of cultural expert witnessing, and in the third part of the chapter, I look at the different positioning of systems of common and civil law vis-à-vis cultural expert witnessing. I argue that, notwithstanding the limitation of the binary and broad opposition between civil and common law legal systems, the insistence on facts within the common law system makes it easier for judges to rely on the assistance of experts who are not legal professionals. Yet, from a socio-legal perspective, it should be possible to reformulate a definition of cultural expertise that accounts for its many variants that occur also in civil law legal systems and out of court. The chapter concludes by suggesting that an integrated definition of cultural expertise, although challenging, would serve the purpose of assessing its usefulness in de facto multicultural Europe.

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Cultural Expertise and Socio-Legal Studies

From Invisible to Visible: Locating “Cultural Expertise” in the Law Courts of Two Finnish Cities

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FROM INVISIBLE TO VISIBLE: LOCATING “CULTURAL EXPERTISE” IN THE LAW COURTS OF TWO FINNISH CITIES

Taina Cooke

ABSTRACT

In this chapter, I examine the informal cultural expertise utilized in the District Courts and Courts of Appeal of two Finnish cities. I argue that the parties that serve as providers of “cultural expertise” are manifold and include eyewitnesses, interpreters, and even the courts themselves. I examine the challenges regarding the informal use of cultural expertise, drawing from debates that consider the relationship between an “insider-expert” and a “trained-expert” in acting as a cultural mediator.

Keywords: Court ethnography; cultural expertise; cultural minorities; eyewitnesses; Finland; interpreters

INTRODUCTION

If we talk about people from, let’s say, the Middle East, we tend to have stereotypes about them that are based on our prejudices rather than actually knowing them and surely that applies – I mean the District Courts and the members of law courts are in no way cut off from the general life, it applies to them, too. [...] It is clear that if we talk about, for example, homicide to which the defendant has pleaded not guilty and it is argued that the meanings of all the important factors would be completely different if the crime was committed among Finns than if it was committed among immigrants, then the only way [to find out about the crime] is to invite an expert witness to explain the cultural issues. However, in no trial, so far,

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have I invited [an expert witness] nor have I been to one where one was invited; although in principle it could happen in any case.

Interview (Lawyer)

The interview I conducted during a one-and-a-half-hour drive to the District Court in a nearby town with a Finnish criminal defense lawyer was a peculiar mix of cynicism and cautious optimism. The lawyer, who had practiced law for 23 years, was no stranger to clients from cultural minorities, and he seemed to become passionate when we first entered the discussion around “culture talk” in courts. He seemed to be of the opinion that information around different cultures and their practices could come in useful in some cases. Moreover, according to him, lawyers should play a key role in introducing such new ideas into a legal system that is often slow to change. Yet, in the next breath, he stated that he was frustrated with the rigidity of the system. Theoretically, one can try to raise all sorts of defenses, but it often feels like in the end nothing is accepted. I got the strong feeling that in the lawyer’s mind the idea of cultural expertise reflected the same frustration: a nice idea in theory but hardly applicable in legal practice.

This chapter discusses the potential of cultural expertise in the legal sphere and examines the complexities regarding the notion of culture. In order to address the cross-cultural challenges increasingly occurring in European and American legal practices, several scholars have examined the potential of so-called *cultural expertise* (Ballard, 2011; Good, 2011; Holden, 2011a; Menski, 2011; Vatuk, 2011). As Western legal practitioners are presently dealing with litigation involving cultural traits largely unknown to them, it has been suggested that further assistance from anthropologists or other cultural experts might come in useful (Holden, 2011a, p. 1; Renteln, 2004; Van Broeck, 2001; Winkelman, 1996). In Finland, expert witnessing was one of the focal points in a 2016 legal reform concerning the law of evidence; however, discussions on the role of cultural expertise appear to remain minimal. Despite the fact that *culture* or *cultural expertise* does not enjoy a formally recognized position in Finnish litigation, cultural argumentation does arise and receive attention in legal proceedings.

In this chapter, I will provide a brief introduction to the national legislative framework concerning expert witnessing in Finland. I will introduce the examples from my own data relating to the use of informal cultural expertise in the legal sphere and examine whose views and knowledge matter when seeking to verify traits regarding a person’s “culture” in court. Furthermore, I will analyze the discursive methods applied by the courts in their verdicts in making cultural information applicable for their use. I will look into the appointment of a community member as a cultural expert and consider the relationship between an “insider-expert” and a “trained-expert” in legal cases involving cultural minorities. Furthermore, I will speculate on the conceptual challenges that may follow when “culture” is harnessed for legal purposes. Cultural expertise is hardly objective and never unburdened by the vexed anthropological questions regarding the nature of culture, but its potential in steering the legal discussions

regarding cultural minority members in a direction that is more transparent and informed is worth considering.

The treatment of culture in legal arenas is worth studying as there appear to be no shared practices or guidelines on how to deal with cultural arguments in court. It is important to shed light on “culture talk” that, nevertheless, does occur in court and potentially impacts the legal outcomes of cases involving cultural minority members. The level of awareness concerning cultural issues among legal professionals, in my experience, varies wildly. It can be argued that the assessments of cases involving cultural minority representatives tend to lend themselves to highly stereotypical and dichotomous notions in legal arenas, resulting in the renewal and validation of this simplifying imagery in the process (Noll, 2006; Spijkerboer, 2005). This chapter is an attempt to highlight some of the ways in which “cultural expertise” is now kept invisible in the legal sphere, yet still utilized by the courts. It will also look into some possible methods that could be of use in transforming “culture talk” and making it more explicit.

FINLAND AND CULTURAL EXPERTISE IN COURTS – A BRIEF OVERVIEW

The Finnish legal system can be regarded as a part of Nordic (or Scandinavian) law, which in turn is classified among the broader legal tradition of civil (or Roman-German) law (Husa, 2012, pp. 5, 12). Nordic law is close to civil law, but its lack of extensive private law codification as well as its pragmatic rather than highly theoretical nature distinguishes it from the traditional civil law legal family (Husa, 2012, pp. 8–12). In terms of Finnish criminal law and the criminal justice system, the Nordic view stresses a rational and humane approach (Melander, 2012, p. 238). Finland has one of the smallest prison populations in Europe, and there is a clear emphasis on a cost-conscious and preventative outlook. The role of expert knowledge in court has been rather ambiguous until the beginning of 2016 when legislation reforming the law of evidence was introduced. Before the reform, a distinction between *an expert witness* and *a witness with expert knowledge* was made: the former was deemed more credible and could only be named by the court, whereas the latter could be appointed by the prosecutor or lawyers (Rautio & Frände, 2016). At present, the division no longer exists, most likely resulting in the increased employment of expert witnesses and also homogenized credibility standards. Regardless of the recent heightened interest surrounding expert witnessing, however, the attention received by cultural expertise appears to be limited.

In some countries, such as South Africa and Australia, the long history of indigenous law has meant that cultural arguments have received recognition also in the national legal systems (cf. Bronitt, 2009; Carstens, 2009). Recognition of Finland’s indigenous population, the Sámi people, and their traditional rights and cultural status in the legal sphere is a sensitive issue (e.g., Heinämäki et al., 2017; Kokko, 2010). There is no far-reaching institution of a specific “Sámi law,” but rather the ambition in the Nordic countries has for centuries been to assimilate the indigenous population as part of the general

national legislation and jurisdiction. Being recognized as Sámi, then, has historically not guaranteed access to special treatment in the eyes of the law. The legal status of the Sámi minority has improved during recent decades and their rights to “maintain and develop their own language and culture,” for example, was added to the Finnish Constitution in 1999 (§17). However, disputes over land rights in particular are ongoing and reflect the reluctance of the state to recognize the Sámi people as an indigenous population with clearly distinct special legal rights. Against this backdrop, it seems understandable that cultural expertise has not developed as a recognized feature of Finnish courtrooms so far.

According to my research data and several informal discussions with different legal professionals, cultural expertise is not commonly sought after in Finnish criminal cases involving cultural minority members, nor is there any established provider of such information generally known among legal professionals. This, however, does not mean that cultural arguments are absent from litigation. As I will demonstrate next, courts can place seemingly unbiased parties to the litigation, such as eyewitnesses and interpreters, into the roles of informal cultural experts. Sometimes, courts seem to merely rely on their own views when debating culture. Overall, it seems that cultural expertise does not find its way into Finnish courtrooms as much through the official channels as through the agency of informal “cultural-brokers.”

TALKING CULTURE IN COURT

The examples presented here serve to demonstrate some of the varied negotiations regarding cultural issues in criminal cases that have taken place in Finnish courts. All but one example are from cases in which I have participated myself: 35 in total, in the District Court and the Court of Appeal in one of Finland’s largest cities. The lengths of these trials have varied from approximately two hours to 15 days. The population of the city is predominantly Finnish (96% in 2015) yet the number of foreign nationals has increased steadily in recent years. The examples, while each relating to different crimes, represent the larger group of legal cases involving members from cultural minorities. The number of these cases has increased along with the related changes in population, yet they still display a clear minority of all the legal cases managed by the District Court and the Court of Appeal. For the cases I have participated in, I have made use of rich ethnographic data as well as the final court verdicts. The ethnographic data consist of extensive notes I have taken either during the trial or right after it, while the written verdicts are produced by courts and are often more concise in nature. For the one example that is not from a case dealt with in this particular city, I have only the written verdict. However, the length of the verdict, around 200 pages, as well as the heightened attention paid to cultural factors in it, make it a valuable source of data for research in cultural expertise. In addition to the court material, I have conducted five in-depth interviews (two prosecutors, a judge, an interpreter and a lawyer) to complement the data. All the quotes presented here are my translations from Finnish to English.

*Eyewitnesses as Cultural Experts**Mr Amin and a Case of Attempted Manslaughter*

A case, tried in spring 2016, involved a young Kurdish man, Mr Amin, who arrived in Finland in 2015 to seek asylum. He lived in a reception center with several other Kurds, with whom he often passed the time by playing pool in the basement of the building. One day, when a group of them were playing in the basement, two of the men, Mr Amin and Mr Rahimi, got into a fight. The situation escalated quickly: both of the men started verbally insulting the other's mother and sisters, after which the fight turned violent. The rest of the group made an effort to calm the situation, but with little success as, in the end, Mr Amin stabbed Mr Rahimi with a pair of small scissors in the neck area several times. As a result, Mr Amin was remanded in custody until trial and Mr Rahimi survived with fairly minor injuries.

At the trial, both the prosecutor and Mr Rahimi's lawyer asked the court to find Mr Amin guilty of attempted manslaughter whereas the defense insisted that Mr Amin had only committed an assault at most. The defense maintained that both parties were involved in a reciprocal assault and that Mr Amin had only used the scissors as a result of strong provocation on Mr Rahimi's part. In order to determine whether the conviction would be attempted manslaughter or assault, the court had to scrutinize Mr Amin's motives and decide if he was likely to have attempted to kill Mr Rahimi. In the process of examining Mr Amin's mindset, a number of culture-specific features of the incident were brought up and received a fair amount of attention during the litigation.

In court, Mr Rahimi, Mr Amin, and a third Kurdish man, who was present at the time of the incident, all provided their oral testimonies. They shared similar views with regard to what triggered the violence, as they explained to the court that both parties were insulting each other's family members and, as the witness stated, in their culture offending someone's mother or sisters is the worst kind of offense, making it "a matter of honor." Mr Rahimi seemed surprised about Mr Amin's decision to attack him so violently and explained "We share a language and the same country, it's not like he is an Arab or anyone like that. He is a Kurd and we understand each other."

In order to scrutinize Mr Amin's motives and the possible intention to kill, the prosecutor and Mr Rahimi's lawyer were particularly interested in the death threats that were presented during the incident. The defense claimed that Mr Amin had threatened to kill Mr Rahimi in the process of the incident. Mr Amin was asked by the prosecutor detailed questions about the number and timing of the threat or threats: "How many times did you threaten to kill Mr Rahimi? Did this happen before, during or after the attack?" Mr Amin seemed confused about the level of interest in terms of verbal threats and could not provide particularly detailed responses. He also added that Mr Rahimi had, likewise, threatened to kill him. With the purpose of further clarifying the situation, the prosecutor also confronted the eyewitness about the nature of the threats. After several questions regarding the subjects and objects of the threats, the number of threats, and their timing, the witness also appeared perplexed. In

the end, the witness decided to shed light on the affair and offered his interpretation of the situation. He stated that in their culture when someone threatens to kill another person, it is most often just “a habit” and does not indicate an actual desire to kill. The witness continued “I can give you an example. As children, when we played outside, mother would call to us, and she might shout ‘Come in or I’ll kill you!’ It’s just a habit, it doesn’t mean anything serious.”

In the end, Mr Amin escaped the charge of attempted manslaughter and he was convicted of a serious assault. The District Court sentenced Mr Amin to just under three years’ imprisonment, in addition to which he was required to pay damages. Later, the Court of Appeal accepted the District Court’s verdict, for the most part, but reduced the sentence by one year. It appears that the courts did take the cultural argumentation into account when assessing the incident as the District Court’s verdict states the following:

It has become clear from the plaintiff’s, defendant’s and witness’s narratives that both the defendant and the plaintiff have insulted each other’s close relatives. In addition to this, at least the defendant has told the plaintiff that he intends to kill him. Then again, it has been told that in the defendant’s and plaintiff’s culture claiming to kill someone without having a real intention to do so, is rather easily done. The court deems that the cultural background of the defendant and the plaintiff shall be taken into account when assessing the significance of the statements, yet there has been no external report presented in this case regarding the way in which these sorts of statements should be interpreted in their culture. According to the witness, in their culture one can insult religion but never close relatives. In any case, both the defendant and the plaintiff are Kurds, therefore they share the same cultural background and they, in all likelihood, understand each other in the same way.

Court verdict (p. 8)

In the verdict, the court stated that it had not been presented with any external report that would guide it in interpreting what were understood as cultural arguments in the case. Yet, as the sentence following that statement demonstrates, the witness ended up acting as a provider of cultural expertise in the litigation. According to the District Court’s verdict, the witness had only arrived to the reception center a couple of days prior to the incident in question and that “He is also a Kurd” (p. 4). His recent arrival must have appeared significant to the court as they made a point of it, and it arguably served to lay the foundations for regarding the witness as credible and also unbiased to a large extent. Furthermore, the video material available of the incident (the reception center had video surveillance in its premises) showed that the witness acted calmly during the episode and even made some efforts to separate the two men in order to prevent the violence from escalating. The witness’ account played a key role in helping court assess what had taken place and for what reasons (the video material did not cover the whole incident and it lacked sound) as in the final verdict, the witness’ description was often raised when drawing conclusions on the episode.

It is reasonable to assume that the credibility of the witness, established by the court, increased also the validity of the cultural arguments confirmed and presented by him in the case. As stated above, in its verdict, the court reasons “According to the witness, in their culture one can insult religion but never

close relatives." Consequently, the court did seem to accept that the incident escalated quickly due to the highly offensive nature of these insults in "their culture." I suspect that it was ultimately the witness' verification regarding the casualness of death threats in "Kurdish culture" that also convinced the court of the less serious nature of the verbal threats in the case. Due to his composed nature during both the violent incident and the court hearing, as well as his status as a seemingly unbiased "insider-," the witness appeared credible in the role of a cultural expert, even when the court did not formally recognize him as such.

Human Trafficking and Forced Labor in Oriental Restaurants

A quite unusual case came to trial first in the District Court and later also in the Court of Appeal of a southern Finnish city in 2012. In studying this case, I relied on the 200-page document that includes both of the courts' final verdicts. The case involved a couple who originated from Vietnam but who had lived in Finland already for at least 10 years. The couple developed a habit of recruiting employees from Vietnam to their Oriental restaurants in a Finnish city. Initially, the kitchen workers, 10 in total, were promised better working conditions than what they really experienced: they worked extremely long hours for very low pay. Most of the employees lived in the employers' house, which was over-crowded, and the little free time the workers had, was more or less supervised by the couple. The workers also became indebted to the couple, which made the relationship even more pressing for the employees. The workers, who had no Finnish language skills or knowledge about their rights, worked for the couple for periods varying from 10 months to six years before the employers were arrested.

In the verdicts, both the District Court and the Court of Appeal considered the cultural backgrounds of the parties. Throughout the verdicts, statements are made regarding "Vietnamese culture" and its connection to the relationship between the employers and workers as well as to the ways in which the plaintiffs acted in court. It was explained, for example, that in "Vietnamese culture," the hierarchy between boss and worker means that questioning the actions of the employer is extremely difficult. Also, it was explained by the defendants in particular that the workers were offered a chance to be flown back to Vietnam if they no longer wished to work in the restaurants. The reluctance of the workers to leave, however, was explained through cultural factors: the risk of "losing face" if they returned home empty handed prevented them from leaving. The influence of "Vietnamese culture" was also highlighted when it was explained that the employees had to send money to their homes in Vietnam and, as a result of that, ran into debt with the employers. Moreover, it was stated that because it was unusual in "Vietnamese culture" to openly show emotions, the fact that the plaintiffs cried in court was to be taken as an indication of them talking about particularly traumatic experiences.

Arguments relating to "Vietnamese culture" were, then, certainly raised during the litigation as they also feature strongly in the written verdicts. But *whose* knowledge do the courts rely on when they make statements about

“Vietnamese culture”? In the written verdicts, there does not seem to be just one source of cultural information the courts systematically depend on, and, as I will demonstrate later, on occasion they appear to mainly trust their own understanding. There was, however, one party to the criminal hearing that, according to my interpretation, ended up assuming the position of an informal cultural expert, namely the witness. In the verdict, the witness is introduced as follows:

According to XX, who is called to testify, her mother is Vietnamese and father Finnish. When she was one year old, she moved from Vietnam to Finland, where she has lived both with her mother and her father. When living with her mother, she has become familiar with Vietnamese culture. XX understands and is able to communicate in Vietnamese.

Court verdict (p. 126)

Only after this initial introduction, it is explained how the witness is connected to the case at issue: she worked in one of the restaurants as a waitress for six weeks. I find it quite noteworthy and exceptional, however, that her “cultural connection” to the case is highlighted before disclosing the actual reason for her being called to testify. This, I argue, highlights her dual role in the case as both a “cultural broker” and an ordinary witness. It can be further argued that her status as a Finnish–Vietnamese person, who has grown up under cultural influences from both of the countries, appeared as an ideal cultural interpreter in the case. The witness was regarded as being sufficiently close to all the parties present at the trials and so was eventually entrusted with carrying the greatest share of the cultural gap in the cases and act a mediator. Within the two-and-a-half-page summary of the witness’ account of what she had seen and heard during her short employment in the restaurant, there is also a paragraph stating the following:

In Vietnamese culture, speaking out about grievances is not commonplace. [...] Vietnamese people had a habit of expressing hardships through joking. The meaning of family was great for the Vietnamese. Speaking ill of one’s own family was not customary. It was typical that [Vietnamese] people working abroad sent money to their relatives back in their home country.

Court verdict (p. 128)

Later in the verdict (p. 132), it is also mentioned that “In Vietnamese culture, according to witness XX, it is typical that emotions are not expressed openly.” On the next page, this is clearly taken as a truth when the court states:

The credibility of the plaintiffs’ statements increase when taking into consideration that many of them have shown emotions when answering questions regarding their working hours or the extreme nature of the labour even when this is not typical in Vietnamese culture.

Court verdict (p. 133)

As mentioned earlier, the witness was not the only source of cultural information in the case as the cultural arguments presented by the defendants and plaintiffs (or their lawyers) also received recognition. However, it seems that as the defendants and plaintiffs are by definition biased in a case that concerns themselves, the court seeks to verify their arguments through the agency of a less involved party. In this endeavor, the witness ended up playing a meaningful role, which is also demonstrated in the following paragraph:

The defendants, plaintiffs *as well as the witness XX* have consistently explained that all Vietnamese people working abroad send money to relatives in their home country. A Vietnamese person who goes abroad to work cannot without the risk of losing face refrain from sending money to their home country.

Court verdict (p. 143, emphasis added)

Interpreters as Invisible Cultural Experts

In the trials I attended, the role played by interpreters turned out to be substantial. Often, members from cultural minorities, most of whom were immigrants, did not have sufficient Finnish language skills and, hence, required interpreting. An interpreter who I interviewed explained to me that ideally she and her colleagues should appear invisible – as neutral tools who enable communication but who do not otherwise intervene in the process. Often, as was also acknowledged by the interpreter, this fails to be the case.

The academic literature on court interpreters, likewise, stresses the crucial yet highly problematic position of an interpreter, who is often confronted with legal actors’ naïve expectations for performing “as a disembodied mechanical device” (Wadensjö, 1988, p. 74, see also Colin & Morris, 1996, pp. 17–18; Gibb & Good, 2014; González, Vásquez, & Mikkelsen, 1991, p. 314; Morris, 1995, 2010; Rycroft, 2011, p. 209). Scholars who have studied interlingual interpreting in refugee status determination procedures and other legal settings have found the myth of verbatim, or word-for-word, translation particularly prevailing (Colin & Morris, 1996, p. 17; Gibb & Good, 2014, pp. 389, 394; Morris, 1995, 2010, p. 59). As noted by Morris (1995, pp. 30–31), this “legal fiction” on absolute accuracy of translation works in favor of the law allowing it to ignore the inevitable failure of the interpreting process “to reproduce an identical replica across the language barrier.” The interpreters are, then, assumed to operate anonymously in a sort of sociocultural vacuum despite them occupying highly active and multifaceted roles in the institutional reality.

A prosecutor who I interviewed was worried about, what she understood as, the varied professional skills of different interpreters. She had a lot of experience in working with immigrants, and she strongly opposed the tendency of some interpreters to “explain rather than just translate” what has been said. The idea of word-for-word translation received strong support from her as she explained to me that the choices of words and order of questions played a crucial role in her work. The prosecutor did, however, recognize the mixed expectations set for interpreters when she stated:

Sometimes they [interpreters] are entirely misused in trials. They might be asked ‘is that really how it is?’. And that’s where it goes horribly wrong.

Interview (Prosecutor)

The interpreter I interviewed was, hardly surprisingly, well aware of their position in the middle of varied expectations and assumptions. She explained how it frequently felt as though some people in the courtroom assumed her to be on someone else’s side, which meant that she had to often remind all the parties of the trial about her unbiased position, think about seating arrangements,

and avoid extensive eye contact. She recounted an instance where some immigrant defendants saw a police officer whisper something to her during a trial and hence started to assume that the interpreter worked for the police. In another case, a prosecutor wanted to know what two defendants had talked about during a break and stressed to the interpreter: “you are *our* interpreter, you have to translate everything.” The interpreter said that she was irritated by the comment and told the prosecutor that, first of all, she was no one’s interpreter, regardless of who pays her, and second of all, it was not her job to remember things during the trial or when she was taking a break.

It seems that interpreters are often expected to have a naturally strong connection to the cultural minority defendants or plaintiffs involved in the case (see also Morris, 1999, pp. 9–10) and are trusted in explaining issues relating to the language as well as culture they are all assumed to share. During one trial I participated in, there occurred a mundane and short, yet quite telling, discussion around two names that kept appearing in a witness’s narrative. Due to the large number of defendants, seven altogether, there were two interpreters present throughout the trial, and they worked together closely:

Judge: The names *Ahmed* and *Ahmad* keep appearing in the story, which one is right?

Interpreter A: Is the question for the interpreter or for the witness?

[Judge remains quiet]

Witness: [says something in Kurdish]

Interpreter A: [explains in general terms in Finnish about the two ways to spell and use the name]

Interpreter B: To clarify, that was the interpreter’s own view, the witness said that he doesn’t know and in his area they just use *Ahmed* and he doesn’t know how it is spelled.

Court notes

Discussions similar to the one above are, in my experience, common. Whenever an interpreter has offered their own explanation to an unclear issue, I have not noticed any opposition or resistance to accept it from other parties of the litigation. On the contrary, the “cultural interpretation” is often welcomed and, as already mentioned earlier, even sought after. When I asked the interpreter (Interpreter B in the above example), if she was ever asked to clarify cultural matters she responded:

Yes, sometimes they do ask. But at times I see it as necessary to say something if I can tell that the other one has not understood and then I say that “interpreter comments” and then explain the matter and interpret the same explanation also into the other language. It does help and in that way we can avoid questions that last for ten minutes.

Interview (Interpreter)

Indeed, it appeared to be beneficial for everyone involved in the trials when the interpreters intervened and helped the process by offering their own interpretation of the situation. This was likewise the case in a trial where an interpreter explained to the Finnish legal professionals why a witness wished to swear an oath by the name of God rather than give a non-religious affirmation.¹ In

another case, the cultural minority defendants' statements, six of them, would have appeared a lot more confusing if the interpreter had not explained that when they talked about their "brothers" they, in reality, referred to their close friends instead of biological family members. All in all, in the cases I studied, it seemed as though the interpreters were utilized as unofficial cultural mediators due to their neutral position and legal status. Consequently, they were relied on in explaining cultural differences that helped to clarify the communication in the courtrooms, but they had to remain invisible in the final verdicts.

*Lawyers, Prosecutors, and Courts Themselves as the
Providers of Cultural Information*

When I heard cultural arguments being raised in criminal trials, they were most often presented by defense lawyers, although on one occasion also by a prosecutor. In one case, a defense lawyer highlighted that due to the extremely subordinated status of their female client originating from Afghanistan, the blame on financial fraud should not fall on her shoulders but solely on her husband's, who was in charge of all the household finances during their marriage. In the same case, the prosecutor undermined the cultural arguments by stressing that the defendant had, for example, abandoned the use of the veil and was not to be victimized. Regardless of the significant amount of "culture talk" during the trial, no comments on "culture" featured in the written verdicts. Indeed, and as indicated earlier, it seems that the courts are reluctant to quote the lawyers' or prosecutors' statements on culture unless they are verified by a seemingly unbiased party or other source of evidence.

The sources of cultural arguments are, then, many in criminal trials, but when quoted in the final verdicts, their origins can also remain unclear. Indeed, it appears that the court can rely on its own authority when making statements about culture – a realm that is ordinarily not regarded as their area of expertise. Here is a quote from the earlier mentioned case regarding human trafficking and forced labor in Oriental restaurants:

The Court of Appeal finds also that the threat of being sent back [from Finland to Vietnam] is connected to the so-called risk of losing face, as in Vietnamese culture it is the duty of a man to provide for both his immediate family as well as his close relatives. Likewise, the shame resulting from an employer terminating the employment relationship works as a threat in a culture where respecting one's employer, or generally someone who is higher in the hierarchy, is central.

Court verdict (p. 7)

Even when reading the above quote in the original context, it is impossible to deduce what or whose knowledge is utilized. It is possible that the court relies on something one of the lawyers, even the prosecutor or perhaps the Finnish–Vietnamese witness said during the trial, but that is not pronounced clearly as it stands. Presently, the sole basis for the "cultural expertise" utilized in the statement appears to be found in the Court of Appeal itself. It is difficult to avoid the impression that the court members have relied on their own existing views which, at worst, have stemmed from stereotypes.

MAKING INVISIBLE

It seems to me that when the law courts addressed culture in the verdicts I studied, their tendency was to either mask the cultural arguments to appear as part of something different from expert knowledge or to make the source of the information anonymous. As a result, the cultural arguments provided by the eyewitnesses were seen as part of their testimony as witnesses who were under oath and not as insight introduced by specially invited experts. In practice, this meant that the eligibility requirements set out for experts utilized in law courts were not applied to the witnesses who, nevertheless, ended up serving as cultural experts. According to the requirements, an expert has to be deemed honest and accomplished in their field, in addition to which they have to remain impartial with regard to the matter and people in question (Criminal Procedure Act, chapter 17, 35§). In practice, as the courts did not treat the informal cultural experts as legally recognized experts, they ended up being less critical toward the cultural information provided by them.

According to my view, the discursive practices utilized by the courts in the legal documents played a key role in allowing them to apply informal cultural expertise. Studying court documents as cultural artefacts that create meanings and social reality (cf. Merry, 1992; Riles, 2006) helps in highlighting the significance of these discursive practices deployed by the courts. The relationship between language and law is undeniably a fundamental one as the concepts that are central to our legal systems, such as “guilt” or “murder,” are accessible to us only through language (Gibbons, 1994, p. 3). Legal discourses, for example, fabricate the categories of persons and things (Pottage & Mundy, 2004) and, arguably, can even end up revictimizing women who prosecute their assailants in rape trials (Conley & O’Barr, 2005, pp. 15–38).

Perhaps the most troubling strategy the courts seemed to utilize in applying informal cultural expertise was to make the sources of the information anonymous. This was particularly noticeable in the legal documents that the law courts provided themselves. The language that the courts used in the official documents favored the passive voice. Phrases such as “it has been told” (quote on p. 8) or “in the hearing it has been noticeable that” or “it can be deduced that” (Court verdict on human trafficking and forced labour, p. 132) were in common use in the documents produced by the courts. Such language problematically hides the social actors behind the arguments making it impossible to reliably locate the original sources of information that the courts relied on.

The way in which the courts referred to themselves in the third person appeared to me as another technique to conceal distinct agency. Depending on the case and the level of the law court, “the court” consisted of three to four people that, in District Courts, included lay judges in addition to one professional judge, and in the Courts of Appeal involved only professional judges. In spite of the courts’ inevitable internal dissimilarity, their views were manifested in the verdicts only through one voice: “The court deems” (quote on p. 8), “The Court of Appeal finds” (quote on p. 14), “The Court of Appeal sees similarly to

the District Court," and "The Court of Appeal states additionally that" (Court verdict on human trafficking and forced labour, p. 7).

The quotes mentioned above come across as particularly peculiar after reading the last few pages of the verdict from the case concerning human trafficking and forced labour. The case evidently posed challenges for the Court of Appeal, and they were, in fact, unable to reach consensus on the issue without voting. One of the three judges had a more lenient interpretation of the events and he would have abandoned the charges of human trafficking. As the two other judges, however, understood the indictment as justified, the defendants were found guilty of the crime. The judge who disagreed had to make a record of his differing views at the end of the verdict document, but that remained the only place where the internal disharmony of the court became visible. Throughout the document, "the Court of Appeal" is presented as a singular and undivided entity, when in reality, it primarily reflected the views of two, not three, of the judges. Arguably, as the legal verdicts tended to mask the sources of cultural information and refer to the court as an impersonal collective, they built toward a view of the court as an omniscient and objective authority. This view naturally facilitated legitimacy for the benefit of the courts, but it disguised the persons behind the views making it difficult to direct scrutiny toward the right party, be it a court member, interpreter, lawyer, or prosecutor.

MAKING VISIBLE

In order to avoid the obscurity regarding the cultural information now utilized by the courts in their verdicts, the textual practices applied should be transparent enough to allow the tracing of cultural arguments back to their presenters. It should perhaps be noted here that the textual practices which hide the multivocality of the law court are, of course, not only applied when it comes to culture. Enforcing the univocal rhetoric might be a wider problem of the legal discourse in general although my focus has been on "culture talk" in particular. Avoiding the use of passive voice whenever possible as well as refraining from alluding to a group of people as a singular entity seems to me like appropriate methods to start addressing the issue of making cultural information anonymous. A possible step further could be to start looking into ways of formalizing cultural expertise. A move from informal cultural expertise toward a more transparent and recognized form of cultural expertise appears desirable in an environment where "culture talk" is, no matter what, present. Yet, a difficult question regarding the legitimacy and credibility of cultural expertise remains: *who* could be seen as a reliable cultural expert?

Insider Experts

The people who, according to my interpretation, ended up providing the court with cultural expertise in the cases discussed above were not doing that from the position of recognized cultural experts but rather they already had distinct roles in the trials as witnesses and interpreters. Occasionally, the courts appeared to

extend their job descriptions and, in essence, perceived them as community members providing information regarding “their culture.” Does this necessarily pose a problem, however, if the brokers can be regarded as sharing the same cultural minority background with the defendants and/or plaintiffs?

There has been scholarly discussion on who could be seen as best qualified to provide the court with cultural expertise: a professional expert, such as an anthropologist, or a community member (cf. [Caughey, 2009](#), p. 326; [Holden, 2011b](#), pp. 209–210; [Renteln, 2004](#), p. 206). Having insiders explain their traditions can arguably appear “more politically palatable” ([Renteln, 2004](#), p. 206), yet it seems problematic for courts to assume that community members can automatically be employed as experts without any training, solely based on traits such as their ethnic identity (cf. [Holden, 2011b](#), pp. 209–210). As [John Caughey \(2009, p. 326\)](#) points out, one can “speak a language fluently without being a convincing expert on its linguistic structure.” In the case involving Vietnamese defendants and plaintiffs, for example, it is worth considering to what extent the Finnish–Vietnamese witness could be regarded as their “spokesperson” in cultural matters more generally. The witness had lived her life almost entirely in Finland, in addition to which her age, gender, and socioeconomic status seemed to set her apart from the majority, if not all, of the other people with Vietnamese backgrounds involved in the case. Despite this, her statements regarding Vietnamese culture were treated in many ways as the objective descriptions of a culture that they all were assumed to share.

In Mr Amin’s case, there seemed to be fewer obvious differences between the witness, the plaintiff, and the defendant. However, even though the witness was assumed to share the same cultural minority background with the defendant and the plaintiff, it did not necessarily make him the most reliable cultural expert. The witness’ statement quoted in the verdict on religion being something in “their culture” that one can insult, for example, might very well reflect the views of a secularized Kurd, but assuming that this would characterize “their culture” more broadly, appears highly dubious. This accepted cultural argument might have not impacted Mr Amin’s legal case, as perhaps he did share the same views regarding religion, yet relying on such generalizations more commonly in a legal terrain certainly appears problematic.

According to my data, when interpreters were used as cultural brokers in courts, the issues were often small in scale and had to do with solving problems relating to communication. On several occasions, it appeared to be beneficial for everyone in the courtroom when the interpreters shed light on cultural matters that went beyond mere linguistic interpreting. Given the criticism pointed to verbatim translation (e.g., [Colin & Morris, 1996](#), p. 17; [Gibb & Good, 2014](#), p. 394; [Morris, 1995](#), p. 27; 2010, p. 59), the expectations according to which such “mere linguistic translation” is even possible, appear unfounded at any rate. The role of an interpreter as a visible actor who seeks to *interpret* and convey the meanings of what has been said should be stressed over the idea of the interpreter as a neutral conduit ([Gibb & Good, 2014](#), p. 396; [Morris, 1995](#), p. 25). It can be further argued that due to the close connection of culture and language, interpreters acting as cultural brokers is even inevitable to some

extent. Indeed, drawing a clear line between lingual and cultural interpreting seems impossible at times.

Despite the inevitable intertwining of lingual and cultural interpreting, there are situations in which the line between the two should be made more distinct. Similar limitations that concern employing witnesses as cultural experts can also apply here. The backgrounds of the interpreters, who according to my experience often have a long history of living in Finland, potentially set them fairly far apart from the people they interpret. Also, the interpreter and the defendant and/or the plaintiff sharing the same language hardly indicate that they necessarily have a connection to the same country or culture. Needless to say, one interpreter can work in multiple languages regardless of their home country, ethnicity, or cultural background. It is worth mentioning that, so far, I have only met one interpreter working in court who was a native Finnish speaker, all the others being native in the minority language they interpreted.

A prosecutor I interviewed pointed out that on some occasions, she wonders if the possible non-professional relationship between the interpreter and the defendant and/or the plaintiff has an effect on the interpreting. She mentioned a case where the cultural minority defendant took objection to employing a female interpreter in a case concerning their purchase of sexual services. The prosecutor also wondered about the possible impact of other personal attributes, such as religion, on the interpreting process:

If I have two Sorani speakers [in court] and one is Shia and the other one Sunni, then is it possible for the Shia to interpret the Sunni? Will the Sunni be able to give the account they should be able to give or are they afraid to speak, or does the story change or is the problem just in my head?

Interview (Prosecutor)

The interpreters have a legally neutral position in trials and, as the interpreter I interviewed highlighted, they can even go to great lengths in terms of arranging seating and avoiding extensive eye contact, in order to secure their impartiality. Diana Morgan (1982, p. 51) and Ruth Morris (1999, pp. 10–11) have, likewise, highlighted the significance of the physical setting for the interpreter-defendant relationship. Yet, and as has been demonstrated already earlier, different parties to the trial can have doubts and assumptions regarding the neutral status of interpreters. Interpreters are in a powerful position in trials as they are the only ones in the room who understand all the parties. Interpreters are heavily relied on throughout the trial and suspicions regarding the influence of their personal views or sociocultural stance on the case can understandably cause uneasiness. Drawing the line between lingual and cultural interpreting more distinct (whenever possible) as well as being more transparent regarding the interpreter's background could prove useful. When an interpreter analyses a situation or explains further why, for example, a defendant acts in a certain way or uses particular vocabulary, they should make it apparent that they are relying on their personal view and experience and not offering an objective description of any singular "culture."

Trained Experts and the Potential of Cultural Expertise

There appears to be several limitations in utilizing community members as cultural experts in legal cases involving members from cultural minorities, which leads into considering the potential of employing experts who are academically trained in specific cultural matters or geographical regions. In the cases I studied, no trained experts were utilized. Is it possible, however, that employing cultural expertise offered by trained specialists would have made a difference in the cases through, for example, challenging some of the notions regarding cultures that seemed simplified? Trained experts might indeed have the potential of converting the informal “culture talk” of courtrooms into negotiations that are more explicit and formalized in nature. It is possible to further reason, however, that using “trained-experts” such as anthropologists to provide cultural expertise comes with questionable baggage of its own. The differences between legal and anthropological knowledge – the former dealing with absolutes while the latter is more intertwined with the idea of relativity – mean that anthropological expertise does not easily receive recognition in the legal environment in the first place (e.g., Fontein, 2014; Good, 2008). The reflective and lengthy academic style might not align itself effortlessly with the legal approach in which the focus is on fact finding and resource (time and money) efficiency (cf. Boullier, 2011, p. 69; Good, 2011, p. 99; Holden, 2011b, p. 204).

Anthropologists or other “trained-experts,” then, are unlikely to share the same language or style of reasoning with legal practitioners, in addition to which, they too (as can be the case with community members) are faced with claims relating to advocacy (Holden, 2011b, pp. 210–211; Menski, 2011; Vatuk, 2011, pp. 29–30). Even when the ideal expert witness, at least from a court official’s point of view, remains detached and impartial with regard to all the parties to the legal proceeding at issue, the reality often proves to be ethically quite slippery. Sylvia Vatuk (2011, p. 30) has aptly highlighted how by choosing a potential expert witness from a pool of academics oriented toward a specific regional area, one is more likely than not to engage with a person “already favourably inclined to sympathise with the aspirations of immigrants.” Indeed, the boundary between cultural expertise and advocacy is a blurry one, and, as Vatuk (p. 30) concludes, “it is not easy to remain dispassionate and, as a result, the risk of being caught in a conflict of loyalties is very real.”

Perhaps the most demanding challenges with cultural expertise, no matter who is the provider, relates to conceptualizing culture. It can be argued that modern statecraft favors simplifications of societal activities and phenomena that are not even intended to represent the complex reality, but only the slice of it that intrigues the official observer (cf. Scott, 1998, p. 3). Culture has to be tailored to fit the “bureaucratic formulae” (Scott, 1998, p. 22), which inevitably leads into an uncomplicated view of culture where all the rough corners of a complex social construct have been rounded. Indeed, it appears that the legal sphere gives support to particularly essentialist presentations of cultural minority identities (Coffman, 2007; Demian, 2008; Good, 2008; McKinley, 2009). This was demonstrated also in my data when, for example, the District Court

suggested in their verdict concerning Mr Amin's case that the defendant and plaintiff are both Kurds who share the *same* cultural background (quote on p. 8). This was their conclusion despite the fact that at no point during the two hearings detailed questions regarding the men's background were asked. It can be argued that by providing "an expert view" on what constitutes a tradition, cultural identity or even *a culture*, the experts too would inevitably reinforce an imagery prone to essentialist features (cf. Good, 2008, pp. 56–57). The two options then, to either reify or nullify culture, must seem equally unattractive to most potential experts giving rise to conflicting views with regard to the possibility of cultural expertise overall (Demian, 2008; Renteln, 2004; Van Broeck, 2001; Wikan, 1999).

Cultural expertise might appear to be legally difficult to digest, while the potential experts themselves can find harnessing cultural enquiry into legal purposes ethically disturbing. The scholars who have immersed themselves in the study of a specific cultural area or a group, not forgetting the community members themselves, might feel it least burdensome to shun all legal involvement, yet the opposite conclusion is equally conceivable. But maybe, after all, "Law is too important to be left solely to lawyers" (Good, 2008, p. 57) and it could even be regarded as the trained expert's or community member's moral obligation to share their cultural understanding when there are high stakes legal decisions in question involving cultural issues (cf. Caughey, 2009, p. 323). Cultural expertise also has the potential of addressing the opportunistic uses of culture and thereby help in ensuring that cultural argumentation is not misused (cf. Caughey, 2009, p. 324).

In the cases I studied, the potential of cultural expertise provided by trained experts was not tested, yet I believe it could have had a beneficial effect on the discussions around cultures that did take place. A trained expert, with no personal connection to any of the parties involved in the case, could have played a role in providing information regarding cultural issues that was more impartial than when presented by an involved eyewitness, for example. The involvement of a trained expert could have also worked as a sort of eye opener for other parties connected to the case regarding the existence and significance of "culture talk" in the legal sphere. Perhaps the authors of court verdicts would have considered the origins and meanings of cultural arguments more carefully and, consequently, also adapted their textual practices in legal documentation accordingly.

CONCLUSION

In order to increase the likelihood of justice in trials, the invisible cultural expertise of Finnish courtrooms should be made more explicit. From a legal perspective, which I am not an expert on, it appears troublesome if a person who is formally not recognized as an expert witness comes to be treated as one. This chapter, however, is not an attempt to engage in that legal discussion. Interpreters and eyewitnesses, according to my data, can be used as informal cultural experts regardless of their official status or the possible legal restrictions.

Also, the courts themselves can act as sources of cultural information without providing further rationale for their arguments, as has been demonstrated earlier. The “cultural expertise” that is now being utilized, then, can be overly simplistic, rely on stereotypes or even turn out biased. Additionally, when informal cultural experts are utilized in a haphazard manner, too much is left to chance. The risk is that a cultural minority defendant or plaintiff would only benefit from (or be harmed by) “cultural expertise” when there are suitable interpreters or eyewitnesses involved in their legal case.

The interpreters are legally neutral and the eyewitnesses are under oath, which arguably makes them appear more trustworthy in the eyes of the court when compared to, for example, the defendants who are not obligated to tell the truth. Additionally, the interpreters and witnesses who were utilized in the cases I studied, seemed to have “a cultural connection” to the defendants and/or plaintiffs through, for example, a shared language or home country. Interestingly, in these cases, there were also indications of the significance of certain bodily strategies in constructing credible expertise. As mentioned earlier, the witness in Mr Amin’s case performed in a calm and assertive manner in the courtroom, and the interpreter I interviewed, talked about the attention she had to pay to seating arrangements and eye contact. Arguably, these ways of being and performing built towards their appearance as honest and dependable in the eyes of the law court. It appears, then, that in the process of constructing expertise, it is not only the talk and “cultural connection” that count, but also the ways of being in one’s body in a specific space.

The discursive techniques applied by the authors of court verdicts tended to hide the roots of the cultural arguments presented in the legal cases, which arguably worked in favor of the court’s own legitimacy. Paying more attention to such textual practices is the first step in making “culture talk” more transparent in the legal field. Introducing formal cultural expertise into the courtrooms could be the logical next step. This does evidently present some challenges and further avenues for study in order to resolve not only *how* cultural expertise could be utilized, but also *who* should be the ones providing it.

The decision of some potential experts to avoid any legal involvement is understandable, yet leaving “culture talk” solely in the hands of lawyers, court officials, and informal cultural experts is hardly desirable (cf. Good, 2008). An insider’s account can prove to be extremely valuable while a “trained-expert” might be better equipped to highlight culture’s importance to human behavior and thoughts in general, as well as to articulate this knowledge to wider audiences and support it with scholarly references (Caughey, 2009, p. 326). Employing cultural expertise does pose challenges, yet “trained-experts” together with community members might well have the potential of addressing overly simplistic notions on cultures and help in spotting the instances when cultural arguments are also being abused. In Finland and elsewhere, the ever widening range of cultural identities is now a prominent feature of courtrooms, and they are constantly being discussed and assessed – with or without experts’ involvement.

NOTE

1. As a result of the 2016 reform concerning the law of evidence, religious oaths are no longer in use in Finnish courts of law, but the witnesses are required to give an affirmation (Rautio & Frände, 2016, p. 272).

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Attempted manslaughter, 2016 (Verdict R16/ZZZ)
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CULTURAL EXPERTISE IN ITALIAN COURTS: CONTEXTS, CASES, AND ISSUES

Antonello Ciccozzi and Giorgia Decarli

ABSTRACT

This chapter contributes to a corpus of legal–anthropological studies concerning the role of cultural experts in legal institutions. It begins by identifying the reasons behind the fragile collaboration between Italian courts and cultural experts and outlining some of the consequences of this relationship. It then presents a collection of cases involving cultural experts including a focus on the L’Aquila trial recounted from first-hand experience by Antonello Ciccozzi, the anthropologist who acted as expert consultant. The conclusions attempt to summarize the “state of the art” of cultural expertise in Italian courts today and call for greater collaboration between law and anthropology as a means of guaranteeing a fair trial.

Keywords: Cultural expertise; Italian courts; law and culture; culturally motivated crimes; cultural causation; fair trial

INTRODUCTION

This chapter addresses the theory and practice of cultural expertise in the Italian legal system over the past two decades. Although it focuses on the dynamics of cultural expertise and not the outcome of legal processes involving cultural expertise, the authors hold a distinctly different ideological position. The first section, by Giorgia Decarli, provides an overview of the law of evidence used in appointing experts, a brief scrutiny of the notion of culturally motivated crimes, and a survey of cultural expertise in Italian judicial proceedings. The second

part includes a first-hand account by Antonello Ciccozzi, the anthropologist appointed as an expert witness in the trial regarding the victims of the 2009 earthquake in L'Aquila, describing his court testimony theorizing that scientists' forecasts of risk led to a fuzzy process of cultural conditioning. This case is significant for at least two reasons. First, it emphasizes the important role cultural experts can play in relation to a portion of the population that is usually perceived as not being influenced by any form of culture. Second, by building on Antonello Ciccozzi's theory about the potential for using the concept of cultural causation in juridical contexts, it offers a glimpse of the extent of personal involvement and experimentation potentially afforded by cultural experts in the courtroom.

The conclusions, written by Giorgia Decarli, outline the wide range of positions on cultural expertise in Italy and reflect on the vulnerability of the relationship between courts and anthropologists, a relationship which leaves considerable room for experimentation while at the same time being heavily affected by a narrow perspective on the role of culture in law.

THE RECOURSE TO “EXPERTISE” IN THE ITALIAN JUDICIARY SYSTEM

In her thought-provoking volume, [Ruggiu \(2012\)](#) examines judicial cases involving parties with different cultural origins in which the court (deliberately or reluctantly) takes the place of the anthropologist in analyzing their socio-cultural backgrounds. The author also proposes a “cultural test” for Italian courts to ensure a more effective approach to multiculturalism. This proposal begs the question, however: why should courts take the place of anthropologists? Why not instead encourage greater collaboration between judicial actors and anthropologists? After all, Italian law allows for socio-legal experts to participate in trials in that the court, prosecutor and parties are permitted to seek advice from professional experts when the matter in dispute involves issues that cannot be resolved based on general notions or experience. The roles of experts in the Italian judiciary system are regulated by articles 61–64 and 191–201 of the civil procedure code and by articles 225–233, 359, 360, 501, 502, and 510 of the penal procedure code. Experts are indicated using different terminology depending on the jurisdiction. A *Consulente tecnico d'ufficio* (CTU) assists the court in civil matters, a *perito* assists the court in penal matters, a *consulente tecnico* (CT) assists the prosecutor, and a *consulente tecnico di parte* (CTP) assists the parties in both civil and penal cases. Specific court rosters include the names of experts deemed to be professionally and technically skilled in particular matters and possessed of a reputable moral conduct. Experts are added to such rosters to ensure that assignments are well-distributed and to aid judicial actors in choosing consultants. The latter are not restricted to the range of options represented by the registers, however. In fact, as long as they justify their decision, they are permitted to call on non-registered experts as well.

In 2014, the Supreme Court of Cassation itself affirmed that, with a view to ensuring the effectiveness of the right of defense, in adoption proceedings, a

cultural expert (acquainted with the language as well as with the mores of the birthplace of the child and his/her family) is to be appointed (Cass. 15457/2014).

In most cases, judicial actors are not aware of the cultural complexities of the groups involved in trials and have no on-site experience with the populations to which the parties belong; only rarely do they have expertise in theories of culture or the analysis and interpretation of cultural processes. It would thus appear reasonable to call in cultural experts, and in fact, some legal scholars consider the cultural expert's appraisal essential to legal proceedings (see for instance [De Maglie, 2010](#)). Others are skeptical about this possibility, however. According to [Basile \(2010\)](#), there is a risk in penal cases that the cultural expert's assessment might trespass into the domain of criminological *perizia*, which is forbidden under Italian law. Cultural experts are not called on to make statements about the defendant's personality, however; their role is limited to providing explanatory testimony about specific phenomena or the party's socio-cultural or historical-political background. Furthermore, a great deal depends on the accuracy of the questions the court formulates for the expert to answer. However, not even cultural experts are unanimous regarding this point. Fear that they might be misunderstood or that the information they provide might be manipulated, not to mention ethical issues, leads such experts to constantly question their role within public institutions. While in principle all cultural consultants appear to believe in the importance of applying their expertise, not all of them agree to participate in trials.

To date, the number of cultural experts appointed in Italian trials has been very low. On reflection, it is possible that hardly any judicial actors choose to consult cultural experts as a result of far-reaching issues related to yet extending beyond those mentioned above. The first such issue is that Italian society as a whole does not have much knowledge about the anthropological science. Despite the visibility of some eminent anthropologists, cultural anthropology in Italy enjoys very low status in academy as well as the public cultural domain. Distinguished scholars from other disciplines often underestimate anthropology, and ordinary people simply do not know what this field involves. The fact that it is largely overlooked by the Italian judiciary system might not be so surprising, therefore, and it is understandable that anthropologists might fear seeing their ethnographies misunderstood or exploited.

A second issue has to do with epistemological considerations. Apart from the specific Italian context, the relationship between cultural anthropology and judicial thought and practice is often regarded as somewhat problematic. In fact, many scholars consider cultural anthropology as a qualitative science to be resistant (from an internal perspective) or unable (from an external perspective) to offer either "objective truth" or deterministic and causal links between facts, that is, the very elements that are supposed to underlie the court's decision. However, however, the fact that numerous cultural experts are appointed in UK and American courts suggests that this particular obstacle might be overcome.

A third issue lies in the anthropological sciences' tendency to adopt a relativist approach, in contrast to state law which tends to employ a universalist orientation in addressing problems. The anthropological proclivity for questioning

conceptual systems often exposes the discipline to the accusation that it supports the most heinous manifestations of human brutality. At times, this also affects the perception of the role played by cultural experts in court, as these outside consultants are seen as defending alleged terrorists or abusive parents. However, this flawed state of affairs might depend on non-anthropologists' often over-simplified understanding of anthropological relativism, which undermines the credibility of anthropological knowledge (Barba, 2008; Decarli, 2012) as well as a tendency to mistake cultural expertise for cultural defense (Holden, 2011; 2013). This latter holds true even though cultural experts (like all other experts) are never requested to express defensive arguments (for this reason, every legal player – including the prosecutor – is permitted ask for the cultural expert's testimony and decide how it will be used).

CULTURALLY MOTIVATED CRIMES IN ITALIAN DOCTRINE

Unfamiliarity with anthropological knowledge might also explain the frequent use of the (controversial) expression *culturally motivated crimes* by a substantial component of Italian legal scholarship.

The genesis of the expression lies in Italian legal doctrine and echoes the definition of “cultural offence” provided by Van Broeck. As the scholar explains, a cultural offence is “an act by a member of a minority culture, which is considered an offense by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as a normal behaviour and approved or even endorsed and promoted in the given situation” (Van Broeck 2001, p. 5). In the Italian legal framework, however, the above definition seems to have taken on precise connotations, as it is invoked in relation to acts specifically committed by (certain) immigrant minorities. In other words, this concept seems to bring into play citizenship status (with its potential nationalistic implications) to the detriment of the term's original neutrality, a neutrality which is better suited to a legal–anthropological perspective.

A number of Italian publications (Basile, 2010, 2017; Bernardi, 2010; Crocco, 2015; De Maglie, 2010; Di Blasio, 2016; Ruggiu, 2012) dealing with (what the authors refer to as) *culturally motivated crimes* cite the Supreme Court's decision concerning the Pakistani father who killed his daughter in 2006 because she wanted to live according to western values (Cass. 6587/2009), the Moroccan husband who abused his wife in 2008 under the pretext of a religious model condoning the disparate treatment of men and women (Cass. 1520/2008), the one sentencing a Roma woman for enslavement because she begged publicly with her infant son, allegedly in keeping with Roma tradition (Cass. 44516/2008), and so on.

Interestingly, scholars analyze these cases on their merits in order to suggest how Italian courts should address the challenge of multiculturalism in trials. At the same time, however, some of these publications seem to imply that culture is the exclusive purview of certain categories of persons (Roma people, certain immigrants and believers). The stereotypical Italian (white, born, and raised in

Italy by Italian parents, claiming no particular identity) is commonly perceived as not influenced by any particular form of culture other than national culture and expressions such as “the ethnic homogeneity of our system” (Bernardi, 2010, p. 54) and “the monoculturality of our social fabric” (De Maglie, 2010, p. 36) appear to be unanimously accepted. This is also echoed in the use of legal terminology. Some scholars tend to distinguish the “legal rule” from the “cultural rule” immigrants follow as if both types of rules were not equally culturally influenced and legally binding for their addressees. Similarly, in a number of decisions (Cass. 44516/2008; 22700/2009 and others), the laws of parties from non-Western backgrounds are referred to as “tradition,” “custom,” or “traditional practices” (perhaps precisely in order to grant them the highly restricted legal status Italian law applies to customs *lato sensu*). Yet, some existing cases involving Italians and referring to their cultural backgrounds reveal that (regardless of the presence of immigrants) Italy is neither an *acultural* society nor a completely monocultural one. Basile (2010) has recently adopted the expression “culturally motivated crimes committed by immigrants” to underline this point, but he seems to be an exception among Italian scholars. It is for this reason that in this essay, we wished to include a description of the L’Aquila case, among others. Without engaging in an assessment of the expert’s *perizia*, I believe the L’Aquila case very clearly illustrates the multiple different facets of the anthropological concept of culture and constitutes a useful example of the importance of collaboration between law and anthropology, including in judicial cases involving segments of the majority population.

ITALIAN CASES INVOLVING CULTURAL EXPERTS

A cultural expert was involved in the 2011 “Tamil Tigers case” in Naples in which 30 Sri Lankan citizens were charged with acts of terrorism (art. 270-bis p.c.). Specifically, the defendants had engaged in fundraising to support the activities of the *Liberation Tigers of Tamil Ealam (LTTE)*, an association based in Sri Lanka which, according to the prosecution, intended to carry out “terroristic actions” to force the state to grant independence to the region that had long been home to the Tamil minority. The court appointed a professor of general and social pedagogy at the University of Enna and author of many publications on intercultural practices, conflicts and the Tamil diaspora. The expert produced a comprehensive historical and anthropological reconstruction of the relationship between the Tamil Tigers and Sri Lanka government. According to the court’s statement of reasons, his approach, unlike that of the prosecutor, explored a number of primary and secondary sources and also included qualitative research. In the end, he was able to reconcile conflicting perspectives. According to the sentencing report (Trib. Napoli 23 June 2011), the scientific method the cultural expert adopted in carrying out his task admirably avoided privileging the information provided by one or the other of the parties in narrating the elements of the case. This was particularly important for an “objective” reconstruction of events given that the Sri Lankan government’s recent military victory had provoked a sort of journalistic, historical, and political rewriting of

the facts (Trib. Napoli 23 June 2011). The expert's work showed that, even though the Tamil Eelam were not indicated on maps or included in international bodies, they had always functioned as a state-like organization and the LTTE was broadly supported by Tamil people (Valsecchi, 2012). According to the court's statement of reasons, on the basis of the expert's detailed reconstruction, the clashes between the Sri Lankan government and LTTE could be regarded as part of a domestic armed conflict. Therefore, the activities of the Tamil Tigers, though criminally relevant, could not be treated as "acts of terrorism" under international law and the defendants were to be acquitted on the grounds that there was no case (Trib. Napoli 23 June 2011). The case also reached the Supreme Court (Cass. 2843/2013), which dismissed the appeal because the statute of limitations had expired.

In 1997, the Juvenile Court of Piedmont and Aosta Valley and Ordinary Criminal Court in Turin (for civil and penal issues, respectively) judged a case involving a minor who had undergone FGM. The surgery was performed in Nigeria but once in Italy, the girl was brought to the hospital to treat resulting health complications. The Juvenile Court immediately ordered that the child be removed from her parents' custody and charged the parents with serious bodily injury. Once it had been established that the parents were emotionally irreproachable and given the care they showed in spite of the forced removal, the juvenile court decided to re-assign the girl to her parents' custody (Trib. Min. Torino, decreto 17/7/1997). The Criminal Ordinary Court dismissed the case because it lacked the conditions required for prosecution in relation to articles 110 (plurality of persons in the commission of a principal offence), 582 (personal injuries), and 583 (aggravating circumstances) p.c. (Bouchard, 2000).

Both the judicial authorities called on an Italian expert in cultural mediation as well as the Frantz Fanon (FF) Center, which provides counselling services to support immigrants' psychological and social health. The FF Center expert explained that the Edo people believe a baby born to a non-circumcised woman is in great danger in that, if the baby's head touches the mother's clitoris, he or she might die. According to the expert's report, female circumcision was fully accepted by the Nigerian Edo community to which the girl and her family belonged and not prohibited by local authorities (indeed, the surgery had been carried out in a state hospital). The court concluded that the defendants had acted to meet a mandatory requirement of Edo society and that their actions were also permitted under Nigerian law. Therefore, there were no elements of injurious or criminal behavior (Bouchard, 2000).

FGM was also the issue of the trial held in Verona in 2010, following the enactment of Law 7/2006, *Regulations concerning the prevention and prohibition of FGM*. The defendant was a Nigerian citizen accused of violating article 583-bis p.c. for having circumcised a two-month-old girl and of attempted offence for having tried to circumcise a two-week-old girl. The girls' parents were also charged (Trib. Verona 979/2010). In the proceedings, a number of witnesses and CTs were heard. The State Attorney appointed a medical examiner and the head of the National Observatory on Domestic Violence. The defense appointed three experts. These included an anthropologist from the University of Verona

who explained that, for the Nigerian Edo-bini (the ethnic group comprising all the parties), the *aruè* is an initiation rite all children must undergo to officially join the community. The incision in the genitals has nothing to do with any form of sexual control; rather, it relates to lineage (Trib. Verona 979/2010). Another appointed expert (an educator from the University of Verona) also tried to explain the complexity of meanings associated with the practice. For the Edo-bini, female circumcision is part of an antropo-poiesi process and, as such, it contributes to shaping the person as a human and social entity. In particular, it marks an immediate distinction between females and males. Simultaneously, the practice expresses a sense of belonging to the Edo-bini identity and enshrines a system of freedoms for women. Finally, the resulting flow of blood is a sign of purification but has no association with the sexual sphere or its control (Trib. Verona 979/2010).

The surgery had caused a minor lesion that healed rapidly (the circumcision entailed a small incision in the front of the clitoris) and the court excluded risks to the girl's future sexuality. Nonetheless, a mild temporary injury can be actionable in the Italian judiciary system on account of the psychological element of the alleged offender, that is, the symbolic significance of his/her action. The court acknowledged that circumcision had multiple meanings for the Nigerian Edo-bini and that it was primarily an initiation rite. In spite of this, it assumed that the practice as performed on girls could *also* serve as a form of sexual control, albeit symbolically (as this purpose was among those indicated by the defendants), and so it could not ignore the existence of Law 7/2006. Following this line of reasoning, the court condemned all the defendants (Trib. Verona 979/2010).

The testimony of the two experts did not serve to exonerate the accused parties, but it did affect the parents' punishment. In fact, the "cultural impetus and rooted ethnic traditions" (Trib. Verona 979/2010) that had conditioned their behavior were considered a mitigating circumstance. The Court of Appeal accepted the experts' anthropological analysis and overturned the lower court's decision (Trib. Venezia 1485/2012). In the view of the appellate court, in portraying the psychological state of the defendants, the first-instance decision had granted the practice a symbolic value specific to the interpreting body (i.e., the court) rather than the agent (defendant). In fact, according to the explanations of the qualified defense witnesses and the defendants themselves, the involvement of female genitals in the practice performed by Edo-bini people had different symbolic significances than the sole meaning assigned by the court. This, along with other considerations on other elements that must contribute to the existence of the specific intent, led to the acquittal of the defendants.

In 2012, the Juvenile Court of Piedmont and Aosta Valley initiated proceedings to definitively remove four Roma children from their parents' custody and put them up for adoption. A specialist in neuropsychiatry was appointed as CTU while an anthropologist experienced with Roma people living in "nomad camps" in Turin was appointed as CTP. The court brought in a Romanian (instead of Roma) interpreter, thereby ignoring the importance of translating thoughts as well as words. The parents' situation was complex. The father was

ill and initially reluctant to seek medical treatment. The family was facing strained economic conditions and the mother had been arrested for begging in the past. Teachers reported bruises on one of the children but the cause of the injuries was unclear due to some difficulties with Italian and conflicting narratives. Although both experts agreed on the delicate state of the children, their long and complex reports disagreed on certain crucial issues. The CTP's analysis suggested that the CTU's historical and cultural/educational background hindered her ability to grasp the expressive modes specific to the family's culture. According to the CTP, the CTU's lack of sensitivity regarding the family's socio-cultural context prevented her from understanding the specific parenting and educational model at issue (an assessment of which was requested by the court). By constantly referring back to her own culture's family model, the CTU was unable to interpret what made these parents' relationship with their children meaningful according to *their* worldview (i.e., parenthood for this particular Roma group). According to the CTP, the CTU regarded evasive answers as examples of incoherent thought or an unwillingness to engage in meaningful communicational exchanges. On the contrary, such answers could have been the result of both a fear of revealing something personal (due to the social stigma they had long suffered for being Roma) and difficulty in understanding why they were being required to open up to a stranger. Furthermore, the CTU was unaware that some Roma groups are loath to answer direct questions and so perceived their different way of managing conversation as a desire to mislead. According to the CTP, instead, "it was clear that the parents tried to tell their history to the CTU but they could not do it according to the latter's modalities" (Trib. Min. Torino, Proc. 296/2012, Relaz. CTP). Again, the CTU did not understand the parents' relationship with Romania, so the fact that they had initially gone to Italy (to a "nomad camp") while leaving their oldest child behind, in the care of grandparents, was regarded as neglect rather than a protective measure. The CTU stated that the parents were incapable of meeting their children's needs. With no further reasoning, both the first-instance and appellate courts ignored the CTP's mediation efforts as well as her report. Without ever questioning that the CTU might have been culturally uninformed, the court declared the minors adoptable (Trib. Min. Piemonte e Val D'Aosta, 98/2014). They never saw their parents again.

A cultural expert was also appointed in the trial held in L'Aquila in 2009 after the earthquake that struck the Abruzzo region. The account of his first-hand experience follows.

CULTURAL EXPERTISE IN THE "L'AQUILA TRIAL"

I have written the second part of this chapter in the first person, as Antonello Cicozzi, because I was appointed as a cultural anthropological expert in the "L'Aquila trial" against the Commission for Major Risks (CMR). The CMR is a governmental institution including high-profile authoritative scientists formed to provide "scientific-technical opinions and proposals" about the "prevention and prevision of major risks" (Decree of the President of the Council of

Ministers no. 23582, 3/04/2006). More specifically, I was instructed by the prosecution to assess whether and to what extent the seismic risk diagnosis came from the context of the CMR reunion led (a part of) the population of L'Aquila to stay in their homes the night of an earthquake despite the two strong tremors a few hours before the disastrous final one (and this after weeks of increasing tremors widely perceived as a warning of worse to come). This section thus begins by outlining an argument I previously presented in a book and two chapters in Ciccuzzi (2013, 2014, 2016) in order to present a hypothesis about cultural causation.

My expert report highlighted the fact that, after the meeting involving the seven CMR experts held in L'Aquila on March 31, 2009, to evaluate the seismic risk, the people were given a specific diagnosis, namely that the crescendo of daily quakes frightening citizens for months constituted an "earthquake swarm", that is, a "positive release of energy" capable of diffusing an otherwise disastrous earthquake (along the lines of "many small shocks will break up and thus prevent the big one"). In the end, however, the earthquake did take place a week after this assessment was made, on the night of April 6, 2009, and it killed more than 300 people.

I essentially focused on one specific point: through a disastrous act of reassurance, a diagnosis of non-hazardousness promulgated by the sphere of expert knowledge altered the local population's "emic risk perception." Normally, most residents would have acted cautiously in the face of shocks perceived as quite strong, albeit not powerful enough to bring down buildings. Given that the city had already suffered other telluric destruction over the centuries, there was an "anthropological culture" of earthquakes that, in similar circumstances, led local people to immediately exit their homes (Clementi, 2009). Whereas in other cases residents had responded to strong tremors by leaving their homes and staying outside for several hours, on the night of the earthquake, many remained in bed because they had internalized the reassuring judgement that essentially predicted a non-earthquake. Furthermore, this diagnosis owed much of its persuasive weight to the scientific authoritativeness of the sphere from which it was issued.

I based my interpretation on two basic theoretical principles: a general assumption derived from risk analysis according to which decreasing the (cultural) perception of risk increases (social) exposure to danger when facing an impactful event (natural, in this case), and Serge Moscovici's theory of social representations (Douglas, Wildavsky, 1982; Moscovici, 1984; Oliver-Smith, 1986; Quarantelli, 1978). According to Moscovici, in contemporary societies, the "reified universes" of the scientific world (expert knowledge) tend to produce common sense (or, we might say, anthropological culture, understood as a protocol for the everyday and generally uncritical decoding of human experience) when scientific knowledge is applied to the "consensual" worlds of everyday life by virtue of the way it functions to normalize the disturbing character of new events. This process of normalization occurs through procedures of *anchoring* (affixing a term or name to new phenomena) and *objectification* (attributing a meaning to that name). At this point, it should be clarified that, coming from the perspective of social psychology, Moscovici does not explicitly speak of

“anthropological culture”; however, his concept of common sense refers to what in complex societies is understood – according to Herzfeld (2001) – as anthropological culture.

In this specific case, Moscovici’s theory revealed how the act of *anchoring* the ongoing telluric phenomenon to the term “seismic swarm” and *objectifying* it with the reassuring meaning of a “positive release of energy” constituted a social representation of reality that was highly persuasive, capable in some cases of altering people’s behavior by changing the common sense (the cultural anthropological habitat of meanings people use to interpret the reality around them) in which L’Aquila locals were immersed on a daily basis.

At the end of the first-instance trial, by finding all the seven experts of the CMR guilty, the court embraced the argument I presented as expert consultant. Indeed, the court used my argument in two different ways to establish the defendants’ criminal responsibility through “mental causation”. It should be noted that, in the Italian legal field, mental causation refers to a nexus or connection in the form of etiologic conditioning between the communicative conduct of those issuing the communication and the behavior, active or by omission, of those receiving the communication (Brusco, 2012). Judge Marco Billi formally recognized my work as evidence and thus found that the causal chain between the conduct of the defendants (the reassuring diagnosis that the situation did not represent a danger) and the destructive event (people’s remaining in their homes despite the two strong tremors preceding the fatal one) both fell under the covering law model of scientific explanation identified in the theory of social representations and correlated with empirical principles and common sense generalizations made on the basis of ideas about the cultural nature of humans and the persuasiveness of science in Western societies.

The judge wrote that “professor Antonello Ciccozzi noted that “studies on persuasion have shown that the persuasive value of any allegation is directly proportional to the authority that the recipient attributed to the issuer”; professor Antonello Ciccozzi demonstrated that scientific institutional information has a special quality, asserting, in a completely reasonable and widely accepted argument that, in Western societies, institutional communication from scientific authorities is the one the masses consider to be “the highest expression of authority” and which therefore has “a potential for maximum persuasiveness, which is expressed in the ability of scientific thought to result in social representations capable of influencing collective behavior” (Trib. L’Aquila 380/2012, p. 669).

In the second-, third-, and final-instance trials, the cultural expertise I presented was formally rejected; at the same time, however, it was “covertly” used as a key tool for confirming the conviction of one of the defendants, the deputy head of Italian Civil Protection (see Ciccozzi, 2016 for a detailed discussion of this paradox and the atmosphere, obviously highly tense and conflictual, that produced it). Specifically, the Court of Appeal arbitrarily ascribed me credit for Moscovici’s entire highly authoritative theory of social representations, which I had used as a scientific framework for my argumentations. As

a result, it rejected this theory as the mere fruit of my own personal experience (Corte d'Appello L'Aquila 3317/2014, p. 271). Immediately afterwards, the sentence goes on to provide precisely the arguments the Court of first instance took from my expert report as grounds for its only conviction of guilt, reiterating "the assumptions of the first Judge – (1) the 'credibility' and 'authoritativeness' of a message are proportionate to the source from which it originates; (2) in modern Western societies scientific experts enjoy particular authority" (Ibid, p. 272). This interpretation reappeared in the grounds of the Court of Cassation ruling. Indeed, these grounds state that the Court of Appeal was correct in the way it determined causality, recognizing "rightly so, that, within the horizon of experiential knowledge, there is a principle that tends to grant significant psychologically conditioning value (in that it possesses significant credibility and authority) to messages publicly issued by institutional authorities when they are based on the premise of validation provided by scientific knowledge, and the resulting influential impact can be observed in the behavior of recipients" (Cass. 2221/2015, pp. 87–89). These key arguments are essentially the core of the theoretical conclusions I drew from Serge Moscovici's theory of social representations to describe this particular causation process.

The deputy head of Italian Civil Protection was thus definitively found guilty of having acted of his own volition to reassure the population of L'Aquila before the CMR meeting in an interview in which he described the ongoing telluric event, stating that the scientific community believed it to be nothing more than a release of energy that was not only not dangerous but actually beneficial. The other six defendants were acquitted on the grounds that they had not participated in any way in formulating either this diagnosis or any other kind of reassuring message. In any case, and this is the main issue, even a single guilty verdict confirms the idea behind the trial as a whole: that there was a causal link between an expert opinion and life-threatening behaviors.

Although this trial enjoyed considerable international visibility, generally speaking both the media and earthquake scientists relied on a core misunderstanding to spread a social representation of the process *anchored* to the idea of "science on trial" (evoking the history of Galileo Galilei) and *objectified* in the belief that people in Italy were looking for scapegoats by trying scientists accused of failing to foresee an earthquake ("failure to warn"). This considering there were some rare exceptions (i.e., [Benessia, De Marchi, 2016](#); [De Marchi, 2013](#); [Oreskes, 2015](#) framed the question without reference to the misleading idea of "science on trial"). At any rate, this misleading representation of the nature of the trial was disseminated even though the indictment explicitly cited negligence in diagnosing and communicating risk: in reality, the scientists were actually tried for having produced a reassuring diagnosis, a disastrous reassurance, not a failure to warn. In other words, the problem was not "failing to forecast the earthquake" (lack of information), but "having predicted a non-earthquake" on the basis of pseudoscience and with disastrous consequences.

THE MEANING OF THIS SENTENCE AND THE ISSUE OF CULTURAL CAUSATION

With this verdict, Italian jurisprudence essentially acknowledged that scientists' erroneous guidance quickly spread as an element of common sense to lower the risk perception of the population and thereby increase residents' exposure to the danger, contributing to making the earthquake fatal for several people. This key point concerns the practicability of using a cultural anthropological approach in juridical contexts to provide cultural expertise about the issue of causal links and especially the type of link known as "mental causation." Given that a defendant in the field of jurisprudence can be considered guilty of a crime if and only if a certain behavior (active or by omission) is causally related to an adverse or dangerous outcome, in contemporary criminal principles (deterministic or probabilistic), deductive nomological laws are used to establish the existence of this causal link. These principles are derived from the scientific theories considered relevant for proving a regular succession of antecedents and consequences. In this sense, the criterion of being subsumed under laws of science (which occurs by combining a scientific generalization based on abstract principles with the concrete elements of the particular court case) is a tool that can be used to identify causal links in doubtful cases in order to formulate rulings about criminal responsibility (Palazzo, 2005; Stella, 1975).

To understand the terrain potentially opened by this trial, however, we must examine the core of the first-instance verdict. This original verdict gleaned the question of mental causation from a highly important Italian legal case about medical responsibility: the Franzese verdict written by Giovanni Canzio, one of the most authoritative contemporary judges in Italy (Brusco, 2012; Canzio, 2003, 2006, 2008; Di Giovine, 2008; Pianezzi, 2011). This sentence was so relevant because, following the Franzese verdict, "as a benchmark in judgments on causal link courts began to no longer take *high statistical probability* (deriving from the scientific law of coverage), but *high logical probability*, marked by a further test, conducted concretely and on the basis of both the available probative evidence and the applicability of the scientific law in the individual, specific case" (Trib. L'Aquila 380/2012, p. 380). Indeed, the Franzese verdict points out that "while in the natural sciences the statistical explanations often have a quantitative character, in the social sciences just as the law – where the relatum is the human behavior – it seems inadequate to express the degree of corroboration of the explanandum and the result of the probabilistic estimation through crystallized numeric coefficients, rather than articulating these elements in qualitative terms" (Cass. 30328/2002, p. 10).

In fact, the L'Aquila first-instance verdict assigns guilt based on the model I formulated in my expert testimony – essentially a thick description (Geertz, 1973) of a fuzzy (Kosko, 1993) process of cultural persuasion – collected and adapted by the first-instance trial judge to fit the juridical methodology drawn from the Franzese verdict for establishing mental causation. Moreover, the first degree judge recently reported the reasons for his guilty verdict in the L'Aquila case (Billi, 2017) beginning from the concept of mental causation, which he

developed precisely by connecting the Franzese verdict with the cultural expert knowledge I presented.

The fuzzy logic approach is essential for understanding a specific point: it cannot be said that the whole population of the city underwent conditioning; however, it likewise cannot be said that this conditioning did not affect anyone. Where individuals' thinking was influenced, this occurred in peculiar, personal, and unique ways (in individual cases where this conditioning did take place, therefore, it is important to understand whether or not it was significant). To clarify this situation, we thus need to move beyond a binary-Aristotelian logic – based on identity, non-contradiction and excluded middle principles – that leads to true/false, “yes or no” sentences. We must move into the epistemological field of fuzzy logic where, adopting a “shades of grey” perspective, there are “yes and no” scenarios that must be understood in detail beginning from a thick interpretative approach capable of deciphering contradictions and contingencies. In this case, the use of fuzzy logic provided a more accurate understanding of the *distribution* of beliefs, social representations, and common sense (helpful for explaining the varying incidence of elements of anthropological culture in a given population) even though it did not affect the legal *decision* (which is based on a sharp, binary logic).

Again, the only way to prove causation for a process in which a given social representation fuzzily spreads throughout a population is to recognize that mental causation is highly logically probable and then to recognize, case by case, the possibility that material behaviors might arise from cultural anthropological variables (indeed, the prosecution focused on a limited number of victims – 37 deaths and five injuries, to be precise – which, especially in view of relatives' testimony, showed strong signs of having been conditioned by the CMR reassurance). In this sense, the judicial judgement regarding cultural causality (i.e., a particular circumstance in which people behaved as a result of a cultural conditioning) had to rely on the complex deconstruction of a fuzzy set of elements (the beliefs of the population in question). Specifically, this process sought to identify who (within the given population) was conditioned by what elements and to what extent. The legal decision could thus be understood as a “fuzzy to sharp” converter.

This application of the Franzese verdict can be used as a juridical-interpretative tool: a judge verifies the validity of a scientific law of coverage in a specific case on the basis of a causal link conceptualized in terms of high logical probability. The expert consultant's role in this case is to provide a general theoretical scenario, a set of authoritative theories inspired by the particular case, that aid in interpreting the event in the courtroom; the judge's role, however, is to interpret this set of theories to verify their applicability in every single concrete court case. The whole process requires the judge to ascertain if the expert consultant's hypothesis holds up in a context of legal truth (placing the expert consultant's insight into a field of juridical validation based on a framework of severe causality). This takes place because, moving from *high statistical probability* to *high logical probability*, the evaluation process essentially shifts from a *quantitative* to a *qualitative* heuristic scenario in which numerical

approaches take second place to interpretative ones, and the whole can only be explained after comprehending the details.

At any rate, the last degree judgement of this trial essentially reiterated the theoretical device used in the first-instance judgment: as recently noted, it “has, among other things, affirmed the configurability of so-called ‘mental causation’ even in the case of crimes of negligence, a causality to be reconstructed on the basis of established and maximum generalizations drawn from experience, which must necessarily be followed by rigorous and timely critical feedback from probative evidence and the contingencies of the individual case” (*Redazione Giurisprudenza Penale*, 2016). Clarifying that in this case, the “maximum generalizations drawn from experience” referred to forms of common sense collectively consolidated through social representations that spread through local anthropological culture, it can be argued that the L’Aquila case shows that cultural anthropological variables can give rise to mental causation.

The only way to determine whether there is a link between the conduct of one or more people and a worldview, a horizon of values as a set of anthropological cultural elements, is to trace a route establishing the existence of this hypothetical link, case by case, through ideographic understanding (rather than nomothetic explanation), beginning from thick investigation. This sort of micro-historiographical interpretative act cannot in any way be reduced to the naturalistic objectification of knowledge; in this case, the horizon of plausibility involved in the concept of “high logical probability” is wholly distinct from the kind of proto-positivist approaches recently reemerging in the field of human behavioral sciences thanks to the neurosciences’ current hegemony. It is telling that the defense drew on neurobiological expertise in the L’Aquila trial even though, to date, no neuroscientific field is able to measure with certainty the thickness of cultural repertoires or the complexity of people’s habitual values. Regarding forensic evidence, it should be noted that, in the contemporary domain of expert knowledge, bringing in forensic experts appears to represent a paradoxical, backward way of achieving scientific authority (*Benadusi*, 2016; *Holden*, 2011). This leads to stage a fictional extreme strictness, high degrees of certainty, and objectivity that finally can reveal, just in the excess of such a claim, a pseudoscientific gap, a hierarchical intention against the competing disciplines, and a governmental position on the society (*Ciccozzi*, 2013, 2016). This move therefore involves avoiding the temptation to treat as absolutely not determinable what is not absolutely determinable and thereby recognize the role played by and need for fuzzy models to identify links in the chain of cultural causality.

To summarize, my work as a consultant essentially involving embarking on an itinerary of thick description to find the details that connected, in the particular case of this trial, an expert diagnosis of risk – disseminated as an element of common sense – with a set of concrete behaviors. In general, this approach revealed the morphology of the epidemiological distribution of a certain belief throughout a local population (*Sperber*, 1996). It thus established a connection between individual actions and a background of anthropological culture. This connection is not deterministic; at the same time, however, it is

not totally non-deterministic either (in the implicit way we often think of anthropological culture under today's post-configurationist, post-culturalist paradigm). Given the fuzzy character of the cultural anthropological background, we must conceive of this connection between individual actions and common sense in probabilistic terms. A fuzzy relationship between a set of cultural elements and a population implies that there is a statistical probability that this general relationship also exists in the cases of specific individuals. The role of the judge in the L'Aquila trial was to verify, in terms of high logical probability, if and how individual persons acted as a result of having incorporated those cultural elements into their habits of thought. This involved identifying a causal link between individual actions and the cultural anthropological background in order to verify that individual actions had been culturally conditioned, a task which called for a "thick" interpretative approach, delving into the depths of individuals' life stories, case by case. As this trial shows, when mental causation stems from cultural anthropological variables, we might indeed be able to assert, in juridical terms, cultural causation.

In this article, I can only touch on this question, as the issue of *cultural causation* has not been formally addressed in these terms in the field of cultural anthropology; however, beginning from a deterministic epistemology, it does hold an extensive place in our methodological past, in the old (and in many ways, justly surpassed) culturalist anthropological paradigm. In this sense, the classical era of anthropological configurationism entailed a substantial idea of cultural causation as an essentially distinct link between individual behavior and cultural background (Benedict, 1934, just to mention one of the most relevant essays of this period and of the whole history of cultural anthropology). It goes without saying that I am not in any way looking to recover the logic behind this approach. This is not meant as a nostalgic or romantic move of methodological disciplinary restoration. Rather, I intend to suggest that, by overthrowing the *old* culturalist perspective in favor of a radically non-deterministic epistemological horizon, we have not only moved beyond some deterministic temptations to cultural generalization and stereotypization, we have also weakened a *new* way of understanding in depth the fuzziness of this (overlooked) link: the fuzzy link between individual behavior and cultural background. This does not necessarily imply reintroducing a sort of determinism in anthropological discourse. From a cultural anthropological perspective, the L'Aquila case shows how the use of fuzzy logic can mediate between old culturalist determinism and the indeterminism prevailing in post-culturalist discourse, often expressed by the implicit trend of acting as if culture did not matter. Therefore, fuzzy logic might be a useful tool for understanding the role culture might actually play. In other words, it seems that, over the last half century, we have transformed an excessively mannerist "culture matters!" approach into an opposite but equally mannerist one of "culture doesn't matter!". It might instead be time to employ a fuzzy approach in order to lay the epistemological foundations for a "does culture matter?" lens and thus encourage fuzzily-oriented answers, namely to understand, case by case, if and how culture might indeed matter.

CONCLUSION

From pleadings, publications, and ordinary conversations, I have indirectly discovered that, to date, cultural experts (with different specializations) have participated in some Italian trials. However, the lack of formal search tools makes it all but impossible to develop a consistent method for identifying other judiciary cases involving such experts. Pleadings are rarely publicly available. In some cases, Supreme Court judgments can be consulted, but these records refer to cultural experts involved in lower instance proceedings which are not themselves accessible. The presidents of tribunals do not always grant or even respond to requests to consult judicial documentation. Some publications mention the involvement of cultural experts in trials but without dwelling on their role. I was able to locate some colleagues who took part in a trial thanks to word of mouth, and recently, a Ministry of Justice official suggested that I go to magistrates' conferences to make a request, but these are not reliable means of conducting a thorough search across the country.

At this early stage, therefore, I followed a non-systematic approach which nonetheless detected the cases presented here. Though few in number, they provide the basis for the following considerations. Italian law allows judicial actors to call in experts when the matter under dispute is cumbersome; nonetheless, cultural expertise does not currently play an established role in Italian courts. It is unclear, however, if this lack depends on the court's or lawyer's presumption that they can take the place of cultural experts, a lack of awareness regarding the contribution a cultural expert might make to the trial, or the economic cost of designating one. Nor is it clear if judicial actors are aware of (or how they deal with) the diverse schools of thought guiding experts' subjective interpretations, which represents a problem in light of the legal need for homogeneity. To date, the presented cases stand out like spots on a leopard skin. An analysis of these cases suggests that designating a cultural expert depends on the discretion of judicial bodies and parties, although experts appointed by the court are granted more authority than experts hired by the parties. The court can accept or disregard the expert's statement according to a number of variables such as the authority of the expert, the (non-)existence of regulations regarding the subject of the case, the need to balance conflicting constitutional principles, contrasting elements of criminal policy, the influence of public policies concerning migrants, the court's sympathy for the soft sciences, and the court's ideology and *philiis* or *phobias*. Incidentally, cultural experts and judicial actors can also be seen to clash in a number of non-Italian cases (Grillo, 2017; Holden, 2011).

In some cases, the court fully accepts the expert's consultancy (see the Tamil Tigers case, the FGM case in Turin and the first-instance L'Aquila trial). In other cases, the court ignores the report of the cultural expert (as in the adoption case involving the Roma family) or rejects previously accepted cultural expertise (as in the L'Aquila case on appeal). At times, the court takes the expert's report into account only marginally, for example, in applying attenuating circumstances (as in the FGM case in Verona). Other times, cultural experts and other

experts appointed in the same trial end up disagreeing (see, again, the case involving the Roma family).

There are currently a number of contrasting situations and it is difficult to identify any clear-cut trajectories. However, despite the small number of trials involving cultural experts, an analysis of such cases proves highly useful in several ways.

First, it proves that the expertise provided by cultural experts deserves the same scientific validity granted to any other expert testimony in legal trials (according to civil and penal procedural codes) and is subject to challenge on the same bases.

Second, it offers different perspectives for looking at culture(s) in legal proceedings. When cultural experts are brought in, courts often begin to view cultural models not as rules to be applied uniformly and without distinction, as something that exists *a priori*, but rather as fluid elements, as forms of participation that vary in intensity and meaning, and, therefore, something that must be proved *a posteriori*. Indeed, cultures are best understood as polythetic. They simultaneously comprise many (partially) related entities and cannot be seen as “essentially” sexist, based on begging or completely neutral. Similarly, they cannot be regarded as pervasive; they do not involve all the members of a community with the same intensity because, while cultures do influence the structure of thought and behavior, they also have to deal with borderline members as well as the choices of human actors who sometimes reformulate their own values. At the same time, however, the cases described here suggest that, although the expertise of cultural experts might be epistemologically perceived as incapable of offering the “objective truth” that is supposed to underlie a legal decision, some courts in Italy have easily overcome this obstacle.

Fourth, culture is not only an issue of penal law. Inasmuch as culture is explicitly called into question (as a mitigating or aggravating circumstance), criminal cases receive much more attention. This holds true to such an extent that the relevance of culture (whatever meaning is attached to it) seems to be a prerogative of penal law. Overshadowed by penal law, however, courts also encounter civil cases involving parties from different backgrounds whose culture is a crucial aspect of the proceedings. Cases of adoption are emblematic. Courts may regard a different cultural identity as a reason for judging parents incapable of meeting their children’s needs or children as mentally incapacitated (Taliani, 2012, 2014). Many of these cases reveal a tendency to “culture medicalization,” that is, treating cultural diversity as a pathology (Saletti Salza, 2003, 2014). An analysis of the psychological condition of litigants might produce significantly different results when carried out on the basis of ordinary psychology or an interdisciplinary approach that pays attention to the psycho-cultural dimension of individuals from diverse social–cultural contexts. An ordinary psychologist might interpret a defendant’s inability to describe events according to a particular chronological order as a sign of mental confusion, whereas an anthropologist might see this as a different way of relating to the past. Saletti Salza (2014) made this point clearly with regard to Roma people. Similarly, the psychologist and the anthropologist may produce divergent interpretations of personality

tests applied to persons from different backgrounds. In view of these points, it makes sense to pursue greater collaboration between psychology and anthropology in legal matters.

Finally, an analysis of these cases suggests that the category of *culturally motivated crimes* as formulated in Italy leads to misunderstandings. In particular, it ignores the fact that penal law established by the state is itself a “manifestation of culture” (Radbruch, 1932) and, therefore, it is very difficult if not impossible to draw a dividing line between cultural and non-cultural crimes or even what is to be perceived as “crime” or “offence” in the first place. And the point can be extended further: as the L’Aquila case in particular shows, several forms of culture may influence portions of a country’s dominant population. The relationship between the legal system and cultural expertise thus goes deeper, as such expertise can also play a role in cases that are not considered culturally influenced according to the conventional definition provided by Italian legal scholarship.

This chapter gives an idea of the critical issues that continue to affect the relationship between Italian legal tradition and cultural expertise. This situation appears to be caused mainly by the very low status of anthropological disciplines in both Italian academia and the public cultural domain, which is reflected (justifiably or not) in the Italian judiciary system and the controversial connotations *culturally motivated crimes* have assumed in Italian legal scholarship.

Furthermore, it shows that, in the absence of systematic collaboration between legal actors and anthropologists, the experts and judges who dare to experiment with law and culture on their own venture into perilous terrain. Greater cooperation between law and anthropology is thus advocated as a further guarantee of a fair trial.

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Cultural Expertise and Socio-Legal Studies

Assessing Cultural Expertise in Portugal: Challenges and Opportunities

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ASSESSING CULTURAL EXPERTISE IN PORTUGAL: CHALLENGES AND OPPORTUNITIES

João Teixeira Lopes, Anabela Costa Leão and
Lígia Ferro

ABSTRACT

Cultural expertise can play a relevant role in countries where cultural diversity marks social life, as in the case of Portugal, a country where migration always characterized its past and continues to influence the present, and where the presence of ethnic and religious minorities must be noticed. In this chapter, we aim to survey the use of cultural mediation in Portuguese law, as well as case law and culture centered mediation out of courts, in order to understand whether the concept of cultural expertise, in a broad sense, might be useful. Although it is a “contested concept,” culture is understood, for the purposes of this chapter, in a dynamic and non-essentialist sense, as a valuable asset providing context and significance to people’s lives. Assuming that the State is not “culturally neutral” and that its institutions somehow reflect the established culture, issues of equality and demands for cultural recognition will necessarily arise. However, it is the duty of the State to respect and protect cultural identity. Even though cultural expertise may become relevant in several domains of the State, particular attention is given in this chapter to the role played by cultural arguments and cultural expertise in courts in Portugal. Cultural expertise is also very relevant for social intervention, and it is mobilized in the processes of cultural mediation. These processes have a low level of institutionalization in Portugal, since it is not routinely recognized in the implementation of public policies as an autonomous professional profile.

Keywords: Cultural diversity; cultural expertise; law; court adjudication; cultural mediation; social sciences

INTRODUCTION

Portugal is a country where migration characterized its past and continues to influence the present. This also means that cultural diversity is a feature of the country. The existence of minorities such as the Roma community, in the country for a long time, and the African community, especially from Portuguese Speaking Countries, continues to renew the debate around cultural differences and the need for cultural mediation.

According to the official statistics, in 2015, 3.8% of the 10 358 1000 residents in Portugal were originally from foreign countries.¹ Despite the scarcity of data, the *National Strategy for the Integration of Roma Communities*² estimates the numbers of the Roma community to be between 40,000 and 60,000. According to the responses obtained in the 2011 Census to the optional question on religion (8,989,849), the religion with the widest presence in Portugal is Roman Catholic (7,281,887), followed not just by other Christian religions, including Orthodox and Protestant, but also the Muslim and Jewish religions.³

One thing is certain, the number of proceedings for administrative infractions instituted by the Commission for Equality and against Racial Discrimination between 2005 and 2015, is mainly related to the security forces (20,4%) and the commercial sector (20%) (CICDR, ACIDI, ACM). Besides, the report from the European Commission Against Racism on the Portuguese situation indicates that a low number of cases presented by members of minority ethnic groups to the security forces, which could indicate the low level of confidence of these citizens in the legal system in Portugal (*ECRI Report on Portugal, 2013*). However, there is a lack of recent comparative research in this area that might provide information on any improvements. These situations justify the need to think about the role of cultural expertise as a mediation tool in court situations, as one of the crucial dimensions of social justice with minorities in Portugal.

The Portuguese reality is multicultural (in descriptive terms) in the sense that people with different cultural affiliations (language, religion, customary practices, and traditions) coexist in the territory (Rosas, 2011, pp. 100–1001). Although it is a “contested concept,” culture is understood, for the purposes of this chapter, in a dynamic and non-essentialist sense, as a valuable asset providing context and significance to people’s lives. According to Parekh (2005, p. 218), cultures are systems of beliefs and practices through which human beings understand, regulate and structure their lives, both in individual and in collective terms.⁴

Assuming cultural expertise can play a relevant role in countries where cultural diversity affects social life, this chapter aims to provide a first assessment of the role it has been playing in Portugal.

The analysis draws on the new concept of cultural expertise proposed by Holden as including the use of concepts of culture in court and out of courts as well as processes of cultural mediation (Holden, 2011, p. 1 and the contribution in this special issue). This concept of cultural expertise provides a neutral and broader alternative to the more studied concept of cultural defense as the “use

of cultural arguments by the defense lawyer” which typically plays a role in criminal law settings (see Holden’s contribution in this special issue for full discussion of the difference).

We will use the concept of cultural expertise following Holden definition: “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).

This framework allows us to take into account a broader role for cultural experts, emphasizing cross-cultural mediation. This approach is larger than a mere linguistic perspective (the ability to communicate with itself and others within a certain culture) as mediation is based on a third position which, while not neutral, favors the impartial intermediation of the parties in knowledge through community work with the populations and cultures involved.

We know that cultural mediation plays a crucial role in attaining more stable and equal societies. Social professionals (sociologists, anthropologists, social workers, etc.) mediate cultural and social meanings in particular national contexts, favoring knowledge and communication in very diverse contexts. The expertise of social professionals can make a difference in the deep understanding of social and cultural meanings involved in court, as well as out of court situations.

Finally, two additional aspects must be stressed. First, this chapter is exploratory: It aims to survey the use of culture in Portuguese law, as well as case law, and culture centered mediation out of courts to understand whether the concept of cultural expertise might be useful. Second, the analysis combines two distinct, but complimentary, theoretical approaches: legal and sociological. Both disciplinary perspectives are key areas to understand the concept of cultural expertise, so thus we will try to build a common base in order to understand the concept and its empirical implications.

FROM CULTURE TO CULTURAL EXPERTISE IN COURT

The State in the Face of Cultural Diversity – Some General Remarks

The theoretical debate on cultural diversity issues in the fields of political philosophy and political theory illustrates the complexity of issues arising from the protection of cultures and cultural rights in the context of modern State theory and modern democracies (see Kymlicka, 2007).

Discussing whether to allow cultural identities to play a role in modern democratic States seems relevant for legitimizing the presence of concepts of culture and cultural arguments in legal systems and practices.

States are not “culturally neutral” in the sense that their institutions – among which, Law – are cultural and somehow reflect the culture of the majority.⁵ The issues of justice and equality between cultures and individuals with different cultural affiliations necessarily arise, especially in relation to the demands of

minority groups and their members, and bearing in mind the reality of migration. A complex understanding of equality is required.

Culture deserves protection as it is a valuable asset for individuals, and provides them with a context of significance for their lives and of development of their personalities. International Law protects a right to culture,⁶ which encompasses cultural identity and the culturally related dimensions of human personality, at both individual and collective level, and entails obligations of respect and protection by the States.

National legal systems may also award protection to culture, according to different models. The Portuguese Constitution, passed in 1976, enshrines an extensive and open catalog of fundamental rights (from article 12 to 79), encompassing civil and political rights as well as social rights. The Constitution does not expressly refer to an intercultural principle, to a right to cultural identity or to the protection of minorities or ethnic groups.⁷ Notwithstanding, the protection of cultural identity can be constitutionally based, due to the principle of human dignity (established in article 1) in articulation with other fundamental rights, namely the right to the development of personality and the right to personal identity (article 26/1), and principles, among which the equality and non-discrimination principle (article 13). These rights and principles are binding on public entities and must be enforced in the performance of State functions (legislation, jurisdiction, and administration) (articles 3 and 18).

The protected dimensions of cultural identity⁸ include freedom to self-identification and self-determination in cultural terms, as well as freedom to act according to one's culture or one's "culturally framed" personality. Since "cultural experience" has both internal and external dimensions, the right to act according to our own culture, but also the freedom to exteriorize our cultural options, shall be *prima facie* protected (Leão, 2013).

The duties of the State to respect and protect fundamental rights, as well as the role played by States in managing cultural diversity, entail obligations of public officials and public institutions to respect and protect the cultural identity of cultural minorities, but also of minorities within the groups (Leão, 2013). Also, the question of limits to the protection and respect for cultural diversity and cultural identity must be addressed.

An intercultural approach⁹ seems preferable to a strict "balkanizing" multiculturalist approach. It not only respects and recognizes cultural identities and cultural diversity but also values and promotes dialogue between cultures to develop a sense of community and belonging, based on a common set of principles, among which the respect for human rights, rule of law, and human dignity (on this, see Leão, 2013). This approach helps to frame an "intercultural methodology"¹⁰ which, in turn, is reflected in Law making and in Law adjudication.

Culture and State Law

The complex relation between cultural diversity and State Law – from Law making to Law application – is widely debated.¹¹ On the one hand, Law itself is culture and somehow reflects the dominant culture. On the other hand, as

seen above, State Law may accord relevance to cultural practices and sets of rules, at the more abstract level of Law making, for example by the legislator, or at the more concrete level of Law application, in court or in other contexts like administrative procedures.¹²

As Ringelheim (2011) points out, cultural diversity poses several questions to the legal sciences. One of the questions concerns the justification and the specific models of recognition or interdiction (for example, through criminalization), by State Law, of cultural or religious practices. Also, there are discussions about the existence of degrees of legal pluralism resulting from the coexistence of State Law and traditional, customary, or religious normative systems, or the impact of cultural arguments on the application and interpretation of State Law (not only but also in the criminal field).¹³

Clashes between different normative systems are more likely to occur in culturally diverse countries, namely because of migration, when individuals move to new countries with different ways of life, although they can also occur independently from migrant background (Renteln, 2005). Dias (2015, p. 96) notices that most culturally determined crimes concern persons – agents and/or victims – socialized according to traditions and cultural practices different from those of the host society.

Some examples taken from Portuguese legal system illustrate the complex relations between Law and Culture. State Law¹⁴ allows a certain degree of normative pluralism through the relevance of religious rules and mechanisms of choice of law governing marriage¹⁵ (see Adragão & Leão, 2016) and establishes the mechanisms of accommodation of religious beliefs in labor and education fields through the admissibility of the readjustment of labor schedules and the rescheduling of exams to fulfill religious duties.¹⁶ Criminal Law includes specific offenses related to cultural practices such as the crimes of forced marriage and of female genital mutilation.¹⁷

Moving to the field of the application of Law, cultural expertise in the broad sense mentioned above may become relevant also in public administration and court adjudication. Public services, from schools to prisons, police departments to hospitals, may face cultural issues requiring intercultural competences¹⁸ and cultural expertise.¹⁹

In this chapter, however, special attention is awarded to court adjudication and to the presence of cultural arguments in Portuguese case law, illustrated through selected decisions from appeal and supreme courts of ordinary jurisdiction and administrative jurisdiction,²⁰ with the aim of assessing the potential role of cultural expertise. It is worth mentioning that the Portuguese legal system falls within the scope of Civil Law tradition. Finally, this article will not deal with issues of private International Law, although we recognize it as a relevant arena of cultural dialogue.²¹

Cultural Issues in Court Practice

Cultural practices and cultural rules may become relevant when the judge makes a decision based on legal rules which explicitly refer to cultural aspects (e.g., by

criminalizing a cultural practice); they may also become relevant when the judge analyses the facts and allows “cultural considerations” in the application of “neutral” rules, general clauses, and indeterminate concepts to decide the specific case under appreciation (on this, see also Ringelheim, 2011).

From a strictly legal point of view, the relevance of culture in court poses several questions on whether and how to allow for the relevance of “cultural information,” “cultural evidence” or “cultural arguments” in court adjudication, the first of which seems to be “to which extent law courts should take social and cultural contexts into account when deciding cases involving litigants that belong to ethnic minorities?” (see Holden in this special issue).

The specific debate for and against the admissibility of cultural defense in cases in which courts are asked to consider and evaluate cultural motivations underlying actions, admitting to some degree the protection of culturally motivated conducts (see Renteln, 2005) can help illustrate the complex questions involved, a discussion that has inevitable interdisciplinary features, as noticed by Cunha and Jerónimo (2015).

Different arguments stand for and against cultural defense (Renteln, 2004, p. 185 ff). Advocates of cultural defense (and of a formal policy of cultural defense) maintain, briefly, that the right to a fair trial, religious freedom, equal protection of the Law and right to culture support its use (see Renteln, 2005; Dias, 2016). Critics of cultural defense often mobilize equality considerations, the need to protect vulnerable persons, and fears concerning cultural evidence and the ascertainment of cultural information. The three-stage “cultural defense test”²² proposed by Renteln (2005, 2006) aims to help minimize the potential misuse of the cultural defense (see also Dias, 2016; Jerónimo, 2016). However, several difficulties remain, namely concerning the identification of a culture of origin in the face of hybrid identities or concerning the coexistence of different interpretations of a cultural tradition within a group, as stressed by Jerónimo (2016).

Despite the specificity of criminal justice settings (Cunha & Jerónimo, 2015), the relevance of “cultural information” to fully understand the circumstances of a case seems to go beyond criminal issues (Jerónimo, 2016). Renteln maintains also that cultural arguments can be relevant in a wide range of subjects besides criminal law, from family to labor disputes, from civil to asylum cases (Renteln, 2005), and therefore adopts a broad concept of cultural defense itself (Renteln, 2004, p. 7).

Cultural Issues in Portuguese Courts Practice

The review of case law for the purposes of this chapter does not aim to comment on the merit of the decisions, but rather to scrutinize the potential role of cultural expertise.

Even though Portugal is “culturally diverse,” in the sense described in the Introduction, so-called multicultural²³ or cross-cultural jurisprudence seems scarce. According to Dias, “culturally motivated crimes” seem to be “a more sociological than legal reality” in court practice, and information from courts

seems to range from scarcity of cases to indifference toward cultural factors (Dias, 2015, pp. 96–97). For example, as noticed by Dias (2015, pp. 96–97), even though academic and journalistic investigations account for the existence of female genital mutilation of children of African descent in Portuguese territory or in their parent's homeland, cases are rarely brought to the Public Prosecution Services (“Ministério Público”) and to Court and are often discontinued (see Leitão, 2013). The abovementioned legislative changes of 2015 in Criminal Law may modify this scenario.

References to personal circumstances such as ethnicity, values and customary practices and specific “ways of life” were found in decisions from appeal and supreme courts, namely while dealing with Criminal²⁴ or Family Law issues.²⁵ Many of them concern minority groups. In some of these cases, the admissibility of cultural arguments in court was further discussed. The argument that allowing culture to play a role in court risks violating the constitutional principle of equality is also present.

In some of the cases identified, different cultural understandings of sexuality and marriage were at stake.

In a case dating from 2012,²⁶ concerning sexual acts performed by an adult of Roma origin with an adolescent of the same ethnic group, the Court of Appeal of Porto was asked to review the applied penalty established by the lower court on equality and proportionality grounds. The defendant argued that the Court should give relevance to the lower nubile age according to Roma ethnicity customs, in order to accomplish the so-called positive dimension of equality principle requiring different treatment of different situations. The Court, after admitting, in general, the possibility of positive discriminations, considered that the age limit was not at stake, since the *ratio* of the criminal norm was to protect the inexperience and debility of the adolescents and the right to an autonomous sexual development independently of their ethnicity. A different understanding, allowing the nubile age argument to be relevant, would amount to discrimination. The Court also expressed doubts that the seduction and abuse of sexual inexperience of an adolescent would respect traditions of the Roma community. The Supreme Court expressed a similar reasoning in 2010 while reviewing a case concerning an adult member of the Roma community facing a criminal accusation of sexual abuse of a minor²⁷ of the same ethnic group.²⁸ The defendant evoked the earlier start of sexual life among the Roma community but neither the lower court nor the Supreme Court accepted it. This Court expressed the view that the Law is general and abstract and that a differentiated application of the Penal Code norm according to race would amount to discrimination, violating article 13 of the Constitution. As noticed by Jerónimo (2016, p. 327), no expert seems to have been called by the Court to help determine the existence of the tradition, which would have been relevant for the purposes of Renteln's “cultural defense test.” Also, Dias points out that the “cultural idiosyncrasy” of the agents, even if noticed by the Courts, was not explored and did not become expressly relevant, either in determining the existence of criminal responsibility, or in determining the measure of the applied penalty (Dias, 2015, p. 97).

A decision of 2010 of the Court of Appeal of Coimbra concerned conducts leading to the performance of a marriage of a minor according to Roma rituals, potentially falling within the scope of several types of crime such as kidnaping and physical injuries.²⁹ The questions of whether the “cultural motivation” of the agent observing cultural rules and customs should be relevant (and, in an affirmative case, how) and whether following a customary rule could fall under the “social adequacy” theory were discussed.³⁰

The terms of relevance of the culture of origin, this time concerning a Muslim defendant facing several accusations of rape, kidnapping, and related offenses, were also at stake in a case dating from 2011,³¹ brought before the Supreme Court of Justice for review. The culture of origin of the defendant, his belonging to the Muslim religion, and its “specific values,” among which gender discrimination, were mentioned, leaving unclear the terms of relation between Muslim culture and the specific behavior of the defendant. For *Jerónimo (2015)*, the case seems to show awareness of cultural circumstances but also seems to accept the linear association between sexual abuse, sexual discrimination, and Muslim culture and religion, which is disturbing. Even though the issue is suitable for cultural expertise, no evidence was found of resorting to the assistance of specific cultural experts.³² The Court noticed, however, that the accused could not be discriminated against on grounds of his Muslim culture, quoting articles 13/2 (prohibition of discrimination), 25 (personal integrity) and 26/1 (right to legal protection against all forms of discrimination), all from the Constitution, in accordance with Universal Declaration of Human Rights (article 16/2 CPR).

Moving to Family Law, case law shows that cultural circumstances and practices may also be relevant in the adoption of protection measures concerning minors at risk, which are decided by public entities with the objective of protecting the “child’s best interest,” for example, measures of referral for adoption. In a decision of 2015, concerning a referral for adoption of children of Muslim parents, the appellant parents invoked that the assessment of whether they were fulfilling their parental duties should consider the fact that they were a “Muslim family,” with “very different characteristics from those of Western families.” However, the Court of Appeal of Lisbon stated that the kind of parental behavior under analysis “could not be attributed, in essence, to particularities inherent in Muslim culture.”³³

The right to education³⁴ can be at stake in cases involving minors from Roma communities, which show high levels of school absenteeism.³⁵ Courts must deal with the refusal of the parents to send daughters of school age to school on cultural grounds.³⁶ The equality principle and non-discrimination of children in access to education, irrespective of their culture, are at stake.³⁷ In a decision of 2012, the Court of Appeal of Lisbon decided, differently from the first instance court, that between the refusal of the parents to allow their daughter of 14 years old to attend school on cultural grounds and the interest of the child in attending (at least) compulsory schooling, this last should prevail.

Questions concerning the role of religious practices in the working place, at school or in family life issues, also reach courts. Religious beliefs may be

relevant to determine the quantity of a monetary compensation for moral damage,³⁸ as well as in the resolution of parental disputes concerning the religious education of the child.³⁹ The accommodation of religious beliefs demanding respect for rest days in public examinations,⁴⁰ in the establishment of the working periods of public servants⁴¹ or as a legitimate cause of absence from work⁴² often reaches the court as well. It is worth mentioning that religious exemptions have explicit a statutory basis,⁴³ even though it raises interpretation and application issues.

This brief review of case law shows that cultural (including religious) arguments and information do reach Portuguese courts in several fields of Law adjudication. Even though criminal settings and culturally motivated crimes seem to remain crucial to assess the presence of culture in court, the cases analyzed do not circumscribe to criminal law and cultural information was not necessarily invoked for defense purposes. No evidence was found of a significant participation of social scientists, or sociologists and anthropologists, as “cultural experts,” in the court procedures involved.

Allowing for Expert Intervention?

Theoretical developments on the issue of culture in court and, more strictly, on cultural defense and culturally motivated crimes are not abundant among Portuguese scholars. However, they have been discussed by legal scholars and anthropologists, sometimes with specific legal, anthropological, and interdisciplinary aims (see Cunha, 2013; Cunha & Jerónimo, 2015; Dias, 2015, 2016; Jerónimo, 2011, 2016). However, discussion of specific issues arising from the intervention of social sciences experts in court in cultural issues seems to be missing.

The presence of “cultural information” in court raises several questions. They range from the admissibility of cultural evidence in court to the ascertainment of cultural practices and cultural belonging, and to the determination of those better positioned – for example, experts or members/representatives of the group - to present cultural information to the court (Renteln, 2004, p. 206 ff. and, among Portuguese studies, Dias, 2016, p. 208; Jerónimo, 2016).

“Cultural information” can reach court through the agency of Public Prosecutors,⁴⁴ Social Services,⁴⁵ the parties to a dispute, witnesses, including social services workers like social workers, experts, or even interpreters.⁴⁶ They may all be called cultural brokers in a broad sense, even though their procedural status may be different.

The participation of cultural experts and/or of members of the cultural groups may be decisive to give judges the “intercultural competences” these cases require and avoid stereotypes in judicial adjudication (Dias, 2016, p. 208). They can be crucial to help the judge establish and evaluate the proof.⁴⁷

In the Portuguese legal system, expert evidence through the initiative of the judge or on demand is admitted in criminal proceedings (articles 151 to 163) of the Portuguese *Code of Criminal Procedure*.⁴⁸ Expert proof will be taken into account, in general, when the perception, or appreciation of the facts, demands

specific technical, scientific or artistic knowledge (article 151). Anthropologists, ethnologists, or even interpreters can assume the procedural role of experts, as pointed out by Dias (2015, pp. 104–105).⁴⁹ It is also possible to request, through the initiative of the judge or on demand, the opinion of experts in civil procedures (art 388 of the Portuguese Civil Code⁵⁰ and articles 467 and 468 Code of Civil Procedure (hereinafter, CPC). Besides experts, the intervention of technical assistants according to the CPC⁵¹ to help the judge or the civil litigants clarify technical dimensions as important to appreciate the facts may also be relevant.

CULTURAL EXPERTISE IN SOCIAL ARENAS

Thereby, the relative indifference of courts toward cultural factors is a key feature of the Portuguese judicial system, although the legislation allows it. Thus, the network of inter- and cross-cultural mediators, already existent, could be mobilized to defend ethnic minority rights and for advice of the courts, particularly using members of the communities in question.

Portugal is today a post-colonial society, although internally diverse: different cultures and ethnicities coexist in the same territory.

Only very recently have we seen initiatives of cultural mediation for all these social and cultural diversities, and they are not yet recognized or institutionalized as professional practice.

Contexts and Forms of Mediation in Portugal

The construction of the fragile legal setting that allowed the framing of mediation started in the 1990s, with the elaboration and approval of some legal orders. The first document to ever mention the figure of the mediator is Law 147/96 of July 8, which defines the Education Territories for Priority Intervention⁵² (compensatory education), and foresees the possibility of hiring animators/mediators (as a special condition for developing the projects).

However, the document that actually opens the way to the institutionalization of mediation is the Joint Order 132/96, of July 27, which approves the implementation of a Free Time Programme for young students and children at the preschool, basic, and secondary levels of education, involving unemployed people registered at the State Employment Centers.

Two years later, the role of the mediator is explicitly recognized by the Joint Order 304/98, April 24, which determined the application of the duties previously attributed to the cultural mediator in the field of education under the Order 304/98 (Oliveira & Galego, 2005, p. 36). However, it was only in 2001 that the Law 105/2001 established the legal status of the sociocultural mediator. This is a very important step for the recognition of this professional role, because the abovementioned law clearly indicates that the mediation can be put into practice in schools and other public contexts, through the establishment of protocols, individual employment contracts, or service agreements, following the regulations governing the employment of Civil Servants. However, the text mentions that for the recruitment, preference should be given to individuals

from ethnic groups, and the specific training of the sociocultural mediators is also mentioned. In article 1, the law defines the job functions of the sociocultural mediator, highlighting collaboration in the task of the social integration of migrants and ethnic minorities, with the objective of reinforcing intercultural dialogue and social cohesion. The possibility of intervening in other areas is added to this definition. The skills and duties of the sociocultural mediator are defined in article 2 of the Law and these include (1) promoting intercultural dialogue, stimulating respect and deepening knowledge of social diversity and social inclusion; (2) collaborating in the prevention and resolution of sociocultural conflicts as well as in the definition of social intervention strategies; (3) working with all the active parts of the social and education intervention processes; (4) facilitating communication between professionals and users from different cultural backgrounds; (5) advising users about their relations with the professionals and services of both a public and private nature; (6) promoting the inclusion of citizens from different social and cultural backgrounds in equality of conditions; and (7) respecting the confidentiality of information regarding the families and populations covered by his/her action.

Even if the profile of the mediator is provided for in law, with the potential of being a resource in several fields, the reality is that mediation is exercised mostly in extra-school and informal contexts. We are talking about projects of community animation or community development that are very restricted in terms of space and time. Community mediation “is understood as a set of processes favoring and intensifying the relations within a certain community and between communities, thus contributing to the construction of a common civic identity, a common collective identity. These processes constitute an articulated set of domains and networks of mediation, including, among others, linguistic, intercultural and conflict mediations”⁵³ (Freire & Caetano, 2014, p. 2). The projects of community mediation usually involve Portuguese and African immigrants from the former colonies. These projects frequently establish bridges between schools and training centers, collaborations with leaders from different communities, encourage and support the creation of neighborhood associations, improve literacy using cultural and linguistic mediation, mediate and enhance the relations with local authorities and organizations, and improve relations between the members of a community and/or different communities. There are also projects of mediation involving Roma communities. Evaluations conclude that intercultural mediation, “driven by Roma mediators from within the local administration,” becomes a public instrument for reinforcing social cohesion (Castro & Santos, 2015, p. 34).

We worked on a project carried out in a social neighborhood located in the outskirts of Lisbon (Marvila), from a harm reduction perspective with drug users (from Portugal and descendants of immigrants from the ex-colonies), with a very poor background and presenting serious problems, like lack of family support, illiteracy, difficulties accessing the labor market, and so on. (L. Ferro, Oliveira, Trindade, & Peixoto, 2014). The project consisted of intervening with the drug users but also with all of the neighborhood residents, in order to stimulate local identities, affinities, and ties between neighbors. Several cultural

initiatives were developed, such as a breakdance workshop, a community murals workshop and an open air film festival with the objective of gathering different ethnic groups, generations, and genders in the public space of the neighborhood (each initiative lasted for one month). Cultural activities were the perfect means to meet local skills and to find cultural gaps and the sources of conflict to act in. The work over one year led to very good results, especially in relation to the harm reduction by drug use, the dynamic use of public space, the enhancing of ties between people from different genders, ethnicities, and generations, as was shown by an evaluation of results during the final phase of the project. However, with the economic crisis and the austerity measures implemented in Portugal, this project, like a lot of others, has had no more funding since 2012, and the work that was just starting at that time, had no time to grow.

It is important to highlight the role of cultural institutions, in part due to an increase of the investment in cultural facilities, especially at a local scale. In this context, the role of mediation in the formation of cultural practice and the relationships between the arts and culture is a renewed interest. In Portugal, this interest is translated into the development of education in several types of cultural institutions, and the stimulation of creation, expansion, and loyalty among the publics concerned.

This tendency has become particularly evident since the 1990s, as a product of the public investment in the creation and recovery of cultural infrastructures (regional and national). However, this trend is counterbalanced by the acknowledgment of reduced and insufficient audiences for the new cultural offers proposed by facilities such as museums, libraries, theaters and cine-theaters, cultural centers, and heritage spaces (Gomes & Lourenço, 2009). Beyond these different cultural facilities and institutions, public support for the professionalized structures in the arts frame more and more the formation of new publics, questions that are being clearly assumed as political priorities today (Quintela, 2011).

CONCLUSION

Understanding, respect, and protection of cultural identities and diversity in the legal arena pose relevant questions to modern democratic States, whose responses to cultural diversity vary. Portuguese Law protects cultural rights, shows some receptiveness to cultural practices, and allows for a certain degree of normative pluralism.

Although the research of case law carried out for this chapter has not been exhaustive,⁵⁴ it clearly points toward a timid presence of concepts of culture and cultural arguments in Portuguese courts, although it did not reveal a significant participation of social scientists, or sociologists and anthropologists, as cultural experts, in the court procedures involved. These results seem to confirm the hypothesis advanced by Holden (see Holden in this special issue) that Civil Law systems are less permeable to cultural expertise than Common Law systems.

Legal and sociological literature addressing Law and culture issues and the presence of culture in court is also very scarce. It deals mainly with minority and

human rights, equality and the need for unequal ways of treating unequal situations (Jerónimo, 2011), the concept of intercultural dialogue, cultural defense and culturally motivated crimes, and the specific and multiple ways in which culture can frame the context of an illicit action (Cunha & Jerónimo, 2015; Dias, 2015, 2016; Jerónimo, 2016). However, specific discussion on the role of social professionals (scientists and practitioners) in court seems to be lacking, as well as evidence of their presence in court to frame specific situations in question at the courts.

The reasons behind this scenario should be further explored. Do they result from dogmatic resistance to the presence of cultural arguments in court for equality and neutrality reasons, or from procedural obstacles, or both? The concerns of sociologists and other social scientists and practitioners about these matters have almost no visibility in the public sphere. It is possible that actors from both fields (legal and social) have been neglecting the collaboration necessary to include cultural expertise in court situations.

As suggested by Holden (see Holden in this special issue), assessing the real presence of cultural expertise in court and out of court scenarios may be crucial to overcoming both indifference and skepticism toward the use of concepts of culture, since it rationalizes and scrutinizes their production and relevance.

Since mediation allows the in-depth knowledge, anthropological and sociological, of the difference but also of the possibilities for mutual understanding, its use by the legal system would make it possible to avoid excessive judicialization.

However, it would be of crucial importance to train and accredit these mediators, granting them a socio-professional status recognized by the State and its institutions.

In social arenas, and unlike what happens in many other countries, there is no entity in Portugal to regulate, compare, and deepen the diverse forms of mediation, that is to say, an entity that establishes a common training matrix. The lack of consensus on the meaning of the term “social mediation” in our country makes it difficult to build a field of activity. The social mediators are recruited by diverse organizations with different statutes and intervene in very distinct situations. Nonetheless, sociocultural mediation does not constitute a structured sector of activity, and this compromises the future of the figure of the mediator (Oliveira & Galego, 2005).

In short, mediation assumes various typologies in Portugal: (1) as a profession with regulated access and a recognized status (even if unusual and not common); (2) As routine professional practice in certain situations (social exclusion, school violence, small legal and family conflicts) and institutions (schools, associations, museums, NGOs and local authorities); (3) As an informal resource for artists and cultural intermediaries operating in intercultural projects, or seeking to invest in public relations, usually associated with (1) education projects and (2) community art projects and the improvement of urban public space. It is clear that this field needs to build on the discussion of experts from various disciplinary backgrounds. The objective should be to obtain a clearer picture of existing problems and propose possible solutions for mediation, by articulating action between legal, social, health, and educational institutions and organizations.

NOTES

1. PORDATA. Retrieved from <http://www.pordata.pt/Portugal/Quadro+Resumo/Portugal-7059>.

2. Approved by the Council of Ministers on the Resolution No. 25/2013 of 27 March, published in the *Diário da República* on April 17, 2013. Retrieved from <http://www.obcig.acm.gov.pt/>.

3. Retrieved from <http://censos.ine.pt/>.

4. This definition is in line with UNESCO's Universal Declaration on Cultural Diversity, 02/11/2001. Retrieved from <http://portal.unesco.org>.

5. On this, see Kymlicka (1995).

6. Among other instruments, see article 27 of *Universal Declaration of Human Rights* (1948), article 27 of the *International Covenant on Civil and Political Rights*, and article 15 of the *International Covenant on Economic, Social and Cultural Rights* for universal human rights protection system. For a broader analysis, see Donders (2010) and Jerónimo (2011 and 2016).

7. The intercultural approach is assumed and promoted at infra constitutional level – see, for example, *Strategic Plan for Migrations 2015–2020*, adopted by the Council of Ministers through Resolution nr. 12-B/2015. Retrieved from www.acm.gov.pt

8. For an exhaustive analysis of this protection in the Portuguese Constitution, see Leão (2013).

9. Council of Europe also endorses this approach; see *White Paper on Intercultural Dialogue: “Living together as Equals in Dignity”* (2008, p. 19).

10. We borrowed this expression from Dias (2016, p. 306).

11. Among others, see Foblets, Gaudreault-Desbiens, and Renteln (2010) and Ringelheim (2011). Among Portuguese studies, see Almeida (2012), Cunha and Jerónimo (2015) and Jerónimo (2016).

12. For an exhaustive demonstration, see Ringelheim (2011). Even though connected, the level of Law making and the level of Law adjudication pose different questions, as stressed by Cunha and Jerónimo (2015).

13. See also Cunha and Jerónimo (2015), with a special focus on criminal justice issues and on the Portuguese legal system.

14. Portugal is a non-confessional State. Religious freedom, both individual and collective, is extensively enshrined in the Constitution, which frames a model of separation or non-identification between State and religious communities and churches and full respect for religious freedom (articles 41 and 288/b of the Constitution). Cooperation between State and religious confessions is allowed (among studies see Adragão & Leão, 2016) and is framed by the *Concordat between the Portuguese State and the Holy See* (2004) and the *Law on Religious Freedom* of 2001 (Law 16/2001, 22/07/2001, with further amendments).

15. Two different legal institutions (articles 1587 onwards CC) are recognized: *civil marriage* and *canonic marriage*. Both the Concordat (2004) and the Civil Code (articles 1625 and 1626) acknowledge Canon Law and the ecclesiastical jurisdiction concerning canonic matrimony (art. 1587 onwards and 1596 onwards). Law on Religious Freedom (2001) and the Civil Code also give relevance to religious rules regulating civil marriage under religious form (article 19 of Law on Religious Freedom and article 1615 of the Civil Code).

16. Article 14 of the Law on Religious Freedom (2001).

17. See articles 154-B and 154-C and article 144-A of the Portuguese Penal Code, introduced by Law 83/2015, 05/08/2015, to comply with *Council of Europe Convention on preventing and combating violence against women and domestic violence* (2011). Before 2015, these offenses could already be punished as physical injuries and coercion. On this, see Cunha (2013), Dias (2016, p. 451 ff.), Leite (2016) and Monte (2016). Further case law concerning these recent criminal types would be relevant for the purposes of this project.

18. The case of healthcare provides a good example: hospitals and public services providing healthcare to immigrants face issues concerning different cultural codes and are required to have intercultural competences (Silva & Martingo, 2007). Specific accommodation of diet requirements compatible with religious or spiritual beliefs are also determined by law (art. 12, j) Decree Law 253/2009). The network of specialized public services developed by The High Commission for Migration (ACM) (and its predecessors) to give support to immigrants and facilitate immigrant integration processes, comprising cultural dimensions, such as the *National Immigrant Support Centers (CNAI)*, *Local Centers to Support Migrants' Integration* and *Offices of Specialized Support to Immigrants* (<http://www.acm.gov.pt/acm/servicos>) is also worth mentioning.

19. Portuguese Asylum Law (Law 27/2008, 30/06/2008, with further amendments, which establishes the conditions and procedures for granting asylum or subsidiary protection and the status of asylum, refugee and subsidiary protection to applicants) expressly admits the use of experts is for specific questions (namely medical or *cultural*) within international protection processes conducted by *Immigration and Borders Service (SEF)*.

20. This review of case law covers decisions from appeal and supreme courts available at public legal databases at <http://www.dgsi.pt> and collected until April 2017. Decisions from first instance courts were not considered. All court decisions mentioned in the chapter are available at that website.

21. See Holden in this special issue as well as Adragão and Leão (2016).

22. Courts applying the cultural defense test would “have to consider three basic queries: (1) Is the litigant a member of the ethnic group? (2) Does the group have such a tradition? (3) Was the litigant influenced by the tradition when he or she acted?” (Renteln, 2005, p. 207).

23. See Jerónimo (2016), providing examples of “multicultural jurisprudence”, some of which from Portuguese case law.

24. Case law in the criminal field provides evidence of the relevance of those circumstances for the characterization of the persons involved, to determine the existence or level of guilt or the risk of recidivism and for determining the appropriate sanction (according to art. 71 of the Penal Code). For an example, see Case nr. 181/13.3GATVD.S1, 29/04/2015, Supreme Court of Justice. The social report produced by the team of the *Direção Geral de Reinserção e Sistema Prisional* accounts for cultural principles and values.

25. In Case 290/09.3TMFAR.E1, 01/03/2012, Court of Appeal of Évora, the revision of a measure of referral for adoption of a child whose mother was Roma was at stake. Issues concerning the Roma communities' way of life were discussed.

26. Case nr. 297/11.0JAPRT.P1, 17/10/2012, Court of Appeal of Porto. Dias (2016, p. 352) mentions a previous case, decided by the Supreme Court in 2006.

27. Article 171 of the Penal Code, punishing sexual abuse of minor of 14.

28. Case nr. 252/09.0PBBGC.S1, 23/06/2010, Supreme Court of Justice. For an analysis, not only but also considering the “cultural defence test” proposed by Renteln, see Jerónimo (2015 and 2016).

29. Case nr. 557/09.0JAPRT.C1, 29/09/2010, Court of Appeal of Coimbra.

30. In Portuguese doctrine, see *inter alia* Dias (2015) and Monte (2016).

31. Case nr. 498/09.1JALRA.C1.S1, 07/09/2011, Supreme Court of Justice. On this, see Jerónimo (2015).

32. The characterization of the defendant was made by the social report of the social services (“Serviços de Reinserção Social”) and there is no evidence of resorting to the assistance of specific cultural experts.

33. Case 6368/13.1TBALM.L1–2, 05/11/2015. In Case 290/09.3TMFAR.E1, 01/03/2012, Court of Appeal of Évora, the revision of a measure of referral for adoption of a child whose mother was Roma was at stake. The mother opposed the measure claiming, among other reasons, that “reduced hygiene habits of Roma community” and living conditions in the Roma camp could not justify the measure and asked for the child to remain institutionalized. The Court valued, not the practices, but the consequences in the life of the child, emphasized the rights of children and noticed that the child should not be

discriminated against because of her ethnicity. Also interesting, namely because of the arguments of the Court concerning cultural diversity issues, is Case 926/07-2, 12/06/2007, Court of Appeal of Guimarães, concerning also a minor of Roma ethnicity; for an analysis of the latter, see Jerónimo (2016).

34. Protected at national, see articles 43, 73 and 74 CPR, and at international level, see for example *UN Convention on the rights of the Child* (1989).

35. See Mendes, Magano, and Candeias (2014).

36. See Case nr. 783/11.2TBBRR.L1-1, 20/03/2012, Court of Appeal of Lisbon. At stake was the refusal of Roma parents to send their daughter, of school age, to school, on cultural grounds.

37. See Case nr. 783/11.2TBBRR.L1-1, cit.

38. This seems to have been the case in Proc. 268/07.1TBSRT.C2, 14/05/2013, Court of Appeal of Coimbra, concerning a dissolution of marriage by divorce.

39. See Proc. 2366/09.8TMLS-B.L1-2, 21/06/2012, Court of Appeal of Lisbon, concerning the decision to baptize a child according to the Catholic faith.

40. See case nr. 1394/06.OBEPRT, 08/02/2007, North Central Administrative Court.

41. See Case nr. 058/12, 06/12/2012, Administrative Supreme Court and Decision nr. 545/2014 of the Constitutional Court (concrete review of constitutionality), concerning the working schedule of a magistrate in the Public Prosecution Service.

42. Case nr. 449/10.0TTLSB.L1-4, 15/12/2011, Court of Appeal of Lisbon. The Court did not consider unlawful a dismissal of an employee on grounds of absence from work to observe the Sabbath, since she did not have a flexible working schedule as determined by article 14 Law of Religious Freedom.

43. Article 14 Law of Religious Freedom, mentioned above.

44. For intervention areas, see the Statute of the Public Prosecutor Services at <http://en.ministeriopublico.pt/>

45. In Case 290/09.3TMFAR.E1, 01/03/2012, Court of Appeal of Évora, and in Case 6368/13.1TBALM.L1-2, 05/11/2015, Court of Appeal of Lisbon, mentioned above, both concerning referrals for the adoption of children, the social services (“Comissão de Proteção de Crianças e Jovens”) reports describe the way of life and cultural habits of the families.

46. The interpreter can also play the role of a cultural broker (see also Dias, 2016, pp. 104–105). The right to justice and to a fair trial can be seriously impaired by the lack of knowledge of the language or by the lack of language proficiency, not only but also in the criminal field (Silva, 2014).

47. In the Portuguese legal system, the general rule is the free evaluation of the proofs in criminal and civil procedures, with limits (article 127 Penal Code and articles 389, 391 and 396 of the Civil Code).

48. It is possible to designate technical consultants to assist the expert evidence (article 155).

49. Specific expert proof is established in the Code, such as medical and forensic expertise (article 159) and expertise on the personality of the defendant, namely aimed at establishing the level of guilt and the measure of the penalty (article 160). On forensic expertise see also Law 45/2005, 19/08/2004 (*Regime jurídico das perícias medico-legais e forenses*). Retrieved from <http://www.pgdlisboa.pt/>

50. Decree Law 47344/66, 25/11/1966, with further amendments. Retrieved from <http://www.pgdlisboa.pt/>

51. Articles 50, 480, 492, 426 e 436, 601 and 604 of the Code of Civil Procedure. It is not a mode of proof.

52. In portuguese: Territórios “Educativos de Intervenção Prioritária”.

53. Free translation by the authors.

54. Namely, excluding decisions from first instance courts.

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CULTURAL EXPERTISE IN ASYLUM GRANTING PROCEDURE IN GREECE: EVALUATING THE EXPERIENCES AND THE PROSPECTS

Helen Rethimiotaki

ABSTRACT

The paper first, indicates the references made by Greek legal order to different kind of cultural experts. Adopting a broader sociolegal definition of cultural expertise, it also refers to “cultural mediator,” a notion which has been introduced by the European Fund for the Integration of third-country nationals which launched the first educational programs for their training in Greece. The so-called cultural mediators should facilitate communication between third-country nationals and Greek Administration, the respect of their rights and thus in long term their integration. Secondly, the chapter exposes the experiences made by Asylum Service employees and lawyers of NGOs involved in the granting or refusing asylum proceedings. It will try to show how cultural mediation for asylum seekers works in action by exploring how do lawyers and officers involved in the process of asylum granting describe it. They also give their opinion about the training prerequisites for someone to work as a mediator and they refer to some common topics why cultural experts are mostly needed. Thirdly, the chapter presents the joint arguments of Greek anthropological theory and the political theory about EU regarding the importance of the effort to understand, to respect, and to integrate the culturally and politically different refugees. Cultural expertise may help Greek State and Society in learning how to respect the principle of

equality and difference. At the same time, it may serve as a venue to solidify EU as a multiethnic political community and a cosmopolitan legal order.

Keywords: Cultural expertise; asylum granting procedure; refugees crisis; EU; cosmopolitanism; post-national citizenship

INTRODUCTION

The Greek State had difficulties in applying the international and European framework for asylum and immigration especially after the Dublin II Regulation adopted in 2003. Until the year 2010, the Greek asylum process had been red flag by the International advocacy community. Greece has been accused for legal, bureaucratic, and moral failure to attain simultaneously the two European Union's prerogatives that is security and humanitarianism, regarding the safeguarding of its external borders.¹ According to the emblematic decision of ECHR "M.S.S. v Belgium and Greece" (January 21, 2011), Greece had failed to guarantee access to asylum process and to an effective remedy before a national authority, having instead exposed the asylum seekers to cruel and degrading treatment. Since then, successive legislative and regulatory reforms have occurred as EU has progressively developed a powerful mechanism of migration management at its external borders applying the Dublin III Regulation in 2013 (Feldman, 2012). Within this framework, the newly created Greek Asylum Service employees and lawyers, working for NGOs offering legal aid to migrants and asylum seekers, have incorporated cultural expertise in their everyday practice in their effort to recognize the refugees and manage the situation.

In 2015, the migration policy system of EU was pushed to its limits because of the massive influx of displaced from the Syrian war. Despite its severe economic and social crisis, Greece had to deal with thousands of refugees and migrants coming from Asia and Africa. The unprecedented migration flow on the southern borders of EU and the growing number of persons drowning in their attempt to cross the Mediterranean irregular, led to the new European Agenda on Migration in May 2015 and to the adoption of provisional measures (according to the article 78(3) TEEU) in September 2015 (Baxevanis, 2016). A relocation mechanism was created in order to relieve the significant pressure exerted on Italy and Greece. In addition, financial and technical support was planned to be offered to them in order to facilitate them to adapt adequately their asylum system structures so as to cope with this extraordinary situation. Finally, in March 2016, the joint statement of EU–Turkey was signed as an effective deterrent to manage the crisis and stop the flow of irregular migration via Turkey to Europe. From the abovementioned legal framework, the obligations of Greece to organize a migrants' qualification system and their institutional reception have become more intensified and complexed. The situation may be aggravated because the relocation mechanism has not been accepted by some member states while the refugees' residence condition in Greece remains

problematic from a humanitarian perspective (Report of European Parliament, 2017).

Cultural expertise can contribute to ameliorate the capacity of Greece to cope with this situation. The chapter will first define the term “cultural expertise” from a sociolegal point of view. Then it will expose the references made by the Greek legal order to similar procedures. It will also present EU’s regulative efforts to promote the education and the professionalization of cultural experts first as a medium to enhance the Greek State’s capacity to integrate migrants and then as mediators in asylum granting processes. Secondly, it will show how cultural expertise has been established in Greek practice through some selective interviews with lawyers working for Asylum Services responsible for granting and withdrawing asylum and NGO’s offering legal aid to refugees asking for asylum granting. Thirdly, it will discuss the theoretical arguments which justify the need for further developing cultural expertise from the Greek anthropological theory point of view combined with the political theory regarding EU’s democratic legitimation as a legal order without a corresponding political one, as an imaginative multicultural political community.

CULTURAL EXPERTISE ACCORDING TO GREEK LAW AND ITS INFUSION WITHIN ASYLUM GRANTING PROCEEDINGS

In general, “cultural expertise” is the special knowledge provided within the framework of legal proceedings in front of a decision-making authority or a judge in charge of evaluating the legality and often the morality of migrants’ actions and the genuineness of their accounts (Holden, 2012, pp. 1–2). Cultural experts use culture in order to describe and give sense to relevant facts in connection with the particular cultural background of a claimant. Thus, they either help to resolve a dispute or to activate a legal status as they may provide legal arguments which are likely to influence the legal outcome of the case in question to the decision-making authority (Holden, 2012, pp. 1–2). Such a broad definition of cultural expertise may encompass all those situations in which cultural knowledge provided by anthropology or sociology of law is used to support all kinds of legal procedures including status qualification and activation of prerogatives related to this status. Adopting this sociolegal definition facilitates the comparative research and the conceptualizing effort by assessing the impact of “cultural expertise” on different legal orders. Under this sociolegal perspective, one may define as “cultural expert” someone who mediates in the framework of the asylum granting process by using culture that is language and knowledge about a civilization in order to support the decision of an interviewer or a judge to qualify an asylum seeker’s credibility so as to grant or deny the status of refugee to this person. In the case of asylum granting process the friction point is the legal recognition of the refugee status versus the one of “economic” migrant or of suspect for terrorism. Firstly the administrative authority and secondly the judge must assure the respect of sovereignty of the State and the rights conferred

to refugees by international and European law. In order to do so, the judge must evaluate the credibility of the applicant who, at most cases, has no documents or other proof to verify his or her pretensions. At this moment, under the threat of terrorism and the geopolitical tensions deriving from power asymmetry, those who cross the borders without the requisite documents are *a priori* suspected! They are considered as irregular migrants in the first place, they are stigmatized as illegal trespassers and they are given a biometric identity. In the second phase, some of them will apply for asylum and the qualification of refugee will be acknowledged selectively to a group of them (Trumbeta, 2012). Credibility determination of the applicants and its articulation in a legal defensible basis for accepting or denying to grant asylum is not an easy task. Given the applicant's inability to provide written documents in most cases, administrators and judges evaluate their credibility by using the tools of plausibility, consistency, and demeanor (Macklin, 1998). As these tools are culturally contingent, the use of cultural expertise may promote intercultural awareness and support both administrators and judges to form principles of intercultural communication. The ultimate target is to rationalize the decision-making processes and to respect the principle of Rule of Law.

From a strictly legal point of view however, one should draw a line between legal and anthropological or sociological aspects of cultural expertise. The Greek legal order makes explicit reference to an expertise related to foreign language or law in two cases² in order to support the Greek judge to cope with linguistic or legal diversity. First, it refers to the Archetype of the cultural expert who is the language interpreter. The Greek legal order has long ago recognized the fundamental right of a person to use his own language in order to express himself by using an *interpreter* in front of the Court or when issuing a judicial act. According to the article 252 of the Code of Civil Procedure, the judge appoints an interpreter if a witness, an expert, one of the parties in trial or their legal representatives, is unaware of the Greek language. The same is valid in case that the abovementioned persons are able to use the Greek language to a limited extend. The person must go under oath that he will fulfill the task faithfully and accurately. He may be exempted from his duties for the same reasons that an expert may be exempted too. Moreover, according to the article 454 of Code of Civil Procedure, if a document is written in a foreign language, it shall be submitted to the Court together with its official translation certified by the Greek Ministry of Foreign Affairs. In any case, the court may order an expert to translate a submitted document from a foreign language into the Greek one. Secondly, according to the article 337 of the Greek Civil Procedure Code entitled "Proof of foreign Law" (as well as the article 144§4 of the Code of Administrative Procedure) when a case presents elements of alienity, if for example one of the parties involved is an alien, the judge must take into account *ex officio* and without proof the law in force or the customary law in the foreign country connected with the case in question (Tsouca, 2017, pp. 223 & 225). However, although the application of the foreign law is mandatory, Greek judges are not obliged to know the content of it as they do with the national one. In case they do not know or they are not convinced by the evidence

brought by the litigants, judges may order an expert to bring evidence for the relative provisions or use any other means appropriate in order to acquire knowledge of the foreign law.³ In the aforementioned cases of expertise relative to the language interpretation or to the ascertainment of foreign law, the role of the expert in another linguistic or legal culture is strictly specified and limited. The judge will freely appreciate their proof value.

Recently a new kind of cultural expertise in a broader, sociolegal definition has been “infused” to Greek administrative practice by E.U’s regulative effort to manage migration in two parallel (yet distinct) phases of the migrants’ contact with the national orders. The first stage is the initial migrants’ entry in the field through the migrants’ qualification procedure. The second one is the migrants’ social integration by recognition or deprivation of rights deriving from the specific status granted to them. In the Greek case the infusion started from the second phase that is the migrants’ integration. The notion of “cultural mediator” was introduced into the Greek administrative practice after the year 2007 when the European Fund for the Integration of Third-Country Nationals launched the first educational programs aiming at the training of “cultural mediators” who were something more than mere interpreters. At this point creating cultural mediators was considered to be of high priority because Greece was ranked very low as far as the degree of support and care offered by authorities to migrants who requested protection or they were set under protection is concerned.⁴ It is interesting to mention that this was the first occasion when the very notion of mediator appeared in the Greek regulative order. It is quite obvious that the use of the term in this context differs from its use as *terminus technicus* in the context of mediation⁵ defined as a resolution conflict process by the parties through the intervention of an authorized third person. The term is also used in a different context from the one studied long ago from a sociolegal point of view (Felstiner, Abel, & Sarat, 1980). Its meaning remains up to now fuzzy as it is used alternatively to the terms of “interpreter” or “translator” although, in reality, it is used in connection with migrants as an equivalent for “cultural expert.” According to an eloquent critique the term “mediation” when referring to communication circumstances where a linguist is aiming at achieving his own communication goal is not about creating a “bridge” between prototype and translated word, nor does it concern the creation of a “bridge” between sociocultural heterogeneities. However, it is just this last skill which is absolutely necessary to achieve communicative goals in the context of refugees and migrants’ communication with state authorities or social institutions⁶! In addition, “cultural expertise” as a professional activity, may require the development and combination of skills (such as language training, interpersonal communication and even conflicts’ resolution) but it is also combined with expert knowledge mostly in anthropology, sociology, law, and religion. Therefore, the question that arises is what is really meant in this case.

In order to comprehend what “cultural mediators” stands for, one may consider the broader political aim to be promoted by the abovementioned programs. European societies, although so much different in many kinds, share the common experience that “linguistic diversity permeates every thread of the

European Union fabric” (Angelelli, 2015). However, this diversity has been proven to be hard to accept and to manage both by European States and their citizens. Although they have been living with resident masses of “noncitizens” (Agamben, 1995), that is aliens or “denizens” who neither can nor want to be naturalized or repatriated, they are still in search of ways to cope with it. The risk of social conflicts and exclusion continuously arise. Administrators, health and education professionals and NGO members working with migrants and refugees need to be supported in their effort to manage the daily problems arising from cultural differences. Promoting the education and professionalization of cultural experts is among the solutions to this problem because it may: (1) diffuse professional intercultural skills which generate attitudes and behavior-oriented understanding of the particularities, needs and problems of migrants, (2) improve the quality of services, (3) reduce discrimination, (4) enhance professional civil servants’ profiles through the acquisition of specific skills and networking and (5) ensure the protection of human rights of the migrant population in their transactions with the local authorities. Cultural experts may contribute to the strengthening of social cohesion through the effective social and economic integration of refugees and migrants. They work in various sectors of the society: schools, where the number of foreign pupils registered increases, hospitals and health structures where medical and paramedical staff should provide assistance and health care to migrants, even shelter to the illegal ones who have to face severe difficulties due to poverty, illiteracy and fear.

Undoubtedly, the abovementioned programs aim primarily at the facilitation of the communication between the third-country nationals and the Greek institutions as well as to assure the establishment of respect of their rights including the linguistic ones (Hertog, 2002) and thus in long term, the achievement of their integration. Cultural mediation has been considered as an important support and information tool for individuals and groups in protection regime. Their social inclusion was said to be particularly low as well as their protection and care indicators, suffering from discrimination due to the accumulation of ethnic, religious and gender stereotypes. The programs were organized by private vocational centers under the supervision of the Department of Social Integration of the General Secretariat of Migrations’ Policy of the Ministry of Interior Affairs. They aim at suppling the police, the health care services and local governments with mediators. It has been quite challenging to organize their educational and training program because it is difficult to predict the educational background of the trainees, choose the trainers and decide what kind of knowledge and skills development would be really useful (Apostolou, 2015, p. 123).⁷ Today there exists a national register of cultural mediators and a platform which provides official information to migrants and refugees, making cultural mediation services accessible to the general public and at the same time working as a network for mediators themselves.⁸

Secondly, there has been a growing effort to systematically involve cultural mediation in the asylum seeking procedure. This need was first faced when Greek Asylum Service was created by L.3907/2011 (transposing Directive 2008/115/EC) for the establishment of an Asylum Service and a First Reception

Service. Until then the Police had been conducting the interviews in a strict bureaucratic spirit with very long delays also due to the bulk number of petitioners as the relevant petition papers certified automatically the right to legally reside in the country. The new European Agenda on Migration in May 2015 set among its five priorities the support provision to member states under pressure in order to obtain adequate reception capacity including the use of cultural expertise in handling the situation.⁹ According to the article 14 of L.4375/2016 (implementing Directive 2013/32/EU recently reforming the procedures for granting or withdrawing asylum) the authorities will ensure that third-country nationals entering the country without legal prerequisites are informed in a language they understand regarding the grounds and duration of their detention in the centers, their rights and the ways of disputing the detention order and their right to free legal aid (Marouda/Saranti, 2016; Naskou-Perraki, 2015; Papasiopi-Passia, 2015, p. 302; Saxpekidou, 2015). Furthermore, according to the decision 12205 Gov.Gaz B2864/09.09.2016 of the Ministry of Economy, applicants for international protection will be granted free legal assistance for the administrative procedure in the first and second degree (articles 61 and 62 of L.4375/2016) before the Committee (paragraph 27 of Article 80 of L. 4375/2016). The applicants will be informed as soon as possible and in a language they understand by the competent Regional Office, for the appointment of an Asylum lawyer who will provide them with *pro bono* legal assistance. The NGO Greek Council for Refugees (Passa, 2008), for instance, possesses a legal network of trained in cultural mediation interpreters. On top of that according to the article 52.6 of L.4375/2016, applicants for international protection are provided with free interpretation services during sessions with their lawyers with the care of the Asylum Office if communication between the lawyer and the applicant cannot be ensured otherwise.¹⁰

Whether this infusion is a success remains to be seen. On the one hand, during the last decade there has been a considerable change in the form of the regulatory power of the Greek State collaborating with NGOs whose members are sensitive to cultural differences and they often use cultural experts. The previous asylum granting regime was arbitrary albeit more personalized whereas the new one is depersonalized and more accountable, performing as a bureaucracy respecting rules.¹¹ In this context the use of cultural experts may contribute to the rationalization of the Greek administrative activity. On the other hand, according to the study of European Parliament's Committee on Civil Liberties, Justice and Home Affairs regarding hotspots (Directorate General for internal policies policy department, 2016; European Parliament, 2016), Greece must still make considerable effort to identify, register and properly process the sorting of refugees seeking asylum to be relocated and migrants to be returned. According to European Commission's Report (European Commission, 2016) in 2016 the Greek authorities should also define their needs in terms of cultural mediators/interpreters in order to obtain "adequate reception capacity". A pool of experts of that kind should be put into place in order to be able to provide interpretation services at short notice.

On the other hand, further development of cultural experts must be set as a target because the importance of cultural expertise is growing due to many interacting reasons. First, the asylum seekers' numbers cannot be stabilized and may augment anytime due to problems related to non-application of the relocation mechanism and the difficulties to activate the EU–Turkey statement. Secondly, from the very beginning some EU member States had not accepted the refugees' relocation mechanism (based on article 80 TFEU) which was adapted by the Commission with a view to implement the principle of solidarity and fair share of responsibility between member States. They had disputed the legality of the temporary derogation from the rule set by Dublin III Regulation, which sets the first entrance country as responsible for the examination of application for international protection. Despite the rejection of their legal argumentation by ECJ judgement of 6/9.2017 (C-643/15 and 647/15) these countries still do not cooperate.¹² Thirdly, the recognition of Turkey as a safe country is not thoroughly legally defensible according to Greek Committees competent for appeal in second degree despite the fact that it was characterized as such from EASO experts at first degree (Baxevanis, 2017, p. 230; Konstantinou, 2016; Kouvaras, 2016). Last but not least, although Greece has made considerable progress, must still fulfill its duties deriving from the EU–Turkey statement. According to the last report of European Commission (European Commission, 2017), Greece must expedite the processing of asylum applications and significantly increase the number of decisions per Appeal Committee, prioritizing the appeals lodged on the islands and stepping up the pace of returns to Turkey. It must ensure the reception and pre-removal capacity required on all islands and the timely, efficient and effective use of the EU funding available. All agencies involved must improve the migration and asylum management capacity of the Greek administration and increase the return to Turkey of those individuals who are not entitled to remain in Greece, in full compliance with EU and international rules. For all these reasons it seems that although cultural expertise is grounded in Greece, it still needs a considerable effort to grow. From a point of view of legal anthropology a field study could elucidate what is needed and in which way this can be fulfilled.

CULTURAL MEDIATION FOR ASYLUM SEEKERS IN ACTION: JOB DESCRIPTION AND TRAINING PREREQUISITES¹³

According to the head of the legal service of the NGO “Greek Council for Refugees” asylum seekers are “just what you see and what you hear” (Koulocheris, 2008). An effort must be made to understand them before deciding to provide asylum or not! People coming from so much different cultures must communicate. There is a need but also a great difficulty of overcoming obstacles to intercultural communication in the process of demanding and providing asylum to refugees.

Firstly, the law provides that the refugees will be informed about the procedure and their rights in their own language. This information is not always easy to provide. The simple translation of the “wooden” language of law is not sufficient so as the refugees to comprehend their rights. Refugees have to struggle to understand the broader frame of reference beyond the strict framework of the rules at stake. But one must start from point zero. Are the applicants familiar with the use of the written expression of language? If they come from a culture based on spoken language and myth, what kind of references do they use in order to receive information? To what extent are they able to produce written language like citizens of western countries who have received years of relevant training to achieve it? Moreover, to what degree do they have the experience of a functioning democratic system and what meaning do they give to a legally recognized right? In which way do they perceive the bipolar scheme state/individual?

Secondly, the asylum granting process is entirely based on a reliability check of the person asking for asylum. This is established by using a set of closed and open questions (Amnesty International United Nations for Refugees, 1998). In order for the person who takes the interview to assess the reliability of the applicant he must be able to understand what has happened to the applicant. The interviewer must use an interpreter. The interpreter is not a living automat translating mechanically the words and thus transmitting the information to the interviewer. The two of them have to cooperate within a common communicative framework. The asylum granting procedure requires a multidisciplinary, professional approach, that is, a professional team involving the lawyer-interviewer, the interpreter, the psychologist or psychiatrist or any other kind of expert needed within the specific context of a case. All of them must be coordinated somehow although the final decision must be taken by the interviewer. The Cultural mediator is somebody who is able to fill the gap of communication without exceeding the role assigned to the interpreter by law. The cultural mediator must be trained and certified in order to be able to mediate the relevant procedures with an open mind and an open heart. The mediator should not take any initiative, nor arbitrarily interpret more than the words of the applicant or omit things arbitrarily considered unimportant. However, he or she must actively help the two parties to communicate in order to understand each other.

Therefore, the education of the cultural mediator should aim at cultivating skills beyond the mere language translation to be made by a long lasting resident in Greece who is able to manage both languages relatively well. The mediator should be willing but also able to listen and help both the applicant and the decision-maker. The training should enable the mediating person to be alert and to try to elicit those facts which may or may not establish the right of an applicant for asylum. It must include basic psychology knowledge and cultural interpretation skills to raise the mediator’s awareness of diversity. The mediator should also be aware of the rights of refugees in order to be able to grasp the importance of information that must be transmitted to the decision-maker. This will support the interviewer’s effort to search for facts which are crucial according to the relevant legal provisions. Finally, the mediator’s training must include

field work and 'reflective' learning through his or her own experience achieved via information and involvement in all stages of the asylum granting procedure. Eventually this may create a kind of information transmitting deontology, a set of good practices which tend to optimize the communication between the parties.

Basically the education of cultural experts must include knowledge of psychology, social anthropology and legal pluralism. As far as *psychology* is concerned it is necessary for them to know how human memory works. Refugees should not become or be treated as victims for a second time! While their experience should be understood through empathy, they should mostly be encouraged by emphasizing their strength to withstand the pains and survive their ordeals (Papadopoulos, 2010). Sometimes this comes easily but other times it needs a special guidance. For example, it is just human to perceive the anguish of a mother or father asking for their family reunification possibilities. But sometimes refugees may seem unwilling to talk, indifferent or provocative. However, anyone who has suffered a psychic trauma (Sarat, Davidovitch, & Alberstein, 2008) may not remember the experience or may be extremely aggressive against anybody investigating it! Some may feel uncomfortable to speak about them being victims of rape or torture. Others may be left speechless because of sadness due to the loss of their family and their loved ones while there are always those who may avoid to speak or even look the interviewer in the eyes simply because according to their cultural code, looking in the eyes may be regarded as a sign of disrespect. For example, Afghans and Iranians are extremely embarrassed when they have been tortured or raped. They feel ashamed because of having lost the control of their body and they have been degraded from their gender status¹⁴. This vulnerability image conflicts with dominant forms of masculinity but later on this may be rejected when their honesty is challenged. If, finally, their claim is refused there is an implicit conclusion that they are deceptive, opportunistic or even criminal (Griffiths, 2015).

As far as *cultural history and social anthropology* are concerned, the mediator must be sensible to the main differences regarding the communication codes of two countries. Interpreting in a meaningful sense is a cultural process of decoding and transcoding. Things which are considered strange according to European standards may be considered normal in the host countries. Culture is considered as a network of meanings carried by symbols within ideology, religion and Rituals (Geertz, 1973). For example, in which way nods and glances are signified? The Persian civilization contains a code (TAROF) by sex, age and social status forming intertwined hierarchies. In Eastern Asian countries people must control their expressions. In some places eye contact should be avoided. Sometimes the applicants are unable to answer simple questions such as how old their mother is! This does not prove that they are unreliable. According their cultural code, it is insulting to ask such questions about their parents because it is considered as a sign of disrespect. Refugees from Africa talk about miracles or black magic. Sometimes they are just hyperbolic because according to their cultural conception this is acceptable even when one is interviewed by a policeman. Especially regarding gender and sexual orientation, attention is needed to

properly decode the refugee's narrative in order to detect whether his or her right of self-determination has been violated. The person may be ashamed to reveal something that is considered immoral but not illegal or he might just have a completely different way to categorize sexual practices and identities. For example, one may deny him or her being homosexual but he or she might answer affirmatively to the question "do you have sex only with persons of the same sex like yours?". Homosexuality is not perceived as an identity. Transexual persons also have difficulties to indicate their sex since they officially dispose of male names but they identify themselves as women. Things get more complicated as there is no third box to indicate the third sexual category in the petition forms they have to fill in and the interviewer begins to question them whether they had already proceeded to medical operations.

Finally, as far as *knowledge about differences between different legal systems* is concerned, it seems that in many cases the mediator should learn to be aware of phenomena of legal pluralism. Legal pluralism means the simultaneous effect of more legal rules, institutions and procedures in a country even though officially there exists a central political institution producing one prevailing legal order (Tamanha, 2000) The alternative legal order may either be recognized by the state or it may simply coexist with it informally (Chelmiss, 2005). The State tolerates the coexistence either because it abstains from mingling with specific fields of social relationships or because it remains unable to fully develop its functions. The alternative rules and institutions function as if they were fully binding for the citizens of these states. For example, an African asylum seeker who mentioned to be married described the marriage as a process of informal, customary marriage which took place in his home. After the relevant investigation, it was found that in this specific country, state's law recognizes this kind of marriage. Or, an asylum seeker from Sudan appeared with four different names. After the relevant investigation, it was found that one can legitimately use different combinations of his or her four names. Nobody has informed him about the completely different principles of European naming system. Last but not least, in many cases, refugees refer to judicial authorities different from the official ones. They may be prosecuted in the name of a judgement of the Council of elders. The force of the alternative legal order should not be undermined leading to the conclusion that the refugee's life is not in danger. In conclusion, what is needed is to try to observe the differences in order to discover pragmatically legal diversity and to set the law under an intercultural perspective (Eberhard, 2010). Such being the case it makes part of the challenge that EU and its national states members' societies have to manage their growing cultural diversity.

THE SOCIOPOLITICAL MEANING OF RESPECTING THE CULTURALLY DIFFERENT REFUGEES AND MIGRANTS

Respecting the culturally different refugees and migrants solidifies both the Greek society cohesion after its crisis and the EU as a multiethnic political community and cosmopolitan legal order. As far as the Greek state and society are

concerned according to the Greek anthropological theory (Papataxiarchis, Ef., 2015², pp. 39–42), there are many arguments which justify the need for further developing cultural expertise within Greece. The reason is that there is a growing tension between a deeply rooted cultural value, the ethical duty of hospitality, and xenophobic reactions. The right to asylum has been considered as a sacred duty since the times of the tragedian Aeschylus who wrote his famous ancient theater play “*The Suppliants*.” At the beginning of the twenty-first century, the Greek society is showing at the same time a growing difficulty to tolerate ethnic and religious differences and a growing inventing capacity to cope with the new challenges (Dalakoglou & Agelopoulos, 2018). The extreme right party called “Golden Dawn” has obtained a considerable appeal, despite its acts of criminal violence against foreigners and “different” Greeks. One should always bear in mind that in Greece Democracy and the rule of law were reestablished after a seven-year dictatorship and finally embedded in late twentieth century. The Greek State has been historically shaped in such a way that public administration’ weakness persists until today (Ioannidis & Koutnazis, 2017; Rethimiotaki, 2013). The civil society has remained the less developed regulatory pole compared to the state and the market (Mouzelis & Pagoulatos, 2005). Europeanization as a political process and legal vision has promoted rule of law and respect of rights stemming from personhood. However, the respect of the principle of equality between “similar” and “different” has not been fully embedded in the Greek society. Forty years after the fall of dictatorship, citizenship, that common component of civil, political, social, and cultural rights has not developed its full potential. The degree of awareness of discrimination even between Greek citizens is low also by the State’s institutions (Rethimiotaki, 2013). Until the late 1990s, the Greek traditional framework of hospitality functioned as a mediating cultural value. The reception of refugees of the same religion and ethnicity from Minor Asia in 1922 became a reference experience legitimating an ethical duty to receive and sustain the refugees nowadays. But some less privileged parts of population have had xenophobic reactions. Suddenly, it was realized that the Greek society cannot absorb all differences. Many of them will remain “undigested” and therefore the Greek citizens will have to accept and learn to live with them.

However, the Greek problem to deal with refugees is also a European one. EU has difficulties to respect their rights deriving not only from international law but also from the European one. According to the article 22 of EU Charter of Fundamental Rights, the Union shall respect cultural, religious, and linguistic diversity. Also, according to the article 167 TFEU, cultural aspects should be taken into account by the Union in its action under the provisions of the Treaties¹⁵. If this obligation is limited only to the cultures of EU Member States then democracy gets vulnerable for all. The respect of European citizen’s rights to diversity is connected with the one of refugees in order to substitute their missing solidarity in their struggle to be free. Bearing conscience of the democratic value of diversity means acknowledging this value to refugees from the moment their political community refuses to do so (Papageorgiou, 2017, p. 83). The Syrian war though has shown that the European common policy for

migration and asylum and the simultaneous effort to regulate migration flow and to respect international and European law have failed (Kapartziani & Papathanasiou, 2016). Once again, it seems that when refugees come in a massive way despite the solemn evocations of the inalienable rights of man, European States cannot adequately deal with it so that police and humanitarian organizations are left alone to work it out in the field (Agamben, 1995). However, EU has legitimated its function as a field of political decisions by referring to the rule of law. EU has claimed to be a supra national legal order without a corresponding political entity. European courts have shown how human rights can be used by citizens to recognize their rights versus their own national states thus showing their inextricable connection to personhood and not only to citizenship. Also, EU has claimed to politically constitute itself by a European constitution and by a vision of multiethnic imagined community. European citizenship and common European space coexist with the national ones infiltrating each other in a patchy manner. The same is valid for EU's legal order in its relation to the national ones (Rethimiotaki, 2012, pp. 239–242). The refugee crisis cannot end by proving that the status of personhood beyond citizenship is inconceivable even for EU which is progressively becoming a transnational political formation.

From the point of view of political theory, accepting the culturally different third-country nationals is connected to visions of enhancement EU's political and cultural integration. The one is cosmopolitanism and the other is post-national citizenship. Both propose a new logic of relationship between society, State and transnational networks of political power. The concept of cosmopolitanism in its most general meaning indicates an approach to dealing with otherness in society – and among societies. According to it, “differences should neither be arranged hierarchically nor should they be replaced by common norms, values, and standards; rather, they should be accepted as such even having a positive value placed on them” (Beck & Grande, 2007). Such a principle tends to privilege diversity against harmonization as far as European integration is concerned. It tends to recognize and preserve the otherness inside and between European societies. Furthermore, the otherness of migrants coming from third countries instead of being considered as a burden may be considered as an asset for enhancing social solidarity, under the philosophical perspective of multiculturalism between individuals and groups (Kymlicka, 2015). This may be the only way to stabilize welfare states in the present context of large scale immigration and persistent cultural diversity (Bauböck & Scholten, 2016). Some even think that if so far the consolidation of EU has happened from above, perhaps the contemporary management of refugees is a manifestation of the same logic from below (Carvalho, 2007). Those citizens who have spontaneously created collectivities at the local level, NGO, and associations grouping together citizens, migrants, and refugees in order to deal with the problem seem to perform a kind of post-national political participation. Their commitment to public action and the means they mobilize is a form of post-national democratic participation aiming at the empowerment of refugees as individuals regardless their nationality. Within European, national, and local government supportive

framework, their political and cultural otherness as third-country nationals has proven to be more of a chance and less of a burden. From this point of view, it is the right timing for cultural expertise to be embedded both in national and in European levels.

NOTES

1. The problem was sensed to be the disorganized, corrupted, and arcane bureaucracy and the violent police (Cabot, 2014, p. 32).

2. The Mufti tribunals which Greek legal order recognizes officially as a special Islamic jurisdiction for the Muslim Greek citizens of Thrace, according to international treaties cannot be considered as a kind of cultural expert because the Mufti operates more as an obstacle than as a bridge of communication between the two cultures. It is supposed to be a case of legal pluralism respecting the religious autonomy of the Muslim minority. However, the principle of “relevance”, that is of mutual recognition which usually characterizes the relations of different legal orders coexisting within the same national territory, does not apply. According to a recent empirical analysis, the jurisdiction operates as discriminatory and partly irregular legal context which is implemented through unregulated and informal religious adjudication that entails the deprivation of principal rights for the Muslim women of the region, being incongruent with Constitution (see Tsavouoglou, 2017).

3. In most cases courts request the litigants to assist them by bringing a written opinion of the Hellenic Institute of International and Foreign law officially recognized for its expertise in Comparative Law (Tsouca, 2017, pp. 223 & 225).

4. In 2009 Greece was at the 27th position among 38 countries according to the survey “*Migrant Integration Policy Index – MIPEX*” running simultaneously in all EU countries. Retrieved from <http://www.mipex.eu/greece>

5. Mediation as an alternative mode of conflict resolution in civil and commercial matters has been regulated by L.3898/2010 (implementing Directive 2008/52/EU).

6. The concept of mediation is shifted from the semantic field that it occupies according to basic assumptions of translational theories: a person speaks an equivalent text to the original in order to achieve a corresponding communicative goal within the factual field of another language. “Mediation” in language context means that “language” is transformed into a tool of achievement of users’ personal communication purpose who chooses the meaning or the information he will give in the foreign language not in order just to inform his or her interlocutor but to encourage, to prevent, to advise, to impress, to threaten, to flatter e.t.c. (Batsalia & Sella, 2016).

7. The Hellenic Open University has been the first public educational institution of third degree which was engaged in the field through the participation in the program SONETOR (2012–2014) (Theodosiou & Aspioti, 2014).

8. <http://www.intermediation.gr>. The record operating via an Electronic Platform has been created within a networking project funded by the Ministry of Interior Affairs and the European Integration Fund.

9. The other four being the creation of functioning “hotspots” at the frontline, the relocation of those who are recognized in need of protection the return of those who have no right to remain and the enhancement of border management (European Commission, 2015).

10. There is currently a NGO named “METAdrasi” which provides the Asylum Service with interpreters. The organization has been assigned the project through a public tender providing interpreters also trained in cultural mediation.

11. According a study of documentary practices in Greece before the legal reform beginning at 2010, at that time none was expelled but also none was recognized as refugee! Although many migrants had pink cards as asylum seekers, they describe their migration in terms of work, money, poverty. In reality they did not wanted asylum but they

wanted the pink card which they understand as a temporary residence's permit. The meaning of the pink card has been shifted, (Cabot, 2014, pp. 54–55).

12. On June 2017 European Commission after having launched infringement procedures against Czech Republic, Hungary and Poland, referred to the ECJ for non-compliance with their legal obligations regarding relocation.

13. This part is mostly based on interviews with lawyers working for the NGO Greek Council for Refugees (<http://www.gcr.gr/index.php/en/>) and legal consultants working for the governmental Asylum Service of the General Direction of Migration's Politics in the Ministry of Interior Affairs, (<http://www.asylo.gov.gr>)

14. Individuals understand and negotiate their reconstruction from vulnerable would-be refugee to undeserving “bogus” asylum seeker. Gender is thus presented as an unspoken but critical dimension of this immigration category (Griffiths, 2015).

15. European Parliament shall adopt incentive measures and the Council shall adopt recommendations. According the same article “the Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.” The Council should also preserve this diversity in the field of audiovisual and cultural services and according the article 207 (4) (a) TFEU.

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COURT CASES, CULTURAL EXPERTISE, AND “FEMALE GENITAL MUTILATION” IN EUROPE

Ruth M. Mestre i Mestre and Sara Johnsdotter

ABSTRACT

This chapter discusses adjudication, expertise, and cultural difference as it appears in criminal court cases concerning female genital cutting (FGM) in the EU, as reported in a 2015 comparative overview. It begins with the distinction between typical and atypical FGM cases; a distinction that connects court cases to the cultural realities of the practicing communities, suggesting that the lack of cultural knowledge can cause unnecessary suffering to families and/or individuals who wrongly undergo prosecution in alleged FGM cases. A contrario, the intervention of experts in FGM court cases could be a positive approach to assessing the legitimacy of public intervention in certain cases.

Keywords: FGM/C; error iuris; cultural defense; typical/atypical FGM cases; cultural expertise; adjudication

INTRODUCTION¹

Practices of female circumcision, also referred to as “female genital cutting” (FGC) or “female genital mutilation” (FGM),² are prevalent primarily in some 30 African countries. With migration, the issue is increasingly relevant also for European societies (Johnsdotter & Essén, 2016; Johnsdotter & Mestre i Mestre, 2017). The European Commission estimates that at least 500,000 women and

girls in Europe have undergone some kind of FGM and according to the WHO 180,000 girls are at risk. The number of reports, research studies, and parliamentary actions in Europe are significant, and a 2015 comparative overview of FGM criminal court cases within the EU, based on data collected by country experts in 11 European countries, shows little occurrence of the practice in criminal courts.³ FGM is prosecutable in all countries in Europe, either through specific criminal law provisions or through general criminal legislation, but fewer than 50 FGM criminal court cases exist in Europe, and a majority of them took place in France in the 1980s and 1990s.

Exploring the reasons for such disparities between estimates of affected girls and women, however, and court cases on the other is way beyond the scope of this chapter. It could be argued that, as any form of violence against women (VAW), FGM is particularly difficult to prevent, detect, prosecute, and punish efficiently. It is, however, unreasonable to believe that all European states fail in protecting girls at that scale. An alternative explanation would be that the number of unrecorded cases is much lower than what official conjectures suggest, making post-colonial feminist arguments more convincing. It has been argued (Peroni, 2016) that Western European states and institutions have targeted VAW of migrant background in ways that are stigmatizing by (1) putting disproportionate attention on and framing specifically certain forms of violence, (2) defining as cultural certain forms of VAW in ways that are stigmatizing toward minorities (as if the majority's forms of violence were not cultural), and (3) creating gendered racialized categories to describe non-Western women affected by violence (vulnerable women or girls at risk). What is usually called "FGM" is one of such forms of violence that receive disproportionate attention. By identifying FGM as a cultural form of VAW, we disregard the ways in which culture shapes the subordination of women in Europe and the cultural forms of violence embedded in, for instance, the ideology of romantic love.⁴ Montoya and Rolandsen Agustín (2013) argue that the European institutional discourse recognizing different forms of VAW has tended toward its culturalization, focusing much on diagnosis but failing to address solutions. In the same vein, the above-mentioned 2015 report on FGM criminal court cases suggests that reiterated law enforcement concerns are not coupled with training and prevention that are needed in the case of FGM in Europe.

Keeping these difficult questions as a backdrop, this chapter will discuss adjudication, expertise, and cultural difference as they appear in criminal court cases concerning FGM in the EU. The discussion is organized in four parts. First, a brief contextualization of the practice in Europe will help understanding of the distinction between typical and atypical FGM cases that we suggest adopting. Typical cases are those where some type of FGM has been performed, either on European soil or abroad; atypical cases are cases without solid ground or evidence in a court of law. This distinction is not common in public discourse on FGM,⁵ but needs to be made from a position that builds on deeper insights into the actual FGM criminal court cases. It connects court cases to the cultural realities of the practicing communities, and requires previous knowledge about the different practices and communities, their migratory history, and the status in

Europe of those involved. Both typical and atypical cases can originate on European soil or abroad, which makes their analysis more complex, as we will try to show.

The second part of this chapter will analyze some atypical cases that have reached the courts, raising issues of whether the intervention of experts is needed, and if so, of what type (anthropological, medical, both?), when (in what procedural moment) and for what purpose. The intervention of experts here seems to be more an evidential-building step than an evaluative one. By calling “atypical” the cases that should not have reached court, we argue that the lack of cultural knowledge or expertise can cause unnecessary suffering to families and individuals who wrongly undergo prosecution on an alleged FGM case. *A contrario*, the intervention of experts could be a positive approach to assessing the legitimacy of public intervention in certain FGM court cases.

The analysis of typical cases, cases in which FGM has been performed, and their complexities will lead us to the fact that, in some of them, the defense has tried for the acquittal of parents by claiming “error in prohibition.” This chapter argues that the ways in which error of prohibition relate to cultural difference need to be further explored. The chapter will conclude on the relationship between *error iuris* and cultural difference, where the purpose of the intervention of a “cultural expert” appears to be related to the task of evaluating the action under judgment, and when that action implies some form of VAW.

FGM IN EUROPE

The recognition of VAW as a human rights violation in the international agenda has been a matter of struggle, celebration, and concern among feminists: struggle, for it was not until the 1990s that VAW entered international human rights law; celebration because it was done by connecting violence to inequality and subordination; and concern for, as Peroni (2016) puts it, the overemphasis on female victimhood may perpetuate stereotypes of women in need of protection. This is particularly true for non-western women. The international fight against FGM has followed the same familiar pattern of struggle, celebration, and concern. The Beijing Platform for Action of the IV World Conference on Women of the United Nations declared in 1995 that FGM is a form of VAW. The international consensus reached in 2008 as to the definition of FGM is expressed in the Interagency Statement,⁶ according to which FGM comprises all procedures involving the partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. It acknowledges four types of procedures: clitoridectomy, excision, infibulation, and *unclassified*.⁷ The type of cutting and procedure varies from one country to the next and also varies among ethnic groups.⁸

FGM is prohibited in all European countries,⁹ either through specific criminal provisions (as in Austria, Denmark, Italy, Spain, Sweden, Switzerland, and the UK) or through general provisions in the Penal Code that penalize bodily injury and mutilation (e.g., Finland, France, Germany, and the Netherlands). The *Council of Europe Convention on preventing and combating violence against*

women and domestic violence (*Istanbul Convention*) entered into force in 2014, and although it is not the first action undertaken by the Council of Europe regarding gender-based violence,¹⁰ it is the first legally binding document. Almost all member states of the Council of Europe have signed it¹¹ and it can be considered the common understanding and standard to combat VAW.¹² It introduces some interesting features into European domestic legal systems as regards FGM, such as the “due diligence” standard regarding state responsibility for non-state acts of violence.¹³ The standard, as declared by DEVAW (1994),¹⁴ refers to the obligation of states to “pursue by all appropriate means and without delay a policy of eliminating violence against women,” including “due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the state or by private persons.”¹⁵ Thus, the *Istanbul Convention* provides the general obligations of the duty to prevent, protect and support; investigate, prosecute and judicially protect, as well as provide effective access to justice for victims of VAW¹⁶.

It specifically addresses FGM in Art. 38:

Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalized:

- (a) excising, infibulating, or performing any other mutilation on the whole or any part of a woman’s labia majora, labia minora, or clitoris;
- (b) coercing or procuring a woman to undergo any of the acts listed in point a;
- (c) inciting, coercing or procuring a girl to undergo any of the acts listed in point (a)¹⁷

Aiding or abetting and attempting the commission of the offense in 38.a must also be considered an offense and these acts cannot be justified as cultural, religious, customary, or other (Art. 42). Regarding state jurisdiction, the *Istanbul Convention* establishes the obligation for states to ensure that its jurisdiction covers *all* the offenses committed *within the territory of the state*, to or by one of her nationals, or a person that has his or her habitual residence in the territory. It demands as well that the state ensures jurisdiction *beyond its territory*, when the offense is committed to or by one of their nationals or a person who has his or her habitual residence on their territory, and *whether the act is criminalized in the territory where they were committed or not* (Art. 44¹⁸). This means that the principle of extraterritoriality of all the states analyzed in the 2015 report covered acts committed abroad *by* a national or resident, *or to* a national or resident, either in Europe or in the country of origin. This is puzzling for jurists, as extraterritoriality is a principle seldom used, and one requiring double incrimination. It is also puzzling that European states are virtually competent to persecute any act of FGM performed by a resident, regardless of the place of commission and the victim of such a crime. The reason for this emphasis in extraterritoriality and in non-requiring double-incrimination lies in the fact

that some girls of European background have undergone FGM while visiting family in the countries of origin of their parents. There is also a fear that, knowing FGM is prohibited in Europe, families will submit the girls to the practice before migrating to Europe.

This complexity makes the classification and analysis of court cases very difficult: typical cases would be cases in which an act of FGM (Interagency statement Types I, II, and III, according to the *Istanbul Convention*) has been performed by or to a European national or resident, either on European soil or abroad. The kind of evidence needed and justification of the judge’s decision are arguably different in both cases, as is the need or justification for asking for cultural *advice* at some point. Atypical cases are cases in which prosecution happens on an *unlikely* FGM act, either because the alleged author or victim does not belong to a practicing community; because the act cannot qualify as FGM; or because, taking into consideration the practicing community the victim belongs to, it is incorrect to point to the alleged actor as responsible for the narrative “to make sense.”

The last factor to consider regarding prosecution of FGM in Europe is the different models of Public Prosecution of European states, along the common law/continental law divide and within the continental system itself (Martín Pastor, García Marqués, & Eloy Azevedo, 2014).¹⁹ The public authority given the power to investigate, the extent and principles guiding such power, its limits and how it relates to the victim’s actions, vary from country to country, making the comparison of FGM prosecution across Europe an extremely difficult task. Our proposal is to call typical cases those where some type of FGM as prohibited by the *Istanbul Convention* has been performed, either on European soil or abroad. Atypical cases are cases that should not have initiated legal procedures. This distinction, which connects court cases to the cultural realities of the practicing communities, requires previous knowledge about the different practices and works well regardless of the public prosecuting system of any given state. Information about the public prosecuting system could, however, be of interest when discussing at what procedural moment and initiated by whom cultural expertise could be of help in detecting and avoiding atypical cases.

ATYPICAL FGM CASES MAKE UNFAIR COURT CASES

On Thursday June 26, 2015, *The Telegraph* reported:

“Disgusting” FGM campaign wins prestigious advertising awards at Cannes. A heavily criticised campaign raising awareness about FGM has won Cannes Lion industry awards. [...] The adverts depict flags of Western countries – such as the Union Jack – splattered with blood stains and with thick thread “sewing” them back together. A message printed on the flag reads: “Female genital mutilation doesn’t only happen in faraway places. Over 50,000 girls in the UK are at risk.”²⁰

The “it happens here” campaign was designed to raise awareness about the fact that FGM is still carried out in countries such as the UK, even though it is illegal. The campaign is very powerful and moving but misrepresents reality by suggesting that the worst form of FGM (Type III) often happens and goes

unnoticed across Europe. Raising awareness in such a strong way, the campaign calls for an urgent intervention from the state, investigating rumors and cases, and effectively prosecuting. This is particularly true in the UK where the case presented as the first criminal case regarding FGM in 2015 seemed in accordance with this *pressing social need* to tackle FGM. In our opinion, however, it is the most atypical criminal court case reported: An obstetrician was taken to court for how he had sutured an already circumcised woman during delivery in November 2012. He had used a stitch to stem blood, and this stitch, the Prosecutor argued, could be classified as criminal according to the UK ban on FGM. During the trial process, the judge rejected two attempts by the defense to dismiss the prosecution on the grounds that, under the FGM Act 2003, a doctor is exempt from prosecution if a surgical procedure is carried out on a woman in labor or after childbirth and was medically necessary. The man was acquitted of the charges in February 2015. It is atypical in that the act hardly qualifies as FGM, the doctor definitely did not belong to a practicing community nor did he do it for *cultural reasons*: the prosecutor simply did not acknowledge the difference between FGM/re-infibulation and medically indicated surgical procedures to correct trauma following labor.²¹

Another atypical case concerns the Netherlands, where a Moroccan man was taken to court in 2008 for suspected FGM. Morocco is a non-practicing country when it comes to circumcision of girls. The man's daughter claimed that he had cut her genitalia with a pair of scissors. He was eventually sentenced for child abuse but acquitted for FGM. Other examples splash the press here and there. In January 2017, the Spanish press reported that the Catalan government would have to pay a married couple of Gambian origin for moral and psychological damages for events that occurred in 2012. They were detained for two days and their two daughters put in a children's facility for nine days, because their pediatrician claimed that the girls' genitalia had been altered. She later admitted that she had no expertise in the matter.²² In a Swedish case, parents of Gambian origin were detained for several weeks in 2012 after a pediatrician had asserted that two girls, aged one and three, had been circumcised. Later a group involving a gynecologist, a urologist, and a forensic expert concluded that the girls' genitalia were normal, and the parents were released.²³

All these cases reflect the willingness to open investigations and legal proceedings regarding FGM in different European countries. In fact, it was reported in *The Guardian* (February 4, 2015) that “[a]ccusation against Dr D. Dharmasena came at time of growing pressure over failure to bring FGM prosecution in UK.” Many have criticized the decision of the Crown Prosecution Service (CPS) to bring “the apparently doomed prosecution,” challenging that it met the evidential test or the public interest test the CPS ought to apply when undertaking prosecution (Rogers, 2015).²⁴ The willingness to bring criminal cases to court, demonstrated by such “atypical” examples, contrasts to common assumptions that the scarcity of cases in Europe is due to reluctance among authorities to deal with cases of FGM. Indeed, one explicit policy goal at the European level is to support EU member states in prosecuting FGM more effectively (European Commission, 2013).

All in all, these cases ended rather well, as prosecution stopped at an early stage or resulted in acquittal. The question remains, however, whether that suffering was necessary or if it could have been avoided with the help of experts, be they doctors or pediatricians with cultural expertise on the different practices and practicing communities, or on cultural experts who know, for example, that Morocco is a non-practicing country.

The cases mentioned show that it is often difficult to decide whether modification of the genitalia has occurred or not. In Sweden, several criminal investigations demonstrate that professionals assessing small girls’ genitalia, when there are suspicions about circumcision, reach divergent conclusions. Where some physicians see clear signs of cutting, others say that the appearance of the (same) genitalia are normal and they thus see no signs of circumcision. Obviously, not all criminal court cases end in convictions, so the point is not that these cases resulted in acquittals, but rather that they should not have been taken to court at all.

A more disturbing case occurred in Sweden in 2006 when a Somali father was sentenced to two years in prison for allegedly performing FGM on his daughter. He was convicted regardless of the fact that there was no evidence, neither direct nor circumstantial, and he was not likely to be the perpetrator (Johnsdotter, 2008a, 2008b²⁵). The only evidence presented in court was his daughter’s statement during police interrogations that he had been in the room when she was circumcised, holding her down. Although the treatment evidence receives in different jurisdictions may differ, it is a common standard that when someone’s statement is the only evidence in court and there is no other valid circumstantial evidence, the statement should be convincing, without major contradictions,²⁶ and the person that gives it must be a reliable person. In this case, during the months of repeated police interrogations and court proceedings, the 16-year-old girl changed her statements about when the circumcision took place (January 2005, or possibly autumn 2004; “no idea at all,” or possibly in August 2005); who was present in the room (the circumciser, the father, and the father’s sister; or the circumciser, the father, and the father’s new wife);²⁷ how her father held her; who else was circumcised with her and other details. Her contradictory statements were offered during a time of conflict between her parents over custody and child benefits that was the tipping top of a conflict between two clans with firm loyalties to their own kin. With such a weak evidential basis, other forces must have been at play for the court to assess the father’s guilt – arguably, stereotypes about Somali men and women, and the power dynamics within the couple in a Muslim marriage, what happens at circumcisions in Somalia, the role men as fathers play in decision-making regarding circumcision of their daughters, and a multitude of other aspects about which the court had little real knowledge. For instance, had they known that among Somalis, it is inconceivable that a Somali man would have anything to do with his daughters’ genitalia and that if a man would insist on being present at a circumcision of a girl, the present women organizing the event would force him to leave, the court might have assessed the likelihood of the described situation differently. This case is different from the others in that an act of FGM had actually occurred, but

evidence was far from convincing in what regards the responsibility of the father of the girl. It is arguable, then, that in the void of knowledge about the culture-specific context, typifications and stereotyping may guide the interpretations of testimonies, producing unfair results.²⁸

We have offered examples of two sorts of atypical cases: those in which no FGM was performed at all and cases where the inculcating evidence was not consistent with a sound cultural narrative. In the first set of cases, cultural expertise would be of use in informing a wide range of professionals, procedures, and decisions: from FGM protocols to the medical profession, or the public prosecuting authority. The second set of cases, in which FGM did happen, demonstrates that it is important that courts in Europe have access to knowledge about culture-specific contexts when they handle suspected cases of FGM in criminal courts, whether they are supposed to have happened in Europe or abroad.

However, for acts performed abroad that fall within the jurisdiction of a European state, this need for knowledge is more evident: Courts are assessing crime scenes that are located faraway from Europe, and events described in the European courts may follow a cultural logic that is unfamiliar to the Western court actors. Assistance in the form of knowledgeable expertise is crucial for the courts to be able to establish what “probably” or “likely” might have happened in these culturally unfamiliar contexts. Although the intervention of experts here seems to be more of an evidential-building step than an evaluative one, it is nevertheless fundamental to guaranteeing fairness. By calling “atypical” the cases that should not have reached the court, our distinction upholds the idea that the lack of cultural knowledge or expertise can cause unnecessary suffering to families and or individuals that wrongly undergo prosecution on an alleged FGM case.

TYPICAL FGM CASES

Typical cases are cases where an FGM act was performed, *either to or by* a European national or resident, either on European soil or abroad. Several reported criminal court cases would match this idea of the “typical” case on European soil.²⁹ In Switzerland, in 2008, two Somali parents were sentenced for an act committed in 1996, after they had arrived as refugees a couple of years earlier. They had their two-year-old daughter circumcised by a Somali physician who was temporarily in Switzerland and who performed circumcision under local anesthesia on the kitchen table. Twelve years later, the parents received a two-year suspended prison sentence for having encouraged FGM.

In Italy, in 2006, a woman of Nigerian origin had been under surveillance for some time when the police tapped a call with a two-week-old girl’s father concerning the operation. The woman was caught red-handed when she was just about to perform the act, surrounded by scissors, gauze, surgical spirit, Lycodine, and syringes. Other cases hit the press reporting similar stories in France: In 2012, there was a court case regarding incidents that allegedly had taken place some years earlier. A circumciser performed an operation on girls whose parents originated from Guinea, and the Minors Protection Squad is said

to have found material evidence in the form of “a bloody kitchen roll holding pieces of genital flesh” (France country report, cited in [Johnsdotter & Mestre i Mestre, 2015](#), p. 18). These cases do not seem to have posed serious problems from a criminal law perspective in building enough evidence to convict the parties. A more problematic case occurred in 2013 when a Spanish court reached the conclusion that an illegal circumcision at some point had taken place in Spain although the place, date, or responsible actor could not be established as a matter of proven fact. The genitalia of a girl, whose parents originated from The Gambia, seemed intact in a first genital checkup, and in the next examination, they were detected as modified. It was assumed that something had happened on Spanish soil, since the family had not traveled during the period between the checks.

The bulk of the recent criminal court cases in Europe concerns acts of circumcision performed in African countries, which seem far more difficult to assess and judge. The first Danish court case took place in 2008 and dealt with parents born in Eritrea who had arranged for circumcision of their daughters, aged four and six, in Sudan in 2003. In a recent district court case in Denmark (April, 2017), two Somali parents were sentenced to prison for alleged FGM of two girls, aged 8 and 15 years, on a trip to Kenya in the summer of 2016. Italy has had two cases in which circumcision was committed abroad: one court case in 1999 regarding circumcision of a young girl (whose mother was Italian) in Egypt and one pending regarding a circumcision performed in Nigeria. The two criminal court cases in Sweden, both in 2006, involved parents from Somalia, and the acts are said to have been performed in Somalia. One of the criminal court cases in Switzerland in 2012 built on a case where the girl had been circumcised in Somalia 11 years earlier. Two court cases on FGM reported from Spain, in 2013 and 2104, were about circumcisions performed in Africa, in Senegal and The Gambia. Hence, it is reasonable to say that the “typical” FGM case is one in which a girl with background in a European country is circumcised in an African country.

In one of the Swiss cases, a woman of Somali origin had custody of a younger relative. She took the girl back to Somalia for a longer stay in 2001, where she let the girl be reunited with her biological mother, who decided to have the girl circumcised. What the Swiss court had to decide was whether the Swiss-Somali woman should have foreseen the risk of circumcision and thus had a duty to *protect* the girl against it. The court decided in 2008 that she had had such a duty and that she had failed it. In a Spanish case, a woman born in The Gambia took her two daughters back for a two-month stay during the summer of 2003. During a couple of days their grandmother (the woman’s own mother) supervised the girls. She decided to have them circumcised and had it performed – a decision that ended up in a major conflict, since the girls’ mother was opposed to the practice. The Spanish-Gambian woman was acquitted by the Spanish court, since her only intentions had been to take her girls back to the country of origin, not to have them circumcised. The court held that it would be disproportionate to hold that leaving her children with her mother constituted negligence in the duty of care. This way of approaching the problem

shows that courts struggle with the difficulty of not really knowing what happened and yet having to find some responsibility in those in charge of the children.³⁰

Two other Spanish cases are of particular interest for our discussion. In 2011, a woman from Senegal was accused of having performed FGM on her daughter in the country of origin, before arriving to Catalonia. The National Audience appreciated error of prohibition because, living in a rural area of Senegal, she could not be expected to have known the laws in Spain. However, the court claims to have extraterritorial jurisdiction regardless of the fact that neither the mother nor the child resided in the state at the time of the facts, but the father did.³¹ In 2012, a Gambian couple living in Teruel was accused of having performed FGM on their baby girl: arriving in Spain when she was four months old, her genitalia looked normal in her first pediatric exam, but were altered six months later. Both parents were accused of having performed FGM on the girl in Spain, although they claimed it was performed in The Gambia, prior to their migration. The pediatrician's words were considered incriminatory evidence and both parents were convicted: six years for the father and two years for the mother. The court stated that a long-term resident cannot claim to be unaware of the criminal provisions against FGM, but a person living in The Gambia can. Further, the court stated that, although it is impossible to admit culture as a mitigating factor, they must consider in this case a surmountable error of prohibition.³²

A similar reasoning followed the Verona case in Italy. The Venice Court of Appeal stated that the *ignorantia legis* excuse requires the union of two elements: a subjective element (the person's situation and perception, knowledge, and so on) and the objective element (the context that could make that error insurmountable).³³ The case involved a Type IV FGM in Verona one month after the enactment of the law prohibiting FGM. No informative campaign had been undertaken by public authorities to explain the new provisions, and the mother had recently arrived in Italy. The court held that it was not reasonable to expect the mother to have known that Type IV was prohibited under Italian law.

***ERROR IURIS* AND CULTURAL DIFFERENCE**

The previous cases and reasoning by the courts resonate with the cultural defense discussed in American and European courts and law journals since the 1980s and, thus, the relations between error of prohibition, cultural expertise, and cultural defense need to be further explored.

Frick (2014, p. 556) defines the cultural defense as an attempt to recognize values and norms in terms of legally privileged justifications toward exculpation (exclusion of guilt) or mitigation of the defendants' guilt and punishment. As Van Broeck (2001) has pointed out, this concept needs to be coupled with the definition of culturally motivated crimes (a terminology currently accepted in Italy and Spain³⁴), that is, "an act by a member of a minority culture, which is considered an offense by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted

as normal behaviour and approved and even endorsed and promoted in the given situation” (Van Broeck, 2001, p. 5). Needless to say, FGM fits perfectly with this definition.

For our discussion, it is important to distinguish two different components of the cultural defense: the volitional and the cognitive, with quite different implications. The volitional cultural defense denies the defendant’s ability to resist the compulsion of his or her culture (his culture made him do it, he couldn’t help himself), while the cognitive defense argues that the individual simply did not know his or her actions were unlawful, encompassing cases of ignorance of law and mistake of fact (Gordon, 2001). While cultural defense as such does not exist as a formal principle within Europe (Frick, 2014), the examples show that different courts have dealt with cultural difference by referring precisely to the already existing defense theories of the error in prohibition. In fact, the cases discussed from Italy and Spain are cases in which a *cognitive cultural defense* (Frick, 2014; Gordon, 2001) was deployed. The argument behind such a defense is that it would be unfair to judge people under laws they do not know or understand, or for acts that lack all the elements of the crime.³⁵ These are cases for which the legal system accepts an exception of the maxim “ignorance of the law is no excuse,” or people’s beliefs or knowledge cannot be placed above the law (Sams, 1986). Cultural cognitive defenses claim that the maxim is not absolute and can be outweighed in situations where cultural evidence is used to show that either the defendant did not realize there was a prohibition or her actions were different from what is prohibited (Gordon, 2001, p. 1813). In her analysis of different Spanish cases, Maqueda Abreu (2014, p. 207) points out that although courts are reticent to accept cultural defense as such, or culture amounting *per se* to error of prohibition, they do actually accept error of prohibition in their decisions as a mitigating factor. What is implied by *cultural defense as such* as opposed to error of prohibition, which makes courts reticent, is probably the widespread criticism the cultural defense has raised over the years, especially when the culturally motivated crime is one against women.

According to Phillips (2003), the main critiques against cultural defense revolve around four issues: (1) It threatens to undermine legal universalism by elevating cultural membership above other considerations. The reasons why cultural difference would justify an acceptable form of ignorance of the law need to be explained; (2) it will put in danger the rights of women, who tend to be the victims of such crimes. Cultural defenses, irrespective of whether the defendant is a man or a woman, reinforce patriarchal cultural practices that should not receive any institutional support. Cultural defense has been criticized for its potential to condone VAW; (3) it lends itself to stereotypical representations of non-Western people, as victims of their culture; and (4) it can lead to an opportunistic use of culture as defense. It is impossible to discuss these arguments but in some brief comments. We believe most of this criticism is better suited for the volitional strand than for the cognitive one. The first, third, and fourth arguments are straightforward reasons for the use of cultural expertise in different phases of the legal handling: when explaining the cultural factors that made a person unaware of the fact that she was committing a crime; helping the courts

in avoiding the use and misuse of particularly static notions of culture as well as avoiding the use and abuse of stereotypes toward minority groups. Courts will then evaluate cultural expertise as the procedural rules of the state prescribe and probably as they do with any other expertise in court.

The argument that says cultural defense threatens legal universalism is true if it is understood in the volitional strand (“their culture made them do it”), but it does not work so well for the cognitive strand (“they did not know it was unlawful”). As Gordon (2001) puts it, cultural difference as a form of ignorance means that “cultural forces prevented a defendant from realizing a fact, but he otherwise acted of his own free choice” (2001, p. 1815). Error of prohibition is a classic defense theory that is used in many situations and not just for dealing with cultural difference, so the question would rather be the opposite: how could cultural difference not be an acceptable form of ignorance of the law? It is true, however, that the problem arises in particularly troubling crimes (and not when “immigrants of East African countries are charged for chewing *khat*”; Frick, 2014, p. 566), as it is difficult to argue the “lack of knowledge regarding the existence of human rights such as the right to life or security of person” (Frick, 2014, p. 568). This argument, again, works well for certain “culturally motivated crimes,” such as “honor killings” (which Frick analyses), but it may not work so well for FGM, where the action itself is not indented as a crime or *punishment* by its actors (as opposed to killing) and no such obvious human rights are at stake.³⁶ Thus, we share the concerns of using and abusing “culture” as a justification for different forms of VAW, by far the most discussed danger of the cultural defense.³⁷ Yet, we believe that the presence of stereotyped images of minority cultures and minority women in court (see, e.g., Macklin, 2006) is what most hinders the modification of patterns of VAW among immigrant groups (rather than taking culture into account). Introducing cultural expertise in criminal court cases does not equal cultural defense; rather, it helps in contextualizing the criminal acts without reinforcing stereotypes. We need to further explore how cultural expertise and error of prohibition can work in favor of women’s rights.

CONCLUSION

In this chapter, we have tried to demonstrate that a distinction between atypical and typical FGM court cases is useful and that engaging cultural expertise is crucial in the legal handling of both categories. As regards atypical cases, they make unfair court cases which potentially cause evitable harm to families and individuals; harm that is avoidable if professionals are attentive to cultural issues at an early stage of the legal procedure. Also, the legal handling of typical cases calls for cultural expertise: courts need assistance when they are to decide what likely happened, or what can be established beyond reasonable doubt, in situations involving unfamiliar cultural dimensions. This is especially pertinent when the crime scene is located abroad.

In both instances, the use of cultural expertise can minimize the stigmatizing effect that the criminalization of FGM may have both on specific immigrant

groups and women of migrant background. Precisely because criminalizing a practice associated with a particular group without “playing into racist conceptions [...] is a daunting and delicate task” (Macklin, 2006, p. 216), we need to further explore how the use of cultural expertise in the legal handling of suspected FGM cases can reduce the harms of unfair results.

NOTES

1. This chapter is part of a broader ongoing common work that has been published in Johnsdotter and Mestre i Mestre (2015) and Johnsdotter and Mestre i Mestre (2017).

2. A note on terminology: We will use the acronym FGM (female genital mutilation) for the legal context. When we deal with the actors’ perspective, we will talk about circumcision of girls (Johnsdotter, 2017). Also, some researchers use FGC (female genital cutting). There is a growing occurrence of the terminological compromise FGM/C, which aims to reconcile conflicting views among a wide range of researchers using their own preferred term.

3. Johnsdotter and Mestre i Mestre (2015). The countries included in the study were Austria, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland, and the UK. It was of specific interest to include Switzerland in the analysis because legal proceedings regarding FGM had taken place in the territory, but this information is seldom included in EU reports. Both EIGE and the European Parliament have issued a significant number of documents. See, for instance, EIGE (2015) on how to estimate the number of girls at risk, or European Commission (2016), a communication requiring states to end with FGM.

4. An EU-wide survey launched by the European Union Agency for Fundamental Rights (FRA) on violence against women (2014) estimates that 3.7 million women in the EU have experienced sexual violence in the course of the 12 months before the survey interviews. This corresponds to 2% of women aged 18–74 years in the EU.

5. We have discussed this in Johnsdotter and Mestre i Mestre (2017).

6. Apologies for this oversimplification of such a complicated and long process. In 1997, several international organizations (WHO, UNICEF, UNFPA) produced an *Interagency Statement* that was revised in 2008, due to the world indices of prevalence, earmarking 2010 as the proposed deadline for the eradication of the practice (*Eliminating FGM. An Interagency Statement*; OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO 2008).

7. ‘Type IV, unclassified: All other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization (OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO 2008). Types I, II, and III are practised in 28 countries in Africa, and a few countries within Asia and the Middle East. The practice has also been reported in certain ethnic groups in Central and South America. Eighty-five percent of FGM belong to Types I and II. The remaining FGM, mainly Type III, is located geographically in the Horn of Africa, where the indices of prevalence are very high (e.g., Djibouti 93%; Somalia 98%). A further distinction is also made between practices that are carried out collectively that constitute socialized rites of passage (usually Types I, II, and in some cases Type IV) and those practised on individual women (Type III and in some cases Type IV). For a description of the complexity of the practices, see, for example, Walley (2005), Gunning (2005), Obiora (1997), James and Robertson (2005) and Hernlund and Shell-Duncan (2007).

8. From the perspective of prevention and abolishment, the meaning of the practice for the group and the way the procedure is carried out imply the use of differentiated strategies and instruments.

9. For detailed information on all EU countries and Croatia regarding FGM (domestic legal frameworks, data, national policies, prevalence estimates, child protection routines, and so on), see [EIGE \(2013a\)](#) and [EIGE \(2013b\)](#). For analysis about European laws regarding FGM/C and their implementation see, [Leye et al. \(2007\)](#), [Leye and Sabbe \(2010\)](#) and [Kool \(2010\)](#).

10. See, for example, the recommendation adopted by the Committee of Ministers of the Council of Europe in 2002 regarding the protection of women against violence. For a systematic assessment of The Council of Europe discourse and actions regarding VAW, see [Choudry \(2016\)](#).

11. Except for Armenia, Azerbaijan, and Russia. It has been ratified by Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Italy, Malta, Monaco, Montenegro, Netherlands, Poland, Portugal, Romania, Sweden, Serbia, Slovenia, Spain, and Turkey.

12. For an interesting critique of the Convention, see [Peroni \(2016\)](#).

13. The concept of “due diligence” has become a customary human right standard in international law since its emergence in the Inter-American Court of Human Rights. See the *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). For an excellent account of the emergence and development of the standard, see [Hasselbacher \(2010\)](#).

14. [Declaration on the Elimination of all forms of Violence Against Women](#), U.N. Doc. A/RES/48/104 (February 23, 1994).

15. In 2006, UN officially endorsed the due diligence standard as a tool to fight violence against women, and recent rulings of the European Court of Human Rights have developed the meaning and scope of the due diligence standard with regard to the state’s positive obligations to prevent, protect, prosecute, and redress violence against women, considering the failure to meet due diligence in the fight against violence as a form of gender-based discrimination. Case of *Bevacqua and S. v. Bulgaria* (Application n. 71127/01, ECHR 2008) and *Opuz v. Turkey* (Application n. 33401/02, ECHR 2009).

16. Articles 5 and 12 of the Istanbul Convention establish the content of the obligations derived from the Due diligence standard and the general obligations States undertake with the signature. For an analysis on how the Convention impacts FGM, see [The Council of Europe & Amnesty international \(2014\)](#)

17. Please note that the *Istanbul Convention* covers only Types I to III of the WHO classification.

18. The principle of extraterritoriality was promoted by the European Parliament in 2001 and 2009, but was definitely embraced after the *Istanbul Convention*. The Convention has already had an impact in Spain and Germany regarding this principle. See [Johnsdotter and Mestre i Mestre \(2015\)](#). Art. 44 of the *Convention* is, by far, the article that has received more reservations. For instance, it imposes a duty on states to allow prosecution of certain crimes, including FGM, until well after the victim has reached majority of age, and some states, such as France, have made a reservation to this provision.

19. The literature regarding Public Prosecution in Europe is wide and extended. In the last ten years, an important amount of comparative analysis has been developed and The Consultative Council of European Prosecutors works since 2005 in collecting information about the functioning of prosecution services in Europe and implementing Recommendation (2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system. According to the CCPE, it has taken longer for harmonization in the field of law enforcement to emerge as a concern because the issue is a delicate one for the institutions in each state, with implications for the way that public authorities are organized. For a very interesting comparison of eight countries, see [Martín Pastor et al. \(2014\)](#).

20. *The Telegraph*. Retrieved from <http://www.telegraph.co.uk/women/womens-life/11699603/FGM-Ogilvy-campaign-wins-Cannes-Lion-awards.html>. Accessed on May 23, 2017.

21. For a recent case of a doctor investigated for authorizing genital surgery of an adult woman, see <http://www.standard.co.uk/news/health/doctor-cleared-over-fgm-says-women-should-be-free-to-have-intimate-surgery-a3477941.html>. Accessed on May 23, 2017.

22. *El País*. Retrieved from http://ccaa.elpais.com/ccaa/2017/01/28/catalunya/1485616989_147479.html. Accessed on May 23, 2017.

23. From Johnsdotter’s research archive of criminal investigations concerning suspected FGM.

24. J. Rogers further states that “The CPS” broad reference to the Code test has unsurprisingly failed to convince many that the prosecution was properly undertaken; at the very least, more explanation should be needed if the CPS wishes to regain public confidence over this episode. In the 2017 case (*supra* note 21), the press reports: “On the criminal investigation against him, he said it had ‘dragged on’ despite having no chance of success. “I gave an opinion in the same way that a barrister or a solicitor is asked to give an opinion. You can’t possibly be held up for aiding and abetting for giving an opinion. But it’s a highly political area. The pressure is on because they [the CPS] have never managed to get any convictions over the past 20 or 30 years.”

25. Johnsdotter reports the first Swedish criminal court case based on the police investigation, transcripts of all police interrogations, audio-visual tape recordings of the three police interrogations with the young girl, and audio tape recordings of all court proceedings in district court and court of appeal.

26. Of course, this has been a major issue in private crimes and especially in VAW and rape cases. We broadly agree with the feminist critique that many forms of violence women face cannot be told in a coherent narrative and beyond all reasonable doubt, because the telling of a story of abuse inevitably reveals ambiguities. As Smart (1989, p. 34) put it, for rape trials, “the experience she wishes to convey is quite incomprehensible [...] the language she will use to explain her experience will be seen as flawed [...]” We nevertheless think that some coherence has to be drawn or has to be possible to make between what the victim says happened and what the context of the crime tells us: It has to be reasonable to believe that the facts narrated are plausible. See Ruiz (2009).

27. The man’s sister travelled from Somalia to Sweden when she came to know that her brother was detained for suspected FGM. She presented herself in a police station in her brother’s city of residence in order to testify that his version was true. She was immediately detained and remained in custody for many months, until her niece had changed her story and said instead that it was her father’s new wife who had been present when the circumcision was performed. In the interrogation by the police, the girl stated that she had previously made these claims about her aunt’s presence because she “hated her” and “wanted to see her dead.” The reason for this bitterness was that her aunt, according to the girl, had told other Somali people that the girl “was a whore” (transcripts from police interrogations, March 27, 2006, and August 7, 2006).

28. The importance of cultural expertise in the legal handling of suspected FGM cases is compellingly argued by Macklin (2006), who relates a case involving a Sudanese family in Canada: “neither the police, nor child welfare authorities, nor the lawyers involved approached the case with any real attentiveness to the complex cultural, social, and gender dimensions of the issue” (2006, p. 221). The charges were withdrawn when it was concluded that it was unlikely that an illegal circumcision had been performed. She emphasizes that professionals dealing with such cases – within the criminal justice system and child protection services – need to seek assistance when they are to deal with intercultural issues in order to avoid, as far as possible, evitable harm. See also Timmer (2015).

29. There seems to be evidence that FGM has occurred in France, Switzerland, Italy, and possibly in Spain (Johnsdotter & Mestre i Mestre, 2015).

30. In these cases, we possibly see the first signs of European systems dealing with caregivers who do not want to have their daughters circumcised but fail to sufficiently protect them from circumcision during stays in African countries. In criminal procedures, this implies a move from criminal intent to *neglect of care* when it comes to circumcision of girls living in Europe (Johnsdotter & Mestre i Mestre, 2015).

31. National Audience AN 13/2011.

32. Supreme Court Decision STS 835/2012.

33. Corte d'Appello di Venezia, 23 Nov. 2013, (dep. Feb 21, 2013), n. 1485.

34. See Maqueda Abreu (2014), Basile (2013).

35. Frick (2014) distinguishes three common arguments in favor of the cultural defense: the argument from necessity (a lesser evil than parallel judgments and societies); the argument from pluralism (imposing the norms of the majority would destroy cultural diversity that is valuable per se); and the argument from fairness, which again has three veins. The relativistic strand states that a system lacking cultural defense is unfair in imposing culturally biased rules to culturally different people; the deterministic strand affirms that it is unfair to pressure someone to act against his or her culture and its ethical imperatives; and the epistemic/cognitive aspect suggests that ignorance of the law should be a defense for people raised in a foreign culture.

36. It is a particularly Western idea to condone genital modifications in infant boys while banning any such modification in the genitalia of the girl. In practically, all societies where circumcision of girls is practiced, so is circumcision of boys, and the procedures are often seen as mirroring each other (PPAN, 2012).

37. Although the discussion did not start with Okin's essay, her publication *Is multiculturalism bad for women?* (1999) invigorated the discussion. See Dustin and Phillips (2008), Frick (2014), Green and Lim (1998), Igareda (2015), Volpp (2000), mestre i mestre (2011), Mohanty (2003), Phillips (2003), Ahmadu (2000) and Peroni (2016) among many others.

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BETWEEN NORMS, FACTS, AND STEREOTYPES: THE PLACE OF CULTURE AND ETHNICITY IN BELGIAN AND FRENCH FAMILY JUSTICE

Caroline Simon, Barbara Truffin and Anne Wyvekens

ABSTRACT

Based on extensive empirical fieldworks conducted in Belgian and French family justice courtrooms in order to explain how culture and ethnicity are processed and understood in the daily reasoning and assumptions of legal professionals, this chapter analyzes different forms in which culture and ethnicity are framed in family law cases. Understanding how and along which dimensions these elements do vary in judicial reasoning constitutes the preliminary but necessary step before assessing the need of cultural expertise as such. In this attempt, we shed light on a scope of variations between complex and non-deterministic models of culture – consistent with contemporary anthropology literature – and more simplistic ones, in which culture and identity are conceived as fixed realities. Throughout this path between norms, facts, and stereotypes, we illustrate not only the multiplicity and complexity of forms which cultural elements can take in the exercise of family justice, but also the risks that some significances may carry with them and the urgent need to improve more fluid and dispassionate conceptions of cultural diversity before developing “cultural expertise” as such, an expertise that could otherwise reinforce stereotypical and fixed views of “cultures.”

Keywords: Culture; ethnicity; judicial reasoning; family justice; families with migrant background; lethal ethnography

INTRODUCTION

In the contemporary context of broader diversification of ethnocultural backgrounds and migration trajectories in European societies, the question of how culture and ethnicity enter the courtrooms still remains empirically under-researched and lacks theoretical systematization (but see Bouillier, 2011; D'hondt & Beyens, 2004; D'hondt, 2010, 2009; Petintseva, 2016; Simon & Truffin, 2016; Simon, 2015; Terrio, 2009; van Rossum & Jansen Fredriksen, 2014; van Rossum & van den Hoven, 2016; van Rossum, 2010; Wyvekens, 2017, 2016, 2014). Offering more detailed and nuanced pictures than the narratives of incompatible values increasingly disseminated through public debates is an urgent need socio-legal studies should contribute to meet. More specifically for us, seeking to explain how culture and ethnicity are processed and understood in the daily reasoning and assumptions of legal professionals constitutes the first step toward this aim.

Praxeological approaches of state justice stand as an important starting point in this direction. Indeed, this growing body of studies allows to look at the judicial activities as made of mundane reasoning aligned with normative aspects of the legal provisions professionals are in charge to interpret and apply (Colemans, 2015, Dupret, 2010, 2007, 2006; Travers, 2001). This theoretical angle is particularly relevant when assessing the role culture and ethnicity play in judicial reasoning in Belgium and France precisely because, in these countries as in many other continental legal systems, neither one nor the other are part of formal legal provision – if we set aside the formal interdiction contained in anti-discrimination regulation. Culture and ethnicity remain therefore unstable, if not elusive, dimensions of judicial reasoning infused by fluctuant background representations, categorizations, and expectations. This theoretical positioning explains why we have chosen to focus more on this fundamental aspect than to discuss cultural expertise in our contribution to a book, however, explicitly dedicated to the latter. Understanding how and along which dimensions these background representations and expectations do vary in judicial reasoning is the core question we want to contribute to as a preliminary but necessary step. What are the conceptions of culture and ethnicity which are mobilized by Belgian and French judges in their daily work and to which extent do lawyers and social scientists operate with similar concepts?

Another reason for this choice is that, to the best of our knowledge, the very few “cultural expertise” reports produced for French and Belgian courtrooms do not really allow to understand what culture and ethnicity stand for in the individual responsibility assessments operated by the courts. Bluntly put, it is difficult to identify in those rare cases of expertise a “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, 2013, p. 2). Whether the crime has a cultural or religious explanation or not, as it was asked in an honor killing case which occurred in a Pakistani family some years ago in Belgium, can be a laconic and a fuzzy

mandate for the expert. In this case, a young woman had been killed by her brother whereas she was dating a Belgian man, wanting to marry him. The parents of the girl had agreed on the murder or even ordered it. A “cultural expert” – who was actually a political scientist specialized in international relations and Pakistan – was required by the examining magistrate and asked “to peruse the whole file; to describe the issues of forced marriages, violence against women and honor killings in the Pakistani community, to confront the results of research to the content of the case; and to possibly give further information about the religious norms that could have played a role.” Here, the way of addressing the question of religious norm is related with the difficulty to translate a non-deterministic definition of culture or religion into legal reasoning and procedures. We will come back on this later.

After some explanations on the analytical status we give to culture and ethnicity and why we have chosen to explore the field of family justice, we give more information on the conditions of our fieldworks in family justice courtrooms in Belgium and France; this being explained the chapter proceeds to review the different forms in which culture and ethnicity are framed in the courtrooms and in the practical reasoning of the judges in Belgian and French family justice: between norms, facts, and stereotypes.

CULTURE, ETHNICITY, AND FAMILY JUSTICE

When they address cultural dimensions, anthropologists rely on complex configurations of facts articulated in non-simplistic causal ways with social norms (Brumann, 1999; Cowan, 2006; Cowan, Dembour, & Wilson, 2001; Cuche, 2016; Dupret, 2007) but, of course, other conceptions of culture and ethnic identity do operate in social worlds, especially through the background expectations, categorizations and representations at work in social interactions. Because conceptions of culture and ethnicity vary in mundane representations, expectations and categorizations as much as they are susceptible to do in practical reasoning of legal professionals, we set the expected scope of variations between complex and non-deterministic models – consistent with contemporary anthropology literature – and more simplistic ones, in which culture and identity are conceived as fixed realities precipitating simple and causal relationships between social norms and facts.

Legal professionals are not by nature resistant to the first model but as rightly put by Anthony Good, “it seems generally agreed that there are basic differences between how lawyers and social scientists think” (Good, 2015, p. 430) and these differences can impact on how ethnicity and culture are used and apprehended in the courtrooms. As we shall see, in our researches we pay specific attention to the ways relationships between facts and norms are posited when cultural or ethnic dimensions are referred throughout the interactions in the courtrooms, because this articulation is at the core of legal theory and practices. Generally speaking, legal models of articulation of facts and rules are “technically” and institutionally driven. Cowan et al. (2001) among other authors highlight the existence of an intrinsic tension in the activities of public institutions which

formulate abstract and general rules, impermeable to ethnocultural diversity, and their applications to concrete and particular cases. Judicial activities offer a paradigmatic illustration of this tension: What is to judge if not to apply general and abstract rules to an individual case?

Our choice to focus on family justice hearings and cases brought to courts by families with a migrant background is related with the changing importance of the articulation of norms and facts in legal reasoning in this field but also to the fact that families with a migrant background massively resort to state justice. Family justice offers a field especially interesting to investigate because of the progressive and recent changes, family law has undergone in most European countries. These recent historical developments of family law toward a specific model of democratization of conjugal relationships and parenthood have different outcomes which all delineate family justice as a transformative field in which the scope of meanings and representations attached to culture and ethnicity are theoretically opened with a decreasing importance of standardized norms and adjudication activities.

First, it goes hand in hand with a transformation of the judges' role when dealing with family matters; when they are to intervene into conjugal or children-care related conflicts within the scope designed by civil codes, it is less and less according to explicit standards and values consecrated by legislative dispositions. They thus enter the field of conjugal conflicts with the legal mandate to help and consecrate agreements between parents, and state regulation of the "private" sphere is then deeply reshaped (Cardia-Vonèche & Bastard, 2005; Ronfani, 1997; Théry, 1998). Moreover, since civil codes presume that spouses and parents are equals, they provide few standards in order to evaluate whether mutual reproaches and claims are or not "acceptable" when disagreements occur.

Second, legislative primacy given to private agreements should allow, at least theoretically, state law and justice to accommodate all sorts of family structures, values and factual organizations. Legal commentators have generally praised such a turning point and predicted that family law was to become more pluralistic (de Singly, 2010; Meulders-Klein & Théry, 1993; Roussel, 1989; Roy, 2012). In a sense, taking into consideration precise elements of the backgrounds of the litigants and/or of the children has become a constitutive part of the judicial function in the field of family justice as remodeled during the last decades.

More often than not, what should or could be labeled as "cultural" remains unclear and uneasy both for law professionals and for the litigants. This was especially significant in the preliminary interviews Anne Wyvekens conducted with judges in Belgium as in France (Wyvekens, 2013, pp. 141–142). When asked explicitly about cultural diversity, they had several forms of "no-answer," which manifested their uneasiness. Some of them answered that the question was not a frequent one; others considered that the cultural issue was much less important than the social one; and another group of judges actually just talked about something else: for instance, the lack of diversity among judges – which is obvious in France – or a list of cases with an international dimension, like human beings trafficking, drugs trafficking, and so on.

One of the reasons some judges gave for their embarrassment about the issues of culture and ethnicity is their lack of knowledge, putting forward the little training they get on these issues. In France, the political context of “republicanism” – all people are equals whatever their color, origin or religion – explains to a certain extent why “France is a bit uneasy with cultural diversity” (Fulchiron, 2010, p. 613). This abstract way of considering people makes the issue of “diversity” quite a taboo in France with a flavor that is not quite the same in Belgium. However, this difference regarding structural dimensions between the two countries is not correlated, in our observations, with significant differences or recurring patterns in the interactions at the level of the courtrooms.

In the absence of formal cultural experts provided by legal provisions or by practical judges’ choices, we have decided to address the reality of the legislative announcement of “family pluralism” through the observation of daily life in the courtrooms grasped by our respective and sometimes disconnected fieldworks.

FIELDWORK AND METHODOLOGY

Our individual and collective research projects have conducted the three of us to feed and progressively build a common study on the diversity of forms taken by cultural and ethnic elements in the field of family justice in Belgium (Simon, 2015; Simon & Truffin, 2016; Wyvekens, 2013), and also in France (Wyvekens, 2017, 2016, 2014). The core of our fieldwork is constituted by extensive observations of different types of family justice hearings, recorded, or transcribed in detailed way. In these judicial settings, we paid attention to implicit scripts and patterns of interactions and to the types of information exchanged between the participants according to their status. It also relies on a careful reading and transcription of the court files and all the documents they can contain, including the judgements. All these information allowed us to “reconstruct” cases in order to highlight the kind of cultural elements and their place in the judicial trajectories of “families with a migrant background.”

By “family with a migrant background,” we refer to family in which one or both parties have migrated to Belgium or France or still have close bounds with a foreign state (they still have family in the country where their own parents came from, speak its language, go there for holidays, and so on). Families belonging to this category were determined on the basis of the court file, which usually contains birth certificates or population registers, documents or other information on the family life and situation that makes it possible to identify them as families with a migrant background. Some exchanges during the hearing have also allowed, in certain cases, to establish it.

As we explained in the previous section, the “cultural elements” we were looking for were not predefined in a static conception. Instead of relying on a monosemic and immutable conception of what “culture” entails, we analytically assume a dynamic conception of culture as a process “permanently produced, reproduced, negotiated, and oriented to by members of various social settings” (Dupret, 2007, p. 305) in order to account for backgrounds representations and

categorizations in line or not with this conception. Our goal was thus to understand how elements were presented especially regarding underlying assumptions about causal relationships between norms and facts. We were thus interested in cultural elements of the everyday life and justice: language skills, family organization, migration experiences, links with the country of origin, and so on. All these elements are as many empirical gateways to unravel how culture and ethnicity are addressed in the daily family justice process.

Our different fieldworks also combine interviews with professional judges, clarifying their perceptions of “cultural diversity” and its importance in hearings and decision-making process. These interviews also allowed us to understand how family judges in Belgium and France organize their caseload and how they perceive their decisional power. Interviews with other professionals – attorneys, social workers – and litigants were also conducted in order to integrate in our analysis differentiated perceptions. The content of these interviews is however less used here, as we rather concentrate on what we have observed in order to be consistent with the praxeological commitment mentioned above.

In Belgium, our empirical observations were conducted in 2012 and 2013 in an urban based Youth Court – a section of the Court of First Instance (*tribunal de première instance, section jeunesse*) – to which numerous family matters were attributed, prefiguring the installment of Family Court (*tribunal de la famille*) created by a Bill of July 30, 2013.¹ Additionally, we have observed how Justice of the Peace (*juges de paix*),² working in local courts situated in ethno-nationally highly diverse urban areas, did conduct their hearings on the basis of Art. 223 of the Civil Code. These hearings have been observed from 2009 to 2013, since in 2014 cases of conjugal separation were legally transferred to Family Courts in an attempt to centralize all family cases in a unique jurisdiction.

Both the hearings based on Art. 223 of the Civil Code and the hearings of the Youth Court regarding issues of civil separation, divorce, legal, and physical custody of the children and alimonies offer a relevant and rich empirical material in order to better understand family justice in action. They are indeed all characterized by the wide decision power legally granted to professional judges and the historical evolution toward a “destandardization” of family regulation it paradoxically encompasses, as we have explained in the previous section.

Among the 31 hearings observed in the Youth Court, Caroline Simon selected 30 study cases for which it was possible to access the entire procedural files and decisions ruled by the judges. During the 22 hearings observed in Justice of the Peace Courts by Barbara Truffin and Caroline Simon, 83 cases concerning families with a migrant background were adjudicated and integrated to the present study even though we were not able to access all the judicial files. As already mentioned, this material was completed by semi-directive interviews with numerous actors taking part in family justice. This includes judges and attorneys and other “experts” such as social workers, but also lay persons as litigants with a migrant background.

In France, Anne Wyvekens observed about 40 hearings in two Family Courts, both in ethno-nationally highly diverse urban areas: one in the Paris region and the other in the South-Eastern part of the country. They included litigation about civil separations, divorces, annulments of marriage, children alimonies, legal and physical custody as well as visitation rights. In addition, she conducted a set of interviews with family Judges. This fieldwork took place from 2010 to 2014. A previous study also consisted in interviews with different kinds of judges, both in Belgium and in France, in order to get a more general, exploratory view of the way they perceived the issue of “cultural diversity.”

All the fieldworks were conducted before the terrorist attacks. They therefore do not include the reactions they have triggered in the discussion of Islamic normativities in Belgian and French family justice.

As already mentioned, cultural elements – whether concerning cultural norms or the factual dimensions of the cases – were exceptional during the hearings we have observed. The paucity of “cultural flavored” discussions varies in extent and quality according to the different roles or status taken by the participants in the interactions.

CULTURAL AND RELIGIOUS NORMS EVOKED BY LITIGANTS

To begin with, it should be underlined that the most exceptional figure in our material is when a litigant “dare” to evoke explicitly a cultural or a religious norm related to migrant background in a family conflict, in order to be recognized or simply taken into account in the decision-making process. This first figure has to be distinguished – according to our understanding of the kind of cultural elements we have chosen to concentrate upon – from international private law discussions about foreign family law dispositions. The latter are and remain “legal” and connected to state-based justice systems. What we explore here are explicit normative statements that do not find their source of authority in a foreign state legal system, but are presented as part of a set of cultural or religious principles that give them their definitive and persuasive character (Comaroff & Roberts, 1985, p. 262; Greenhouse, 1985, pp. 100–101).

In our material, there were very few cases of this type in which the parties expressly invoke a cultural or religious norm in support of their application. Two types of applications specifically belong to it: applications for minor’s marriage authorization and for marriage annulment. The first ones were observed in two cases brought before a Belgian Youth Court (in front of the same judge). The parties were claiming the application of a Belgian legal norm that allows the Court to lift the ban to marry before the age of 18 for “serious reasons” on a request of the minor or his/her parents (Art. 145 of the Belgian Civil Code). These claims were clearly linked with Muslim religion which prohibits any sexual intercourse and any cohabitation before religious marriage but also with the state legal requirement to precede religious marriage by civil marriage (Art. 21

of the Belgian Constitution and Art. 267 of the Belgian Penal Code). In one of the cases, the following discussion took place during the hearing:

The fiancé: I would just say, we have rules to respect [...] There is the Belgian law but we have other rules to respect as we are Muslims, that's why [...] If she gets pregnant [...]

The Judge [to the minor, we will call Aïcha]: Are you pregnant, Aïcha?

Aïcha: No, but if we want to have a baby, we must be married [...]

The Prosecutor: But our law is a secular one and ignores religions [...]

The Judge: I understand that your religion forbids you to have a relationship before marriage but I will have to consider whether this is a serious reason or not [...]

In both cases, the religious norm motivating the legal claims was not upheld as a “serious reason” by the Judge. Both judgements state, in very similar terms, that:

In the present case, the litigants put forward, as serious grounds, the love feeling between Aïcha and her fiancé, their wish to get married as soon as possible, as well as the reasons related to their religious confession, which prevents them from having close relationships, let alone intimacy, before marriage.

The love feeling that binds Aïcha and his fiancé, their desire to live together as soon as possible, to have a family and the respect of the Muslim tradition, are respectable, but do not constitute, according to the Belgian law and more specifically with regard to Art. 145 of the Civil Code, a “serious reason” that would allow the Youth Court to lift the ban to marry before the age of 18 years.

These cases show a Judge and a Prosecutor that are not keen to consider the religious norm invoked by the litigants as a relevant argument for their claims and thus dismiss it. During the hearings, the religious norm is clearly situated as contradictory to secular legal Belgian norms, as well as balanced – to some extent – against the open legal concept of the best interest of the child, mentioning the risk that girls will not finish their studies, for example. But this assessment does not appear in the judgment, which limits itself to note that love and tradition cannot be recognized as sufficient reasons for marriage authorization.

The cases of marriage annulment are usually ruled the same way. During our interviews, several family judges explained that requests for marriage annulment can be “cultural”: Some spouses request annulment instead of divorce in order to see their marriage completely erased, as a way to keep the “virginity,” culturally or religiously needed to marry another time. In such cases, the cultural norm is more often than not dismissed by the judge, based on a strict enforcement of the legal conditions of annulment. Yet we have found one decision of a French Family Court which explicitly admitted it and recognized it. The motivation is interesting insofar it mixes legal and cultural arguments. The annulment is based on Art. 184 of the French Civil Code and a lack of consent since the spouses had undergone “family and cultural pressure.” At the same time, the ruling explicitly mentions that the spouses had chosen to ask annulment because it was the request which was “closer to their traditions and their culture.” In this case, a “virginity certificate” had been produced in order to prove that the marriage had not been consummated.

These cases involve a normative understanding of culture, as we have explained it in the first section. This normative understanding does not appear

problematic as such, because it seems in line with the conception endorsed both by the litigants and – in his/her turn – by the judge who has to decide the case. Even if no legal rule provides guidelines according to which the judge could consider these cultural norms as pertinent elements in ruling the case, the fact that both litigants and judges consider the cultural element as a norm rather than a fact, a norm the litigants asked to be taken into account, allows the judge to assess these norms in comparison with the norms of the Belgian legal system and to contrast them – often in a conflictual relationship – with the legal rules that the judge must apply. Although the reasoning behind the decision may appear insufficient, it remains that the assessment of a claim seeking to give an effect to a cultural or religious norm in light of the legal norms concerned, seems adequate regarding the judges' mission. Other cases appear more problematic as they show a gap between the way cultural elements are framed by the litigants and the way the judge apprehends them.

CULTURAL FACTS RAISED BY LITIGANTS VS NORMATIVE UNDERSTANDING OF THE JUDGES

Cases in which culture can be clearly grasped under a normative conception are infrequent. More often than not, what should or could be labeled as cultural norms or facts remains unclear and uneasy to unpack. There is a multiplicity of forms and a complexity in the significance which the cultural elements can take in the exercise of family justice.

The case we propose to analyze here is representative of these multiples incongruous ways of understanding cultural elements. In this affair, two grandparents (both born in the Democratic Republic of the Congo) filed a lawsuit in the civil chamber of Juvenile Court against their son (born in Belgium) and his wife (born in Burundi); they asked for the recognition of the grandparents' right to personal relationships with their three grandchildren on the basis of Art. 375 bis of the Belgian Civil Code.³

The context of the disputes between the grandparents and the parents, as documented in the procedural written pieces but also during the interactions of the hearing, appeared to have started with a major conjugal crisis in the parental couple in 2006. This crisis led the young mother to leave the marital residence which she nevertheless returned to, a few weeks later, after reconciliation with her husband. If the stepparents did not oppose her returning to the marital home, they asked the Congolese custom to be respected. In other words, they wanted their daughter-in-law to perform the rituals necessary for the restoration of trust, that is to say, the organization of a large meal with the extended family and the payment of a sum of money to the husband's parents in order to compensate for the dishonor inflicted upon the whole family during their separation.

The daughter-in-law refused to perform the ritual, arguing that the couple's affairs were private, that the issue was between her and her husband, and that it should be resolved without the involvement of her husband's family. Since then, relations between the couple and the rest of the family were tensed and progressively shattered. The daughter-in-law was not welcome any more at her

stepparents' home. Conversely, the son and his wife did not allow their children to spend time with their paternal grandparents since the latter would not open their door to their daughter-in-law.

At one point of the hearing, the judge – which was obviously trying to assess the interest of the children – asked to the grandparents: “In your living room, is there room only for your grandchildren, or is there also a place for your son and his wife?” After a pregnant silence, the grandfather explained at length that it was thanks to his intervention and respect for Congolese customs that his son and his daughter-in-law were still together at the time of the trial. During the crisis in 2006, he stated, it was he who had done everything to encourage them to return to each other, while his son’s wife had not respected the simple customary principle of restoration. Nevertheless, the grandfather argued, they had contracted a customary marriage under Congolese custom in which they had pledged to respect the traditions, and since his son’s wife had honored neither customs nor the customary wedding, she could not return to the grandparents’ home. The daughter-in-law replied that she had always done everything possible to maintain a good relationship with her husband’s parents, but that they continued rejecting her and that the couple’s crisis in 2006 did not concern them.

After having closed the hearing and being back to her office, the judge said:

I cannot accept that the grandparents reject the mother. [...] Well, I do not mind taking diversity into account, but there is a limit: I rule according to Belgian family law and I know nothing about Congolese culture, so I cannot decide on it! I cannot accept it under Belgian law. And if the mother does not want to submit to the custom, she is within her right to do so!

This extract shows how the judge interpreted and responded to the invocation of the customary rite: the judge took it as if the grandparents had asked to recognize it and therefore dismissed it. In the prolongation of this comment, her decision did actually reject the grandparents’ application:

The plaintiffs required from their daughter-in-law the respect of a Congolese customary rite. The defendants refused to do so. Given this, whereas their son [...] and grandchildren are always welcome at their home, the grandparents not only refuse to let their daughter-in-law enter their home, they also deny her status as a wife and mother. Under these conditions, the interests of the three children would not be met at the grandparents’ home as they would speak and even behave in a way that would show that they refuse to respect the person of the mother. In doing so, the grandparents, the plaintiffs, would undermine respect for parental authority in this case. Therefore, the lawsuit was judged to be unfounded and is dismissed.

This orientation of the judge might be problematic if we consider that in explaining the causes of the conflict (cultural facts) the grandparents were not automatically asking the judge to confirm the legitimacy or to recognize the validity of the custom. In refusing legal relevance to customary norms and affirming the right of the mother to resist it, under Belgian law, the judge somehow reduces the scope of discussion of the “best interest of the children” according to a normative understanding of what culture entails here.

But if we take the cultural elements of the case as pertinent facts instead of a customary norm, the question that the judge would have to address is no

longer about the (mis)recognition of the Congolese custom but about the arguments at stake concerning the interest of the children to maintain personal relationships with their grandparents. In the discussions, there were clearly two kinds of conception of such interest. On the one hand, the grandparents were seeking to mobilize the interest of the children to be included in the wider family, as a community called to structure the relationships between individuals. Likewise, the grandparents' counsel particularly stressed the importance of the grandchildren being integrated into a larger family, with their uncles, aunts, and cousins. The argument of their daughter-in-law, however, referred to individual interest and the right to privacy of the nuclear family – the values that are more commonly associated with contemporary Western societies.

In linking her ruling to the question of the respect of the Congolese custom instead of assessing where the best interest for the children lies between two conceptions of the family, it appears that the judge misunderstood what was at stake in the claim of the grandparents. It also led her to immediately take the side of the mother and the liberal family model, leaving aside all questions about the possible coexistence of different systems and the values vested in the conception of the grandparents. She fundamentally slips into a hierarchical normative assessment instead of weighing both sides in a determined context. In her reasoning, the best interest of the child standard is established as normatively corresponding with the respect of the mother. It might well be so, but here it is striking that such “interest” is not adjudicated against others. Shortcuts of this kind in the assessment of the interests of the children might well be caused, at least in part, by a normative apprehension of the cultural element of the case and its (almost automatic) dismissal. As a matter of fact, what our empirical material illustrates here is the difficulty for the judges (and other legal professionals) to operate with a more “factually” based definition of culture in order to read and conceive “cultural aspects” as arrangement of facts instead of “rule oriented bodies.” In our case, the fact that the conflict originated in relation with the customary (disputed) norms was actually “turned” against the plaintiffs by the judge. In her perspective, customary norms could not be legally recognized at all; her reasoning was therefore oriented as if the plaintiffs had used family justice to ratify a customary-made decision. Regretfully, the custom being dismissed, no other dimensions of the case were discussed which led to an impoverished discussion of the interests of the children.

Our point here is to highlight that from the vantage point of the litigants, cultural explanations do not “pay well” in the family justice courtrooms. To invoke a cultural argument or background is not strategically the best option for a plaintiff and can lead to a mismatching in the way cultural elements are tackled in court. This analysis is symmetrically corroborated by a much higher proportion of “culturalization” or ethnic assignations occurring between litigants during the hearings.

ASSIGNATIONS AND CULTURALIZATION BY LITIGANTS ... AND JUDGES

The much common figure in the litigants' discourse is the reference to a supposed religious or ethnic background of other litigants. These cultural elements can be brought as pertinent facts by the litigants. Yet the most frequent kind of reaction by judges is indifference. We could even talk, sometimes, about blindness. It was the case, for instance, in a family hearing in France. A father, native of the Ivory Coast, filed for principal custody of his son. He was worried: the child says his mother calls him an "unblessed child" and he reported that his son was traumatized. The judge seemed not having even heard those words. She only noted that the request was not complete and advised the father to go to the Youth Court. In another case of divorce, the wife claimed that her husband was being Islamically radicalized and that his family forced her to consult a marabout. Her husband denied everything. And there was not a word about religion in the decision.

Cultural elements can also appear in social investigation or psychiatric expertise, as facts that are likely to shed light on the situations under scrutiny. But the answer or even the attention they receive from the judge appear highly unpredictable. In a lot of cases, they are simply ignored during the hearings as much as in the judgment. Sometimes, they are brought up in the scene or in the decision. For example, a Guinean couple appeared before a family judge in France. The father had requested his daughters' custody and exclusive parental authority. According to his attorney they would have suffered female genital mutilation when living at their mother's home. A social investigation has been ordered by the judge. The report mentioned the issue of female genital mutilation as one point of disagreement among others between the parents. The mother denied everything, the report said, stating the girls had refused to be medically examined. The report concluded by recommending that the daughters remained living with their mother. We ignore which decision was taken by the judge.

If these kinds of elements can be brought as "neutral facts" by litigants, they can also, in a lot of cases, mobilize stereotypes and mechanisms of identity assignment. They are often powerful meanings used in order to devaluate the other litigant and – consequently – appear more reasonable or somehow "civilized" than him/her.

During a hearing at the Justice of the Peace Court on civil separation, a Moroccan woman claimed that her husband – present in the room – had reproached her to have brought their problems up to a "miscreant judge." In a case in which a French judge had to rule on custody rights, the mother claimed that her ex-husband was being Islamically radicalized and that she had been the victim of religious harassment. Conversely in another case about domestic violence in a French Court, the husband declared at the end of the hearing that his wife was now wearing a headscarf and moving in Salafist circles. Here, again religious assignation and signs are used to morally portray the other litigant.

In such cases, migrant ethnicity, cultures and religions are framed in negative ways: they are part of the typical moral repertoires and accusations – which

might be true and fact-based or not – that are thought to convince the judge to take side. Somehow this use of cultural and ethnic background is much more salient than any in-depth discussions of family organization, trajectories or “style.”

Several cases are built on the same scenario: one of the spouses uses “cultural” elements in order to depreciate the other. An old Moroccan woman asking divorce describes at length her life and the way her husband had been treating her. “I have never worked, I cannot speak French, my husband wouldn’t let me go outside, he didn’t give me any money, and he used to beat me [...]” The judge interrupts her “This is not the place to explain why you want to divorce.” The woman speaks again “I was not allowed to go out, he owns two cars, two houses in Morocco, he used to keep all the money [...]” The judge interrupts her again “I know, I know that.”

Frequently adopted to respond to accusations and assignations to problematic ethnic or religious identities advanced by one litigant against the other, the indifference of the judge is difficult to interpret. It seems however that this attitude simply expresses a lack of time and means to establish the reality of the accusation. It is not clear for us in which extent this indifference occurs and varies when compared with other moral accusations.

A last and somehow much more problematic figure is the one in which the judge himself introduces the cultural element to “culturalize” the litigants and assigns them to ethnically charged figures of “migrants.” During a hearing concerning a conflict between divorced Turkish parents about parental authority and visiting rights of their children, the judge reasserted her decisional power when saying:

Mister has to stop his threatening text messages. But please, Madam, your family also has to renounce to threatening your ex-husband. I know the ways of certain communities [...] with the uncles, aunts and the family [...]. This is “settling of accounts”! It worked before I arrived, but now that I am here, it has to stop.

In another case, the fact of being an irregular migrant becomes an aggravating factor in the reasoning of the judge in the assessment of the best interest of three children whose legal and physical custody was disputed by their divorced parents, both Russians.

Mister [...] has filed in for principal custody of the three children. The psychological examination is not worrisome inasmuch the children are concerned. However it highlights a disturbed psychological state of mind of their father. We have to keep in mind that Mister [...] does not speak a word of French and is quite passive: he still stays at a reception center for asylum seekers with two of the children. All this, despite the fact that he is living in Belgium for years now. Now, he states that he wants to apply for Czech nationality and establish himself in Czech Republic when obtained. The Court would be much more reassured if the custody of the children was attributed to Madam, but she has not asked for this.

Here, the reasoning heavily relies on a moral evaluation of the administrative status of the father and of what appears to be his failure of integration into Belgian society (precarious housing in a shelter, lack of French language, irregular administrative stay and poorly organized actions to obtain a regularization

of his administrative status). The judge mobilizes what he knows about the administrative status of the father; he connects his lack of integration, as it was an incriminating evidence, with his parenting aptitudes. More than operating a simple equation between two figures, the “badly integrated migrant” takes literally over the father’s one. From a legal perspective such overdetermination of family law issues by administrative status is quite disturbing. Here again cultural or ethnic backgrounds are heavily charged and morally shortcut proper in-depth assessment of the family situation.

CONCLUSION

In documenting the ways in which cultural elements were brought into the script of family justice, our first finding was the lack of “textbook” cultural defense cases or “red handed” cases of cultural diversity in our material. Occurrences where cultural elements were conceived in a normative outlook by the litigants and mobilized to insert or support the cultural dimension of a case were rather an exception. Even when they happened, most of the time judges were ignoring them, or immediately dismissing them as opposing the secular state legal system, which led to an impoverished discussion about cultural norms entering family justice.

Other cases show how the meaning given to cultural elements can be very different from the litigants’ point of view and the one of the judges, leading to a misunderstanding between culture as a relevant fact in the contextualization of the case and culture as a norm that litigants supposedly want to be recognized by State justice. Here also, oppositions between the alleged cultural norm and state law systems are blurring the lines of a comprehensive and complex understanding of cultural elements entering family justice.

Several hypotheses of such a paucity in the way cultural elements can be brought and addressed in the day-to-day family justice can be made. First, we would like to point out that the judicial script which implicitly structures family justice is not propitious to the unveiling of elements associated with migrant “cultures.” No legal provision considers cultural elements as relevant in the assessment of a case; cultural claims are almost instantly considered in a conflictual relationship with the secular state legal system; presumed equality and agreement’s primacy hardly suffer other standards than the deliberative and liberal postulates; time constraints and routinized ways of assessing families’ realities do not allow discussing differences in family values. In this perspective and quite logically, the reactions of the judge contain rare acceptance of cultural dimension.

If cultural facts are more often used by litigants in order to explain a situation, cultural elements can also be used in a more essentialized way between litigants with migrant background alluding to negative conception of cultural identities. Litigants with the same migrant background accuse one another to have bad moral qualities attached to barbarian or savage status linked to a common but somehow contested identity⁴. The impact that such “use” of cultural elements has in the judicial process and on the decision forged by the judges is

difficult to measure. But the way in which some judges also mobilized these mechanisms of assignation to reify conceptions of cultural identities raised in its turn a lot of questions.

On an average, judges have vague ideas about cultural features of family diversity and tend to reproduce these stereotypical views. “African people like to solve their problem through discussions, rather than bring up a case to state justice.” “Men from North Africa do not easily admit and express regrets about their actions,” As we have seen, this can lead to or reinforce ethnic assignations of the litigants to “bad” moral identities (“savages”; “poorly integrated foreigners”) on behalf of the judges themselves. This tendency might, in turn, encourage the “culturalization” of the adversary used by the litigants as we have seen above.

But other judges are quite aware of this type of risks and biases encompassed in “cultural diversity” and actively seek to train themselves: reading, attending training sessions – which exist – at the National French School of the Judiciary and in a lesser extent at the Belgian School of the Judiciary. Each judge becomes his own expert and develops his own expertise. In French we call it “tinkering” (*bricolage*). Cases can also be informally discussed with other judges familiar with one another, but not within official meetings. Finally, whether families have migrant origin or not, judges use the same general tools – social investigation, psychiatric or psychological expertise – in which cultural elements can appear and be addressed ... or not. Therefore they only incidentally bring up elements likely to shed light on cultural dimensions of a situation. Additionally, the result is always unpredictable. They intervene only “by chance,” rarely, and their interventions can be more negative than positive when considering general communication.

This common feature for Belgian and French fieldworks in family justice should be compared with other national settings in order to assess the importance of these reified and negative views of migrant ethnic and cultural backgrounds. For us, this should be the first step before assessing the need of cultural expertise, which might otherwise reinforce stereotypical and fixed views of “cultures.” Indeed, if socio-legal knowledge has to be inserted in the courtrooms we have observed, it should be aimed at allowing more fluid and dispassionate conceptions of cultural diversity and help to deflate harmful stereotypes and disturbing dual-type of migrant identities.

As we have documented above, judges play a critical role in admitting and/or reinforcing such stereotypes and, at the end of the day, in (not) allowing cultural dimensions to be brought by litigants. The possible role of cultural expertise in these judicial settings could not be envisioned without keeping this in mind. As gatekeepers of the judicial communication, judges might be more systematically trained to help to deflate ethnic assignations instead of reinforcing them. In this regard, the most worrisome result of our researches lies in the tendency of some judges to culturalize litigants with migrant backgrounds with damaging consequences as judicial reasoning is concerned.

Our results suggest that assessing the cases without presupposing stable cultural identities and simplistic models of causalities but interrogating the

importance of other dimensions than the one directly pertinent for the law might facilitate the communication between the judges and the litigants. However, such training might not be easy to design nor to implement. In a training session in France, a young judge and an expert from Malian background engaged in a revealing dialogue on this point. The young judge said “We have never been taught about all this!” And the Malian “cultural expert” responded “The problem is, that when you will leave the training, you won’t know what to do with it.”

NOTES

1. Loi belge du 30 juillet 2013 portant création d’un tribunal de la famille et de la jeunesse, *Moniteur Belge*, September 27, 2013.

2. The *juge de paix* – literally translated by Justice of the Peace – in Belgium is a professional and local judge in charge of small civil cases. He was in charge of specific familial cases including civil separation before divorce until September 2013 when this competence was transferred to the new Family Court.

3. It reads as follows: “Grandparents have the right to maintain personal relations with the child, as does any other person who justifies a special emotional connection with him. In the event of disagreement, the exercise of this right is determined by the Court at the request of the parties or the public prosecutor, in the interest of the child.”

4. We observed the same reversal in a criminal case in which the defendant (a young man) and the victim (his wife) were of the same Moroccan origin: the family of the young woman called her husband an archaic person, a savage. (Wyvekens, 2014, p. 142).

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CULTURAL EXPERTISE IN AUSTRALIA: COLONIAL LAWS, CUSTOMS, AND EMERGENT LEGAL PLURALISM

Ann Black

ABSTRACT

British colonization of Australia had lasting consequences for Australia's legal system. Although designed as a "one law for all system" based on the English common law, the reality was, and is, that there have always been people regulating their lives according to their own distinctive culture and religion. Recognition of de facto legal pluralism, has only recently given rise to instances of de jure legal recognition. The latter necessitated a role for cultural expertise in a range of legal cases. The first considered is how social science expertise was employed in redressing the dispossession of the continent's first peoples: indigenous Australians and Torres Strait Islanders. The landmark case of Mabo No 2 laid the legal ground for native title land ownership which fueled a demand for cultural experts in indigenous traditions, laws, and customs. The second aspect is Australia's response to recent immigration from non-European nations, including from Muslim countries. Many Muslims continue to regulate their interpersonal relationships exclusively, or partially, by principles of Islamic law and their "homeland" culture. This is particularly evident in family matters and the prism for exploring the nascent role for cultural expertise is through post-divorce parenting orders. The third issue is the extent to which a court can accept an accused's cultural practice or religious belief as a defense to a criminal act or omission. In all three, who is a "cultural expert" can be contentious. While cultural expertise in

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indigenous matters is well established, the role for cultural experts in the resolution of family disputes and criminal cases is just emerging.

Keywords: Australia; cultural expertise; native title; parenting orders; cultural defense; family law

INTRODUCTION

Australia is a country of paradox. Australia is situated on the opposite side of the globe to Europe proximate to Asia and the South Pacific yet is categorized as a European, not an Asian, nation. Australia is considered a new nation but is an ancient land where its first peoples settled over 50,000 years ago. Today, their descendants comprise less than 3% of the Australian population (ABS, 2017). The other 97% is made up of comparatively recent immigrants, initially from Europe but in recent decades also from Asia, the Middle East, Africa, and the Americas. The 2016 census found 6.8 million (35% of the Australian population) were born overseas (ABS, 2017). As an immigrant nation Australia can be distinguished from the many emigrant European countries: Portugal, Greece, Ireland, and Italy, for example (see, for Portugal, Lopes & Ferro, 2016). The result of two centuries of migration is that today Australia is one of the most ethnically diverse nations in the world.

Australians have come from over 200 different countries of birth; speak over 400 different languages; and follow more than 100 different religions. Therein lies another paradox. Australia's cultural and religious pluralism has not translated to legal pluralism. There is one formal legal system whose courts apply the English-derived common law of Australia. Yet, citizens and residents do have considerable freedom to enter in and out of relationships according to their own laws, customs, religion or traditions with the proviso that state criminal law is not violated. For example, according to s. 270 of the *Criminal Code Act 1995* (Cth) and s. 23B(1)(e) of the *Marriage Act 1961* (Cth), underage and forced marriages are a violation of federal law with imprisonment for citizens and deportation for non-citizens. Female Genital Mutilation is also a criminal offense in all States and Territories of Australia, and can operate extra-territorially to criminalize FGM on Australian children, under the age of 18 years, performed overseas. Excluding criminalized conduct, informal or unofficial legal pluralism can operate freely. Many recent migrants and also members of established ethnic or religious minorities choose to live by religious or cultural norms and resolve differences within their communities, but when matters between parties are unresolved and agreement cannot be reached, they can, without prejudice, take the matter to the secular courts of law.

It is against this backdrop that the emerging role for cultural expertise in Australian courts is considered. Cultural expertise plays a role to varying degrees in several aspects of law. One is in regard to indigenous Australians in particular how belated special legal recognition has drawn on social science expertise in indigenous culture and traditions to determine legal rights and

outcomes, especially, in deciding questions of native title. The second role for cultural expertise is in the family law courts and is a vehicle by which to evaluate the extent to which the Australian legal system accommodates recent immigrants, in particular Muslim Australians seeking to have family and other matters decided in accordance with their “homeland” culture and the norms of Islam. The chapter looks specifically at parenting orders where pt. VII of the *Family Law Act 1975* (Cth) directs the court to take into account the “culture” and “background” of the parties when making the orders for the care of children. The third is more general and considers to the extent to which a “cultural” defense in criminal trials can be brought into play. Each is in some way a consequence of the political and legal ideology of colonialism and the distinctive form of colonization which occurred in Australia differentiating Australia from other European colonies in Asia and the South Pacific. The consequences live on and still impact on the nature of court processes today.

It should be added at the outset that culture can also play a role in other legal matters which are not considered in this chapter. For example, Coroners Courts take expert advice on whether there are cultural or religious norms against performing an autopsy or delaying a body for burial (see generally, [Arnold & Bonython, 2016](#), p. 27). This is important for Indigenous and other ethno-religious communities, including Muslims and Jews, but where there are compelling reasons why it is in the public interest for an autopsy to be performed, the cultural and religious considerations will take second place (*Evans v. Northern Territory Coroner*, 2011).

INDIGENOUS PEOPLES OF AUSTRALIA: NATIVE TITLE CLAIMS AND THE ROLE FOR CULTURAL EXPERTS

The main distinguishing feature of colonialism applied in Australia was the application of the international law concept of *terra nullius*: land belonging to no one. It was employed because the Aboriginal people were considered so “uncivilized” that the land could be categorized as uninhabited. Hence, there was no need for any treaty, for legal recognition of prior ownership, or for acceptance of indigenous customs, languages, laws, or religion. This is quite different from the colonization in neighboring Malaya, Singapore or Borneo where treaties were negotiated, rulers retained titles and a role (even if their power was significantly reduced), where the local language was retained (but not for official matters which was English) and where Islam was legally recognized as the religion of the people and separate religious *Kadi* Courts were funded and developed by the colonial Governors and Residents ([Black, 2009](#)). Chinese and Indian minorities were also able to regulate their interpersonal laws for marriage, divorce, family, inheritance, and so on. In these colonies, legal pluralism was endorsed. This did not occur in Australia. No treaty,¹ no land rights, no acceptance of indigenous languages, customs, or spirituality was accorded – everything English was transplanted. The aim was to fully assimilate the indigenous peoples and extinguish their “uncivilized” way of life. From the moment Captain Arthur Phillip hoisted the British flag in 1788 marking the start of the

penal colony in New South Wales, all land became Crown land, the sovereign was King George III, and all laws were English. That did not change until the 1970s when a form of statutory native title – *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) – was first introduced in Australia’s Northern Territory. This created a demand for anthropologists and other social scientists to work with Indigenous Australians and the courts in claims for legal title to land and waters.

However, *terra nullius* was not fully rejected as legal fiction until the 1992 landmark case of *Mabo v. Queensland (No. 2)* (1992), when addressing or redressing its consequences – the dispossession of indigenous peoples – became a national priority. The High Court of Australia held (6:1) that native title could be legally recognized by the common law of Australia. Legislation was quickly enacted the following year to allow for native title across the whole continent. To assist claimants and the courts, cultural experts in Indigenous culture and traditions, past and present, were needed. This was due to the fact that s. 223(1) of the *Native Title Act (1993)* (Cth) required proof that the traditional law and the customs observed by Indigenous claimants which connected them to land or waters were the substantially the same customs and laws of their ancestors at the time of British settlement. The law also recognized that certain acts and events² could extinguish the continued existence of native title. In *Members of the Yorta Yorta Community v Victoria* (2002) the trial judge found that the “tide of history” had washed away any native title because by 1881, the Aboriginal claimants’ ancestors were no longer in possession of their tribal lands and had ceased to observe their traditional laws and customs. By majority, the Full Federal Court and the High Court of Australia agreed.

Many native title cases were and are negotiated through consent determinations and by mediation from which agreed native title outcomes are ratified by the Federal Court. However, the focus in this chapter is on litigated claims involving cultural experts.

The legal process requires Indigenous applicants/claimants for native title to give evidence about themselves and their knowledge of custom and connection to place, with supporting expert evidence. In *Sampi v. Western Australia* (2010), French J stated at [48] that the Aboriginal witnesses’ evidence regarding the laws and customs of the claim group was of the highest importance and all other evidence was second order. The claimants have the persuasive burden to prove the existence of native title in accordance with the rules of evidence. The standard of proof is the civil standard – on the balance of probabilities. Experts can be instructed by the claimants, their lawyers, the court, or the respondent government parties. Expert evidence (as is outlined in more detail in the section that follows) is necessary to overcome the inherent forensic difficulties in proving the content of pre-sovereignty laws and customs and their continued observance. Cultural experts are mainly anthropologists but linguists, historians, ethnomusicologists, and archeologists also play a role. Asche and Trigger note that not only are anthropologists with expertise in native title in high demand but demand well exceeds supply (Asche & Trigger, 2011; Palmer, 2011).

The management of native title cases now lies with the Federal Court of Australia, whereas the original *Native Title Act 1993* (Cth) provided that applications were to be filed in the National Native Title Tribunal. Such a scheme was held to be unconstitutional and from 1998, applications were filed in the Federal Court. Cases proceed slowly (potentially taking 15 years or more for a determination): the matters involve large areas of land or water; there are many parties; complex issues of law and fact arise; there are numerous interlocutory steps, including a requirement for mediation which can be a lengthy process; there is the cross-cultural context; intra-Aboriginal disputes over membership of claimant groups and areas; concerns over sufficiency of funding when all parties are publically funded (Edwards, Anderson, & McKeering, 2006); and the adversarial nature of the proceedings in which witnesses giving evidence can be examined, cross-examined, and reexamined. The examination and cross-examination of anthropology experts in *De Rose v. State of South Australia* (2002) took 24 hearing days (Edwards et al., 2006). To overcome this impost, expert conferences and concurrent evidence in litigation have gained momentum allowing the court, the lawyers, and the parties to hear all of the experts discussing the same issues at the same time.

The complexity of the issues and evidence can be seen in the *Wongatha* case, where there were eight claimant groups with the Wongatha people's claim being for more than 160,000 square kilometers of Goldfields land in Western Australia. The native title claim was first lodged in 1994, and the judgment, dismissing the claim,³ was not delivered until 2007. There were 149 witnesses. Lindgren J notes the evidence is recorded in approximately 17,000 pages of transcript, with 100 extended hearing days (in various locations), 34 volumes of experts' reports comprising 2,817 pages, and 97 volumes of submissions comprising 8,087 pages (*Wongatha People v. Western Australia (No. 9)*, 2007). Cultural experts in the case included nine anthropologists, two historians, two linguists, one archeologist, and one ethno-botanist. Experts had the opportunity in the witness box to question each other and to make statements on any areas of disagreement and there was the opportunity to conference as well. Each expert was also cross-examined and reexamined in a conventional manner. Like many native title cases, it consumed considerable resources of people, time, money, and emotion. For example, Bauman (2010, p. 124) estimates that connectivity reports are estimated between A\$50,000 and A\$350,000.

Role for Cultural Experts in Native Title Cases

In native title cases, anthropologists conduct fieldwork to record informants' statements about how a person may rightfully belong to a place (*ngurra*), "the rights that flow from one's traditional connection to a place, and how one should behave according to customary rules to do with interests in sites" (Sutton, 2005, p. 122). Published manuscripts of early ethnographers, diarists, and archival records of the relevant ethnographic area are used to go beyond living memory and oral history. Anthropologists' knowledge of comparable Aboriginal societies and theoretical and practical understanding of Aboriginal

and Torres Strait societies generally can be used for context and to fill in gaps. In these ways, anthropological evidence is drawn on to establish the nature of the pre-European Indigenous society in that location and whether the required uninterrupted connection to the contemporary indigenous claimants still exists. Palmer describes this as “reconstructive anthropology” noting it needs to be treated with caution, as it depends on “interpretations of interpretations” (Palmer, 2011).

Other cultural experts help complete the picture for native title claims. Linguists give evidence on the cultural difference in communication styles of Indigenous witnesses when giving evidence and being cross-examined in English in a culturally very European formal legal hearing. They also can explain words and phrases which have special meanings for land, kinship, and spiritual connections between the people and the place (Sutton, 2005) and interpret earlier historical records where there can be an array of spellings and uncertainty of meaning. Historians provide a social history of an area which is the subject of the claim. Their reports are seen as providing a “broad brush approach” rather than what Sutton refers to as “probative evidence as to the history of *these* particular people in relation to *these* specific forms of occupation over *these* particular lands and waters” (Sutton, 2005). Archeologists also are engaged as experts to provide evidence regarding the use of sites which claimants assert have cultural significance, perhaps as a ritual site, fishing or camping area.

Several issues arise in relation to anthropological and other cultural expert evidence in common law court proceedings. One is the strict rules on admissibility of evidence which is a hallmark of the common law method. The admissibility rules require all experts, including cultural experts, not to exceed their area of expert knowledge and to identify the facts on which their opinion is derived. Proof may also be needed for any underlying assumptions on which their opinion is derived (*Jango v. Northern Territory (No. 4)*, 2004). Otherwise, expert evidence will be given little weight (Edwards et al., 2006). It is the judge who makes the factual and legal decision as to whether native title exists or not, and expert evidence from anthropologists or others is but one consideration. In *Wongatha*, where the native title claim was dismissed, Lindgren J found substantial parts of the expert reports: “can be described as undifferentiated combinations of speculation, summary description of facts, opinion (including opinion beyond the witness’s field of specialised knowledge), hearsay, unsourced assertion and sweeping generalisation” (Edwards et al., 2006, p. 155).

The discordance arises from the difference between legal method and social science methodology. Young (2014, p. 244) sees incongruity in the “purposes, priorities, languages, protocols and processes” as factors at play in the “troubled relationship” between law and anthropology especially in the adversarial context. Cross-examination by barristers which is the standard means for testing the accuracy and veracity of evidence in any adversarial setting is misunderstood by some social scientists as lawyers acting to discredit or undermine the anthropologist’s evidence. Burke (2011, p. 25) writes that anthropologists “wounded from humiliating cross-examination, swear, yet again, never to be involved in a native title claim.” The rule against hearsay means that evidence of what an informant

may have said to an anthropologist has no weight and is inadmissible, unless the informant comes to court and gives his or her account. This is necessary for verification, which may involve cross-examination. In addition, the legal method requires facts to be verified and accordingly field notes are discoverable. Inferences drawn from facts need to be highlighted as opinions. Palmer (2011, p. 11) recommends an “introductory phrase such as, ‘in my view’ or ‘in my opinion’” be used. Edwards et al. note that anthropological reports tend to be ‘lengthy, written in the form of an essay’, ‘may use terminology not familiar to judges’ and ‘consider various aspects not directly related to the land tenure issues’ (Edwards et al., 2006, p. 160). They suggest that lawyers assist social scientists with report-writing, and Lindgren J advocated lawyers be involved with the writing of reports by experts, not to the substance of the reports but in relation to aspects of admissibility (*Harrington-Smith v. Western Australia* (No. 7), 2003, [19], approved by Sackville J in *Jango v. Northern Territory* (No. 2), 2004, [9]). There are of course natural concerns this could compromise the independence and professionalism of the anthropologist as cultural expert. However, Morton (2010, p. 19) believes anthropologists would agree that many judges do not understand anthropology, and “probably see no requirement to understand it,” which is unreasonable given the importance of anthropological evidence.

Related difficulties arise from differences in language and concepts used in law and social science. Young (2014, p. 236) advises lawyers of the need for caution in handling anthropological terms and concepts as anthropology is a “sophisticated and dynamic field of study that is an equal partner in collaboration.” Palmer concludes that “the relationship between anthropological concepts of ‘society’ or ‘community’ and the legal requirements of the native title legislation is complex especially as these terms may not command the same meaning in anthropology as they do in law” (Morton, 2010; Palmer, 2011, p. 25). Anthropologist Paul Burke (2010, pp. 60–67) explores in some detail the differing emphases given to the core concept of “society” in both legal and anthropological discourse, while Bauman notes that other terms such as “customs acknowledged and observed,” “occupancy,” and “continuing connection” remain elusive and judges themselves accord meanings that are inconsistent (Bauman, 2010, p. 129).

A second issue is that in the common law system cultural experts, like lawyers, have an overriding duty to the court, above their duty to their client. As experts they must be professional and impartial, and not biased to give only evidence favorable to their client. However, Palmer as an anthropologist notes an ethical dissonance as anthropologists believe they should not knowingly allow information gained on a basis of trust from Indigenous people to be used against their interests by those he calls “hostile third parties” (Palmer, 2011, p. 8). This aggravates the concern that anthropological evidence given in native title cases is particularly vulnerable to bias (*Jango v. Northern Territory*, 2006, [315]–[338]). Anthropologists Ron Brunton and Lee Sackett (2003) have suggested that anthropology allows more room for interpretation than other disciplines and that friendships develop between the anthropologist and members of indigenous groups especially when there are periods of fieldwork. The danger is that

claimants may also come to depend on the “anthropologist for advice and see them as a mediator on their behalf with the European system of government and justice” (Brunton & Sackett, 2003, p. 86). In this way, they become advocates rather than expert witnesses on which the court can rely, thereby tainting the credibility of their evidence. Justice Rangiah (2016) warned that “when an expert is no longer objective and has become an advocate, it quickly becomes apparent to the judge. There is nothing that more readily undermines a judge’s confidence in the expert.” There are cases, however, where this close relationship between expert and claimants has been approved by the court. In *Neowarra v. State of Western Australia* (2003, [112]–[119]), the anthropologist’s objectivity was challenged in court and he did acknowledge his close association with the claimants over a period of years yet Sundberg J accepted that the evidence given was at all times professional.

A related concern is where anthropologists assist the claimants in drafting their claims and then present themselves to the court as independent objective experts. Sackville J in *Jango v. Northern Territory (No. 2)* (2004) at [322] was critical of the anthropologist taking an “active part in formulating and preparing the applicants’ case” and then giving evidence in the court to accord with it, and preparing the witness statements. When such assistance is given to claimants, the expert should not also submit a report or give evidence as an independent expert.

The third issue lies within the discipline of anthropology where native title research is said to be denigrated by some in the academy who assert that applied research, particularly native title work, is not “real anthropology” (Asche & Trigger, 2011, p. 222). This may make anthropologists less likely to take on native title cases, despite the demand for them. However, given the scrutiny on expert evidence in the court process, not only in cross-examination, the questions, and challenges from other anthropologists and the judge, one can conclude it is as rigorous and academically defensible process (Asche & Trigger, 2011) as any peer-reviewed chapter. Related to this, Brunton (1992, pp. 2–5) is concerned there is a “lack of candor and objectivity” in applied anthropology in the postmodern setting as “moves to atone for the sins of the past [...] [are] jeopardizing standards of scholarship.”

Lastly, there is the issue of inconsistency and differences between expert reports. This is discussed below as there are new ways courts are adopting to better manage this.

Refinements in the Cultural Expert Process

Native title claims have cemented an important niche for cultural expertise in Australian courts. Refining the process to increase effectiveness and reduce complexity, time, and costs has resulted in some changes to standard adversarial practice, as permitted under the court rules (*Federal Court Rules 2011* (Cth) r. 23.15). One is for a single court-appointed cultural expert. This has occurred in a number of cases, and is helpful when the court needs necessary or specific factual information (see, e.g., *Australian Law Reform Commission, 2015*) or as an

aid for an impasse in mediation. The case of *Djabera-Djabera* (1998) clarified that a report of a single expert would not be used in the trial unless the author was available for cross-examination, and the parties were free to call other evidence.

Other methods gaining favor in native title claims are concurrent evidence, and expert conferral or conference. In concurrent evidence, cultural experts present their views in the same sitting where each gives his or her findings and reasoning and respond to questions from counsel, the court, and colleagues. Unlike in the adversarial system, the experts can ask questions of each other and hopefully reach a consensus. This is also the aim of conferring and conference. Rather than appearing in the adversarial court room, anthropologists meet to determine issues of agreement and disagreement. The issues on which there is agreement are accepted by the court and only issues of difference go to court for examination and cross-examination (Edwards et al., 2006). Conferral and conferencing techniques have been successful in narrowing, clarifying and, in some cases, resolving issues in dispute between expert witnesses (*Ngadju v. Western Australia*, 2012; *Banjima People v Western Australia (No. 2)*, 2013; *Clara George (Badimia) v Western Australia*, 1998; *Wyman on behalf of the Bidjara People v Queensland (No. 2)*, 2013; Hughston & Jowett, 2014).

An added advantage is that a collegiate environment allows the experts to “see their role more clearly as one of assisting the court rather than advocating a party’s case” (Hughston & Jowett, 2014, p. 4). The process has been labeled a “hot tub” and has been used in a range of native title cases with varying degrees of success (see explanation and evaluation of “hot tubbing” in Farrell, 2007). In *Wongatha*, it was not successful as only four of the nine anthropologists took part in the conferencing, but in other cases, it has been used successfully. Selway, J in *Gumana v. Northern Territory* (2005) at [173] described how an agreement reached between the senior anthropologists:

significantly reduced the extent of the factual disputes between the parties and the time involved in hearing the witnesses. Before any pleadings were filed in these proceedings procedural orders were made for the exchange by the parties of draft anthropological reports. Orders were then made for a “hot tub” involving each senior anthropologist for each party under the supervision of the Deputy Registrar. The purpose of the “hot tub” was to enable the experts to identify the issues and principles about which they agreed or disagreed.

Hughston and Jowett (2014, p. 1) found that since 2012 “most, if not all, native title proceedings heard over the last two years have incorporated expert conferences and concurrent evidence” which benefits the courts, counsel, parties, and expert witness.

COMMON LAW COURTS, CULTURAL EXPERTS, AND PARENTING ORDERS

Given the cultural and religious mix in immigré Australia and the rise in inter-faith intercultural marriages, it is not surprising that another area of law in which culture comes into the courts is decisions regarding the care of children

post-divorce or after separation of their parents. When a relationship ends, a child's religious upbringing and cultural identity can be important to both parents. To adjudicate between competing parents, the Family Law Courts in Australia (i.e., the Federal Circuit Court and the Family Court of Australia) apply the "best interests of the child" test in accordance with *Family Law Act 1975* (Cth) s. 60 CA. The *Family Law Reform Act 1995* (Cth) introduced this principle from the United Nations Convention on the Rights of the Child (1989) ratified by Australia in 1990. In any parenting order, this must be the "paramount consideration" (*Family Law Act 1975* (Cth) s. 43C). To determine the best interests, the judge must decide "in light of the particular facts and circumstances of the case" and not "from the viewpoint of the standards of particular parents or of one section of society" (Harland, Cooper, Rathus, & Alexander, 2015, p. 146). The *Family Law Act 1975* (hereafter the Act) in s. 60 B sets out the principles and factors to guide the court in determining the best interests of the child, one of which is:

s 60 B (2)(e) children have a right to enjoy their *culture* (including the right to enjoy that culture with other people who share that culture).

Right to culture is only one consideration. Others include the child's views, whether there has been any family violence against the child, and "the lifestyle and background (including lifestyle, culture, and traditions) of the child and of either of the parents" (see *Family Law Act 1975* (Cth) ss. 60 CC (3)(a), (g), (j)).

Parenting Orders for Indigenous Children

When the child is Aboriginal or Torres Strait Islander the Act in ss. 60 CC (3) (h) and (6) goes further than s60 B (2)(e) as it adds that this right extends to:

- (1) to maintain a connection with that culture; and
- (2) to have the support, opportunity, and encouragement necessary:
 - to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - to develop a positive appreciation of that culture.

Section 61F which was introduced in 2006 adds that the court must have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture.

Although the legislation requires courts to take into account Indigenous culture, the judges may still unconsciously construct the notion of "family" as is understood as the nuclear family of European culture. There are marked differences between Indigenous and non-indigenous people relating to the concept of family with Anglo-European kinship based on a narrow range of relations centered around biological parenthood while Indigenous systems are much broader. In many Aboriginal cultures the term "mother" can be given to more than just the biological mother (Dewar, 1997), and similarly, the term "aunty" is not predicated on an antecedent relationship. The *Bringing Them Home Report* found, "by privileging parents and relegating the rights of other family

members, the Australian law conflicts with Aboriginal child-rearing values” (Human Rights & Equal Opportunity Commission, 1997, p. 286). Ruska and Rathus (2010, p. 8) point out that the law still “struggles to deal with Indigenous concepts of kinship and a multiple child-rearing practices.” Ralph (1998) also has found that Aboriginal people accept that children have the ability to effectively attach themselves to many carers in the course of their “growing up” and that unlike the Anglo-Celtic nuclear model, multiple serial attachments are the norm and are not regarded as necessarily harmful to the child’s development and long-term adjustment. The 2006 amendments to the Act were to address such issues and do allow for parenting orders to be made in favor of non-parents and for applications to be made by anyone “concerned with the care, welfare or development of the child” (see ss. 64 B(2), 65 C).

Aboriginal communities are not homogenous or uniform (*Donnell v. Dovey*, 2010, [321]), which gives rise to another concern that the “inter-distinctiveness of Aboriginal cultures” (Nicholes, 2008) is not fully understood. Ruska and Rathus (2010, p. 9) found that expert evidence of cultural issues was “not always presented” or was not presented equally for both parties which made it difficult for judges to make culturally appropriate decisions. In *Re CP* (1997), the distinctive aspects of two Indigenous cultures, the Tiwi culture and the Torres Strait Islander culture were not appreciated by the court. Similarly, in *Donnell v. Dovey* (2010), the Appeal Court found the Aboriginal (Wakka Wakka) culture of the mother and Torres Strait Islander culture of the father were not equally presented in the expert report. A ground in the appeal was that the magistrate did not seek anthropological expert evidence on the child-rearing practices of Wakka Wakka culture.⁴ The court held that it was not necessary for there to only be expert evidence from an anthropologist if “an elder or such other person within the indigenous community who is accepted by the community as being able to speak with authority on its customs” gave evidence (*Donnell v. Dovey*, 2010, [228]).

Parenting Orders for Children of a Muslim Parent(s)

Comprising of 3% of the population, Muslim Australians are numerically similar to (ABS, 2017 & Department of Parliamentary Services, 2010), possibly a little larger than, Aboriginal and Torres Strait Islanders. Muslims did come at the time of first settlement, but the majority is recent immigrants, through skilled migration, family reunion, and via Humanitarian and Refugee visas. Although the Muslim minority is a religious, not an ethnic minority in that the Muslim community is comprised of over 100 different ethnicities in Australia, Islam unites its adherents (the *ummah*) in a Sharia-informed culture with shared practices and traditions. Islam acts as a marker for identity, one that binds Muslims together to form a religious boundary, described as a “ring fence” within the territorial boundary of the nation state (concept by Maznah binte Mohammad, National University of Singapore).

Some Muslim groups (i.e., Australian Muslim Mission and Islamic Friendship Association of Australia) have been vocal in their support for legal

pluralism and have put this on the national agenda. The Australian Federation of Islamic Councils in a submission to government titled “Embracing Australian Values and Maintaining the Rights to be Different” drew on the notion of “Twin Tolerations” (Stepan, 2012). Their case is that as Australia is a multicultural, multireligious society then legal pluralism should logically follow. Conflicts should be resolved according to the law and traditions of a person’s religion and multiple legal regimes should replace the “one law for all” and “the rule of law” (AFIC Submission). A 2013 *Enquiry into Multiculturalism* rejected any change to the Australian common law system, but did highlight the need for greater, or better, accommodation of Islam in the society as a whole and in the legal system.

The Australian government (Strategic Framework for Access to Justice 2009) set out a reform agenda for improving access to justice, acknowledging the diversity of people seeking legal assistance. The [Family Law Council of Australia \(2012\)](#) acknowledged the need to reduce barriers that may be encountered by people from “culturally and linguistically diverse backgrounds.” Barriers identified by the Council included lack of knowledge about Australian law; insufficient awareness of available legal and counseling services; language and literacy barriers, cultural, and religious barriers that inhibit seeking help outside the community; preexisting negative perceptions of the courts and family relationship services; lack of responsive culturally responsive services and bilingual personnel; social isolation; fear of government agencies; and cost and resources issues. The focus is on addressing these issues rather than supporting a parallel system of religious courts. I have written elsewhere on the reasons for why Australia endorses a secular and neutral one-law system (Black, 2012) and these include historical, philosophical, constitutional, and practical factors. One of the practical factors is the intra-plurality of Australian Muslims regarding ethnicity, language, school of law, and the level of adherence to Islam. Just as occurs in indigenous communities, Muslim Australians are heterogeneous. In this way, they differ from Muslims Europe, where there are concentrations of ethnicities and schools of law; for example, in England, where 80% of Muslims are from South Asia, Sunni, and Hanafi sect.

Not all parenting cases are resolved in the Family Court. Some members of Muslim communities will choose an Imam or a community-based tribunal of Muslim clerics to resolve disputes using Islamic principles and bypass the Australian legal system. Others will proceed to mediation using the government-funded Family Dispute Resolution Program where culturally and ethnically diverse mediators who speak a range of languages aid couples to reach agreements and avoid court, but have their agreements registered. Muslim mediators are accessible in the Program. The intractable nature of some disputes, however, results in litigation. Muslims like Indigenous Australians have a right to have their case adjudicated by a judge and the aim of the legal system is to make this a realistic and accessible option for all. The courts will not apply Shari’a law but will take into account the culture, religion, and customs of the parties as a factor to be considered when making parenting orders.

By not applying Shari'a law, legal outcomes and process are quite different, even perplexing, for Muslims in Australian courts. In Islamic law, there is predictability that a Muslim father will get guardianship of the children and be financially responsible for them while the mother (with some provisos going to her conduct and religiosity) will have custody of young children, usually until they are pubescent or old enough to decide with whom they wish to reside. (For the concept of *hadhanah*, – see Black, Esmaeili, & Hosen, 2013, p. 141.) Concepts of custody, access, and guardianship no longer exist in Australian law. They have been replaced by parenting orders which set out parental responsibilities, place of residence, and contact permitted. This is to emphasize duties and responsibilities parents have to their children and to negate any concepts of parental rights over children. It is at variance with the Islamic model which is fixed and predictable while the outcomes of the “best interests” of the child are on a case by case basis.

As Muslims see transition of Islamic values and practice to their children as crucial, the application of the neutral “best interests” of the child test can seem baffling. This is especially in cases where a parent has left Islam as an apostate, or where a mother has remarried or is deemed *nusyuz* (disobedient to her husband). In a Shari'a law, setting each would be relevant and most likely fatal for the mother's chances to gain custody. In Australian law, none of these considerations is relevant. Similarly, whether one parent drinks alcohol, remarries, is socializing with members of the opposite sex, or whether children are “illegitimate” are irrelevant considerations in Australian family law but can be crucial in Islamic law (see, e.g., *Mohammed Salah v. Gastana*, 2011). Similarly, who was “at fault” in the marriage, and who is lax in his/her adherence to Islam has no bearing on the decision. This was a significant issue in *Heiden v. Kaufman* (2011). The mother unilaterally left the marriage after four years, took the two children, and renounced Islam. As an apostate, and one who also failed to follow her husband's dictates, she would automatically lose custody of those children in an Islamic court. Evidence of this was given in court and also the father's concern that as an apostate she would not “bring up these children in the faith” (*Heiden v. Kaufman*, 2011, [132]). However, continuing adherence to culture and religion is just one consideration for the court. In this case, there was also a record of violence towards his wife and children and concerns about the father's “extremist views” of Islam including his membership of an extremist Islamist organization. During the marriage, he had required his wife to wear a burqa, be segregated from males and not to leave or have guests in the home without his permission. The Federal Magistrate was additionally concerned for the children's welfare as the father had pronounced *du'as* (prayers of supplication) that his children die “as martyrs in the cause of Islam” (*Heiden v. Kaufman*, 2011, [54]). Harman FM was conscious that their safety must outweigh the benefit the children would potentially gain from their father's rich Palestinian culture. He found it was in the “best interests” of the children to reside solely with their mother.

Best interests of the child can include stability of lifestyle, so when the father in *W v. W* (2001) later converted to Islam and took on a new Islamic lifestyle

and a new Muslim wife, that break in continuity was held as detrimental to their child's development. Ryan F.M., in *H v. H* (2011, [29]) affirmed that "it is not the judicial role to prefer one religion over another" and while cases involving religion often involve one of the parents arguing that being brought up in a particular faith is fundamental to a child's best interests, courts are reluctant to make value judgments as to the merits of differing cultures, religions, and ethnic heritage. In a case where a Muslim mother and a Maronite Catholic father were in dispute about the school their child should attend, the court decided that it was in the best interests of the child to go to a secular government school, rather than a religious one. Religious holidays are usually allotted to the parent of that faith, but, in *Eriksson v. Tinkham* (2011) Monahan FM found that the importance the Christian mother gave to Christmas was cultural, not religious, so the order was for her to have the children only for every second Christmas and in the alternate year, the children would be with their Muslim father.

Role for Cultural Experts: Report Writers for the Family Court

The Act does not specify how information on religion and culture is to be provided to the Court. Cultural experts, such as anthropologists who were integral to native title cases have played a minimal role, to date, in family law cases. These disputes are about children and family, not rights to land and resources, so the expertise sought in the family law system is for child psychologists, psychiatrists, psychotherapists, social workers, and family relationship counselors. They provide the courts with reports in which factors of culture may be included. According to s. 62G of the *Family Law Act 1975* (Cth), these report writers are family consultants, not cultural experts per se, who are appointed by the Family Court to provide an assessment of the main issues in relation to the child and parents for the first court hearing after which the judge may seek a more detailed family report. If the judge wants a particular issue covered in the report, he or she can order it; alternatively, if the judge knows that a report writer has special expertise in a particular area, such as Aboriginal customs or in Muslim family relationship, the judge can have that writer prepare the report. If the judge does not know a consultant report writer with the requisite expertise, it will be left the head of the family consultants to do the allocation. Essentially, the court has latitude to be able to get the information required to determine the best interests (Personal communication with Federal Circuit Court judges, 22.2.2017). The report writer interviews the parties individually including any children, visits the homes, observes children interacting with each parent and provides the court with an overall assessment of family dynamics and relationships. They may give formal recommendations to the court and be called to give oral testimony and be cross-examined. These reports are at no cost to the parties, but parties can pay to have a private professional of their choosing undertake another family report assessment admitted into evidence. Just as with native title and all expert evidence, the findings and recommendations of report writers need not be accepted by the court. In *Andrew v. Delaine* (2009, [72]), a case where the trial judge rejected the recommendations in a Family Report, the

Full Court on appeal held a report can never usurp the role of the court as the report writer does not have the opportunity to weigh and test all evidence.

Given there is considerable variation across cultures about marriage, divorce, gender, and spousal roles and responsibilities and child-rearing practices, family report writers are required to recognize a person's perspective on family and child issues, especially when it is shaped by cultural factors while avoiding cultural stereotyping. How well culture is understood and evaluated has been questioned and recommendations made that the cultural knowledge or expertise component needs to be strengthened (Family Law Council of Australia, 2012, p. 90 recommendation). The recommendations of the Council were for "Cultural Advisors" to be appointed to deliver cultural awareness training to staff including report writers and for a system-wide cultural competency policy to be implemented (Family Law Council of Australia, recommendation 5:2). The recommendation did not spell out who would qualify as a cultural adviser; the nature, form or duration of any training program; nor monitoring or evaluation of the program's effectiveness. It was telling that the Report went on to admit that "there is no clear and common understanding of what effective cultural competency training should involve" and therefore there was "a need for a more sophisticated understanding of what constitutes concepts such as cultural competency" (Family Law Council of Australia 2012, p. 91). Furlong and Wight (2011, p. 38, 39, 54) while noting the popularity of "cultural competence" as an add-on to professional training or a "tick-the-box" for staff development have criticized the construct as "narrow and tokenistic" especially given all the ethnic groups in Australia, and also it lacked conceptual coherence. While it is "hard to fault as a slogan," Furlong and Wight (2011, p. 39) argue it is "impossible to work cross-culturally without reflective self-scrutiny."

In a review of 177 judgments involving families of diverse cultural and religious backgrounds, some of which were Muslim parties, the Family Law Council of Australia (2012, pp. 75–77) found that cultural background is mentioned in some judgments but rarely dealt with in any detail. This may be because culture was not raised by the parties or seen by them as important; lawyers may not have alerted the court to the need for engagement with the child's culture; or the court may not have seen its relevance. In some cases, both parents would be from the same cultural community so maintaining a child's connection with culture was not contentious, but there may be different levels of adherence to Islam and different schools followed, and as noted already with Indigenous children, there can be significant intra-cultural difference. A case in point is *Nouhra v. Clements* (2010) where the father was a Muslim of Lebanese descent and the mother was Scottish and an adult convert to Islam. Also in *Mohammed Salah v. Gastana* (2011) where both parents were Sunni Muslim, but the religiously devout father was born in Kuwait, of Kuwaiti ethnicity and the mother was born in Australia of Lebanese ethnicity but identified herself as culturally Australian and less religious.

A further concern is that the family assessment undertaken by the report writers is "steeped in the traditions of western psychology, with its emphasis upon the individual, and based upon modern Anglo-European notions of social and

family organisation” (Ralph, 1998, p. 4). Ralph (1998, p. 4) argues that the prominence of psychological theory in their training and clinical practice with individuals in small family groups runs counter to an effective understanding of the collectivist nature of other cultures. In a collectivist concept of family, the responsibility for bringing up children is invested in many people. If the report writers have limited knowledge or experience in working with collective cultures, they may produce reports that do not adequately address the issue of the child’s cultural identity and consequently the report may fail to attend to vital cultural issues affecting the child’s best interests. This is not just for Indigenous communities. Extended families and polygamous relationships add complexity in to Muslim families. Marriage may have been entered on the brokerage between families giving both sides an interest in outcomes, including for children (Abela & Borg, 1998). In these cases, it may be helpful for counseling and parenting orders have the input of the extended family members.

In addition to the consultants who are the report writers the court can take expert evidence from members within the community who have cultural or religious knowledge and authority. The role of elders was noted in the case of *Donell v. Dovey* and Imams also fulfill this expert role. In the case of *Mohammed Salah v. Gastana* (2011) where the court had to decide for registration of birth whether the name given to a Muslim baby by her mother was blasphemous in Islamic law, as claimed by the father. An Imam gave expert evidence that it was not.

To overcome concerns are sufficiency of cultural expertise, a proposal is that in addition to a routine independent expert report, that in cases where cultural and religious issues are important, the Court needs power to appoint a cultural adviser to assist judges in its understanding of cultural issues. Alternatively, a cultural adviser could be permitted to sit with the judge hearing a case to give advice on cultural and religious issues to ensure that the best interests of the child is not simply rhetoric. Another proposal is for the more specific wording in s60 CC which is just for Indigenous children be replicated for children of all cultures (Black & Sadiq, 2011, p. 94; Chew, 2007, p. 190). Chew (2007, p. 188) used sociological research to argue that exposure to cultural beliefs and traditions gives children a “narrative of community identity” from which “self-worth and personal value” develop.

THE CULTURAL DEFENSE

In a multicultural society, it is inevitable that there will be two forces pulling toward and against a role for culture to mitigate or negate criminal responsibility when acts are committed in the belief that it was either acceptable, even required, in the accused’s own ethnic or religious tradition. In Australia, the cultural defense is raised for Indigenous Australians whose traditions predate British colonization and for more recent immigrants from a non-Anglo-Saxon background whose religious and cultural practices and attitudes have migrated with them to Australia. Although there have been periods in which the cultural defense had support in the courts, in academia, and with minority groups today

in practice, its role is curtailed by legislation (see *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth)), by decisions of the High Court (see *Stingel v. R*, 1990) and public distrust of differential treatment in criminal law of Australians on the basis of ethnicity, religion, or traditions.

The Reasonable and Ordinary Person Test

The “reasonable person” and “ordinary person” have a long history in the common law as the yardstick by which the conduct and the mental state of an accused can be objectively determined. It has been used in a range of defenses, including self-defense, provocation, duress, and criminal negligence. The question has been whether it is the “ordinary person” is of the dominant Anglo-Saxon ethnicity or an “ordinary person” with the very same characteristics of gender, race, religion, and age as the accused. The later was employed in provocation which operates as a partial defense to reduce murder to manslaughter, and a lighter sentence. In *R v. Dincer* (1983), a Turkish Muslim immigrant was partially excused for killing his daughter because of a cultural belief that he had a duty to ensure his daughter was a virgin until marriage. Drawing on the tradition of honor killing and his duty as a father in his Turkish culture, a defense of provocation was accepted. In *Moffa v. R* (1977), an Italian immigrant husband was also partially excused for the killing of his wife because of his ethnically-linked hot bloodedness. He lost control when he learnt of her adultery and killed her, by implication just as an “ordinary (volatile) Italian” husband would do.

Murphy J in *Moffa* argued an objective test of the reasonable or ordinary person “is not suitable even for a superficially homogeneous society and the more heterogeneous our society becomes, the more inappropriate the test is.” Essentially, there should be different standards of self-control for different groups in society. But not only does such an approach embed ethnic stereotypes into the justice system, but gender disparity as overwhelmingly male perpetrators used the “cultural” defense and their victims were female. Eventually, the High Court of Australia clarified the law of provocation. In *Stingel v. R* (1990), the High Court held that the cultural background of an accused is relevant only in determining the gravity of the provocation. The standard of self-control that an accused must exercise in response to the provocation is that of an ordinary person devoid of culture or background. The ordinary person the court decided is not the reasonable person of the law of torts, or the average person. It is a hypothetical ordinary person who does not share any of the idiosyncrasies of the accused, with the exception of age (*Stingel* [327]). For determining the minimum standard of conduct, the ordinary person is not to be invested with the ethnicity, religion, gender, physical attributes or disability of the accused. Therefore, it is no longer the control expected of the “hot-blooded Italian male” as in *Moffa* or the “Turkish Muslim father” as in *Dincer* but the self-control expected of ordinary Australian regardless of ethnicity or culture.

The recurrent use of provocation in cases of femicide induced three Australian states, Western Australia, Tasmania and Victoria, to remove provocation altogether as a partial excuse or defense to murder. Although Victoria

abolished provocation as a partial defense able to reduce murder to manslaughter, provocation remained an independent consideration in sentencing, along with remorse, age, prospects for rehabilitation, and future risk (Sentencing Advisory Council, 2009).

Cultural Defense in Indigenous Communities

After *Mabo* and the recognition of native title, a case was mounted that that British settlement had not extinguished Aboriginal customary criminal law. This was rejected by the High Court of Australia. Mason CJ affirmed that there was no analogy with native title law and that Australian criminal law does not “accommodate an alternative body of law operating alongside it” (*Walker v. New South Wales*, 1994, p. 50).

Although cultural defense did flourish in many Australian state and territory courts to excuse or justify Aboriginal criminal conduct on grounds of an Indigenous customary law or cultural practice this now has now been modified by legislation. An amendment in 2006 to the *Crimes Act* (Cth) removed cultural background as one of the matters a judge could consider when making sentencing and bail decisions. The Act at s. 16A(2A) expressly states that a court must not take into account any form of customary law or cultural practice as a reason for:

- excusing, justifying, authorizing, requiring, or lessening the seriousness of the criminal behavior to which the offence relates.

A similar provision came into force in the Northern Territory (see *Northern Territory Emergency Response Act 2007* (Cth) s. 91). Although this precludes the judge from taking into account customary law in deciding the objective seriousness of the crime committed, expert evidence on culture can be given to aid with general sentencing provisions. In *R v. Wunungmurra* (2009 [24]), a Yolngu man from Central Australia stabbed his wife multiple times. At [8], a Yolngu law expert (a member of his clan) gave evidence to the effect that as Wunungmurra was a leader in his community it was his cultural duty to stab his errant wife and thereby enforce traditional Aboriginal law. Southwood J acknowledged the recent legal amendment but still accepted the expert’s evidence on culture for subjective sentencing considerations going to the likelihood of rehabilitation and lack of propensity.

This finding has been praised and criticized. The criticism is that the decision gives a misogynistic view of Aboriginal women and leave unchallenged male privilege. In the Northern Territory, an Aboriginal woman is 80 times more likely to be hospitalized for violence against her than a non-Aboriginal woman (Finnane, 2016) and betrays “Aboriginal women’s scathing criticism of the use made of such evidence in criminal courts” (Howe, 2009, p. 166). By excusing Aboriginal violence and sexual assaults against women, it sends a message that sexual violence and physical abuse is tolerated in Indigenous communities while, in fact, it is rejected by most Aboriginal women (Howe, 2009). Aboriginal women object to “cultural defenses offered by white lawyers on behalf of

Aboriginal men who have assaulted women or children” (Howe, 2009, p. 167). Support has come from the National Aboriginal and Torres Strait Islander Legal Service that restricting a court from taking into account a “person’s cultural obligations and his society’s cultural practices runs counter [...] to the protection of equality under the rule of law” (National Aboriginal & Torres Strait Islander Legal Services, 2012, p. 7). The service also argues that it is unworkable to distinguish between objective and subjective considerations of culture.

The High Court in another case of spousal killing by an Aboriginal man recently opined that

Aboriginal offending should not be viewed as less serious than offending by persons of other ethnicities [...] to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour would be wrong [...] just as it would be to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide (*Munda v. Western Australia*, 2013, [63]).

In the same appeal, the High Court rejected an argument Munda’s sentence be reduced on the basis that he may face corporal punishment by way of payback when released from goal. The justices warned that courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice. Punishment for crime is to be meted out by the state, and even if the offender would accept “payback,” as Munda indicated he would, the choice as to the mode of punishment is not his to make (*Munda v. Western Australia*, 2013, [61]).

CONCLUSION

Legal pluralism comes in different forms. Rather than establishing separate or parallel religious or ethnic courts, the diversity of Australia’s people has been recognized through policies and strategies to make Australian courts and legal services more culturally nuanced. The aim is to reduce barriers for Indigenous Australians and ethno-religious minorities to facilitate access to law, legal services and the courts. The intersection of customary, cultural and religious practice in judicial decision-making will be strengthened when accurate information on prevails. Herein is the role for cultural experts.

This chapter has highlighted a spectrum of approaches to cultural expertise from high demand to minimal. For indigenous Australians seeking legal recognition of native title claims, cultural expertise, particularly from anthropologists, is indispensable. While there are a many tensions between the legal and anthropological methodologies, the refining of giving expert evidence in the court for native title is underway through less adversarial mechanisms of concurrent evidence, expert conferral and conferencing. In the family courts, the main mode for obtaining expert evidence for parenting orders is through the court’s report writers who are considered experts in child and family dynamics. Cultural expertise is tacked onto their remit when the child is indigenous or from an ethnic or religious minority. In some cases their evidence is supplemented by other experts

including Aboriginal elders or Muslim Imams. Although anthropologists currently have minimal input, a greater role has been foreshadowed especially when kinship and child-rearing practices are at the heart of a parenting order. The third dimension was the criminal courts and the decreasing role for cultural defenses. A series of court decisions on the “ordinary person” in the common law, legislation removing culture as a mitigating factor in sentencing, and also feminist critiques that such defenses perpetuate cultural stereotypes and elevate masculine versions of ethnicity and religion into the legal system have seen a decline in culture employed as a defense.

The search for genuine equality in a multicultural, multireligious society remains a work in progress. Despite opposition and a lack of political will to formalize legal pluralism, unofficial, informal, and extra-judicial pluralism does operate throughout Australia and importantly, the courts are now encouraged to be more culturally nuanced in adjudicating outcomes for the nation’s many and diverse ethnic and religious minorities.

NOTES

1. South Australia and Victoria are currently reviewing the possibility of introducing a treaty with their indigenous populations with compensation to be paid by the relevant state government.

2. *Wik v Queensland* (1996) 187 CLR 1 held that native title could coexist with interests gained under pastoral leases; but *Fejo v Northern Territory* (1998) 195 CLR 96 held that the grant of freehold totally extinguished native title.

3. The claim failed for several reasons including that the Wongatha applicants were not authorized to make the application as required by s 61(1) of the Act.

4. Ground 8 of the Appeal: “the s 60 CC factors, including s 60 CC(3)(h) and (6), His Honour erred in failing to inform himself of any anthropological evidence and/or ‘well recognised peer-reviewed research’ concerning the parties respective Aboriginal and Torres Strait Islander cultures.”

CASES

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Cultural Expertise and Socio-Legal Studies

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CULTURAL EXPERTISE IN LITIGATION IN SOUTH AFRICA: CAN THE WESTERN WORLD LEARN ANYTHING FROM A MIXED, PLURALISTIC LEGAL SYSTEM?

Christa Rautenbach

ABSTRACT

South Africa's mixed, pluralistic legal order demands a nuanced approach to cultural expertise in litigation. Culture in general and cultural expertise in particular have always played an important role in all areas of law, both state and non-state, and a rich collection of jurisprudence is available to serve as illustration. Even though both the common law and the customary law are both recognized legal systems, they are treated differently by the judiciary. The general rule is that judicial notice must be taken of the common law rules and that judicial notice of customary law may only be taken "in so far as such law can be ascertained readily and with sufficient certainty." The ascertainment of customary law provides a challenge to the judiciary because of its adaptive inherent flexibility and indeterminate nature, especially where the rules are oral or so-called "living" customary law. Cultural expertise also plays an important role in the case of non-state law. A considerable quantity of case law exists where the courts have considered expert evidence regarding the content of certain religious legal systems to provide protection to litigants claiming that they are subject to those systems. The aim of this contribution is to investigate the diverse approaches of the South African courts when it comes to the admissibility of expert evidence in cases where culture (both custom and religion in both state and non-state law) is relevant. The fact that

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the South African legal system has its roots firmly in Western law and has been confronted with cultural diversity for a very long time might provide some lessons to the Western world, even if those lessons are only to prevent it from making the same mistakes as the South African legal system has made or might still be doing.

Keywords: Cultural expertise; customary law; religious legal systems; state law; non-state law; South Africa

INTRODUCTION

South Africa's mixed, pluralistic legal order¹ demands a nuanced approach to cultural expertise in litigation.² In order to convey an understanding of the many shades of this approach, it would be prudent to begin by giving a brief overview of the composition of contemporary South African law. Providing an overview of the South African legal order is no easy feat, but in general it can be explained as follows. State law is mixed and pluralistic, with Western³ and African⁴ characteristics. The body of law made up of transplanted Western legal norms is known as the common law of South Africa.⁵ It is a mixture of mostly uncodified⁶ legal rules based on Roman-Dutch law⁷ and English common law,⁸ though the South African mix no longer resembles the jurisdictions from which they originated. African customary law,⁹ a plurality of mostly uncodified and unwritten local community laws, also exists in South Africa.¹⁰ Together these two legal systems make up South African law.

Even though both the common law and customary law are "part of the amalgam of South African law" (*MM v MN* 2013 (4) SA 415 (CC), para. 23), they are treated differently by the judiciary. With regard to the common law, the general rule is that judicial notice must be taken of its content.¹¹ In general, parties may not lead evidence to clarify legal rules, though they may advance arguments pertaining to the nature and scope of such rules (*Schwikkard & Van der Merwe*, 2014, pp. 489–490). There might be issues that do not fall within the knowledge of the judge and which warrant expert guidance. For example, in criminal cases, though they are tried in terms of the common law, where the so-called "cultural defence" has been raised during a trial, the courts have allowed experts to testify about the existence of cultural practices.¹²

In contrast to the situation with common law, the rule was that customary law can be taken judicial notice of only if it can be "ascertained readily and with sufficient certainty" as stipulated by Section 1(1) the Law of Evidence Amendment Act 45 of 1988.¹³ Section 1(1) of the Act provides as follows:

Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles.¹⁴

Some authors have argued that this provision is no longer in operation since it is obvious that customary law and foreign law can no longer be treated in the same way.¹⁵ However, this is not true. In terms of the Constitution, “[a]ll law that was in force when the new Constitution took effect, continues in force, subject to: (a) any amendment or repeal; and (b) consistency with the new Constitution.”¹⁶ Section 1(1) has not been repealed, and it is still applied by the judiciary when taking judicial notice of the customary law.¹⁷

Despite the continued existence of Section 1(1) of the Law of Evidence Amendment Act, the judiciary’s approach to customary law has changed quite considerably over the last 23 years. The Constitution recognizes customary law (s. 211(1)) and the courts are ordered to apply it when applicable (s. 211(3)). Although the recognition of customary law is no longer an issue, the ascertainment of customary law provides a challenge to the judiciary because of its “adaptive inherent flexibility” and indeterminate nature (*MM v MN* 2013 (4) SA 415 (CC), para. 25). Moreover, there are three types of customary law, as pointed out in *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (para. 152), namely:

(a) That practised in the community; (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for teaching purposes.

Type (a) is referred to as living customary law and type (b) as official customary law.¹⁸ Type (c) consists of official customary law, which is found mostly in statutes, case law, and textbooks. The three types of customary law vary in many respects and so does their method of ascertainment. Cultural experts play an important role in the case of type (a), particularly where the rules of living customary law need to be proven in a case of law.¹⁹

There is of course another area where cultural expertise also plays an important role. Even though other cultural and religious forms of non-state law remain unrecognized to date, the judiciary has acknowledged that people subject to other unofficial²⁰ legal systems (for example Muslim, Hindu, and Jewish law) also need legal protection. A considerable quantity of case law exists where the courts have considered expert evidence regarding the content of certain religious legal systems to provide protection to litigants who claim that they are subject to those systems. For example, in *Ryland v Edros* 1997 2 SA 690 (C), the parties concluded a Muslim marriage. After 16 years of marriage, the plaintiff divorced his wife (the defendant) by means of *talaq* (divorce) and instituted an action against her claiming eviction from the common home. The defendant instituted a counterclaim for an equitable share of his estate but the plaintiff argued that Islamic law provided for such a claim only where a wife had made a direct contribution to the growth of her husband’s estate, which she had not. Expert evidence was led to prove the existence of such a custom in Malayan law (from whence slaves were imported into the Cape during the time of Dutch rule).²¹ Though the Court found that there was no evidence to prove that a similar custom prevailed among the members of the relevant Muslim community in the Western Cape, this case illustrates the important role cultural experts can play in solving disputes between parties. Both

the husband and his wife called experts on Islamic law who met before the trial to discuss the facts in order to reach an agreement on a number of points. Some of the points that they agreed on were that the Shafi'i rules were to be applied in the case, and that a Muslim marriage is a contract which creates rights and duties for the spouses. These duties included the husband's responsibility to maintain his wife during the marriage and also three months after the *talaq*. However, the experts had opposing views regarding the question of whether or not the Malaysian custom allows a wife an equitable share of the husband's estate and the Court found that there was no basis for regarding this rule as being part of Islamic law as practised in South Africa. The case illustrates the South African courts' willingness to engage with non-state law where the parties adhere to normative orders other than those officially recognized, namely the common law and the customary law.

In summary, South African law is made up of a complex labyrinth of state and non-state laws with Western and African characteristics.²² Culture²³ in general and cultural expertise in particular have always played an important role. A rich collection of jurisprudence is available to serve as an illustration of the judiciary's quest to find their way in this labyrinth of state and non-state normative orderings. The judiciary's pursuit is not merely worthy of note but important, as the *stare decisis* doctrine is followed in South African law, meaning that the courts are bound by the decisions of higher courts and their own decisions.²⁴

It is also important to note that expert evidence is not the only way to utilize cultural expertise. Other ways are through the appointment of assessors and/or the participation of *amici curiae*. In both these areas, the role and use of cultural laymen and experts have proven indispensable to the cause of promoting and protecting cultural diversity.

Against this background, the aim of this contribution is to investigate the diverse approaches of the South African courts when it comes to the admissibility of expert evidence in cases where culture (both state and non-state) is relevant. The fact that the South African legal system has its roots firmly in Western law and has been confronted with cultural diversity for a very long time might provide some lessons to the Western world, even if those lessons are only to prevent it from making the same mistakes as we have made or might still be making.

In attempting to realize this aim, the contribution is structured as follows. After the preliminary remarks introducing the issues, the second part commences with an overview of cultural expertise in litigation in South Africa, focusing on the use of cultural experts as witnesses, assessors, and *amici curiae*. Ample use is made of case law examples to serve as illustrations. As already pointed out, this exercise is important in a South African context because case law is an important source of South African law grounded in the doctrine of *stare decisis*. Though the doctrine is an English common law adjudicative strategy, the South African judiciary has been using it for many years to adapt Roman-Dutch law and even to "make" law where there is none. The contribution concludes with a few comments regarding the value of the South African approach to the Western world, where most countries have been home to fairly homogenous societies but are nowadays increasingly being confronted with cultural diversity in both the private and the public spheres.

CULTURAL EXPERTS IN LITIGATION

Cultural Experts as Witnesses

The role of cultural experts in the legal arena is legion. Their expertise is utilized during the pretrial, trial, and posttrial phases in both civil and criminal cases. There is no fixed class or list of cultural experts from which lawyers and litigants can choose the most relevant expert to testify in a particular case. They would, in general, choose someone who evidently has some standing in the legal profession or relevant community. Depending on the facts of a particular case, experts can be, among other things, anthropologists, academics, or leaders or elders from a particular traditional community. It is the responsibility of the expert witness to convince the court that he or she has specialist knowledge which could assist the court in making a decision on cultural issues. In order to narrow down the scope of this discussion, the focus is on the presentation of expert evidence during the trial.

Relevance, Qualifications, and Procedure

The mix, or distinction, between Roman-Dutch law and English common law is particularly evident in the difference made between substantive and procedural law (Schwikkard & Van der Merwe, 2014, pp. 2–22). In general, Roman-Dutch law is followed in the case of substantive law and English law in the case of procedural law (of which the law of evidence forms part).²⁵ The practical result is, for example, that the elements of a crime (based on Roman-Dutch law) must be proven by the rules of evidence based on English law.

It is also important to keep in mind that South Africa follows an accusatorial (adversarial) procedure²⁶ in contrast to the inquisitorial procedure followed in some civil-law jurisdictions.²⁷ The leading of evidence, including the calling of witnesses, to prove one's case is thus vital to litigants. If a case involves cultural issues which might be beyond the knowledge of the presiding officer, the tendency is to present the opinions of cultural experts to presiding officers to sway their judgments in one direction or another.

As already explained, there are neither fixed classes of experts nor specific lists of cultural experts. Some authors argue that it is “strictly speaking imprecise to think of some witnesses as ‘experts’ and others as ‘non-experts’, because in a sense every witness who is asked to express an opinion is an expert” (Du Toit et al., 1997: paras. 24–28.8). Even so, as pointed out, the law differentiates between expert and non-expert witnesses and prescribes specific procedures for the calling of experts (Zeffert & Paizes, 2009, p. 323). The law does not prescribe when expert evidence must be provided and what the qualifications of an expert witness must be; it is the prerogative of a presiding officer to decide if a purported expert is essential to assist the court and qualified enough to give expert testimony.

The general rule relating to the admissibility of the opinion of an expert witness is that it must be relevant. For this purpose, the court must be satisfied that (Schwikkard & Van der Merwe, 2014: 95–96; Price, 2006, pp. 143–147) the expert witness has specialist knowledge which can assist the court in deciding

the issues;²⁸ the witness is indeed an expert for the purpose for which he or she is called to express an opinion;²⁹ the opinion of the expert is logical and supported by proper reasons;³⁰ the expert evidence is objective and not biased toward any of the parties (Schwikkard & Van der Merwe, 2014, p. 99);³¹ the expert evidence “compare[s] favourably with competing theories” (Price, 2006, p. 143); and the cost of presenting expert evidence does not outweigh its potential benefit.³² The party in a civil case seeking to adduce the opinion of a cultural expert must thus satisfy these requirements before a court will consider his or her opinion favorably.

The opinion of an expert witness can never bind a judge to reach a certain conclusion pertaining to the facts; that is the prerogative of the court. In this regard, the case of *R v Jacobs* 1940 TPD 142, 146–147 remains the authority:

Expert witnesses are witnesses who are allowed to speak as to their opinion, but they are not the judges of fact in relation to which they express an opinion; the Court, whether it consists of a magistrate or of a Judge or of a jury is the judge of the fact. Judicial officers should be careful, therefore, not to allow the opinion of witnesses to take the place of their own findings of fact.

The procedure for securing expert evidence differs slightly depending on the nature of the dispute. In the case of a civil dispute,³³ Rule 36(9) of the Uniform Rules of the High Court³⁴ provides as follows:³⁵

No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received, unless he shall—

- (a) not less than 15 days before the hearing, have delivered notice of his intention to do so; and
- (b) not less than 10 days before the trial, have delivered a summary of such expert’s opinion and his reasons therefor.

No prior notice of the intention to present expert evidence is required in criminal cases but prior disclosure may be demanded by an accused and is generally granted on constitutional grounds (Schwikkard & Van der Merwe, 2014, p. 101).³⁶ In both civil and criminal cases, the evidence of an expert can be challenged and subjected to cross-examination by the opposition party or the accused, whatever the case may be.

Duties and Responsibilities of Expert Witnesses

The link between South African and English law of evidence is also evident from the jurisprudence. In *MV Pasquale Della Gatta MV Filippo Lembo Imperial Marine Co v Deiulemar Compagnia di Navigazione Spa* 2012 (1) SA 58 (SCA) (para. 27 note 12),³⁷ the South African Supreme Court of Appeal confirmed that the duties and responsibilities of expert witnesses are similar to those set out in the English case of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (*‘The Ikarian Reefer’*) [1993] 2 Lloyd’s Rep 68 [QB (Com Ct)], 81, namely:³⁸

- (1) Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

- (2) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
- (3) An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion [...].
- (4) An expert witness should make it clear when a particular question or issue falls outside his expertise.
- (5) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one [...]. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
- (6) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
- (7) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports [...].

Witnesses purporting to be cultural experts need to take heed of these rights and responsibilities when asked to testify in court, because the decisions of the Supreme Court of Appeal is binding law.

Cultural Experts as Assessors

The jury system modelled on English law was abolished in civil cases in 1926 and in criminal cases in 1969 (South African Law Reform Commission, 2008, p. 8). However, during the 1990s, the appointment of various types of assessors (lay and expert) to assist the presiding officer in civil and criminal cases was introduced into the lower and high courts of South Africa. The Constitutional Court, however, does not appoint assessors.

Section 34 of the Magistrates' Courts Act 32 of 1944 allows for the appointment of so-called "expert assessors" in a civil matter. The provision empowers a presiding officer to summon one or two assessors "of *skill and experience* in the matter to which the action relates to" to be appointed by the court at the request of any of the parties in a civil matter, in an "advisory capacity."³⁹ In the case of a suit relating to the nullity or divorce of a marriage or civil union, the regional court magistrate may, in his or her discretion, summon the assistance of up to two assessors to act in an advisory capacity on questions of fact (s. 29(1B)(c)). Although the parties seldom make use of expert assessors in civil matters in the magistrates' courts, this provision could provide a handy tool to obtain the services of cultural experts in cases dealing with cultural diversity which might fall beyond the scope of the presiding officer's expertise. The assessors need not be persons with legal training and could be, for example, an Imam in a Muslim community from which the parties in a civil action stem, or a traditional leader in a case dealing with aspects of customary law. The words "advisory capacity" also make

it clear that the assessor has no voice in the actual determination of the outcome of the case. There is, however, the issue of costs, because the cost of securing the appointment of an assessor involves costs in the action, a fact which might discourage parties from obtaining the services of assessors during civil proceedings.

Section 93 *ter* of the Magistrates' Courts Act also makes provision for the appointment of so-called "lay assessors" in criminal cases in the lower courts, if the presiding officer thinks it would be "expedient for the administration of justice." Assessors (up to two of them) can be appointed at two stages; before any evidence has been led, or after a verdict of guilty if the presiding officer is considering a "community-based punishment" (s. 93 *ter* (1)).⁴⁰ In order to decide if it would be expedient for the administration of justice, the presiding officer should take into account, among other matters, the "cultural and social environment from which the accused originates" (s. 93 *ter* (2)(a)(i)). If, however, the accused is standing trial on a charge of murder, the presiding officer must appoint two assessors unless the accused requests that the trial proceeds without assessors (s. 93 *ter* (1)(b)). The Act does not prescribe minimum skills or experiences for an assessor to be appointed in trials or during sentencing, but it is common practice to summon a respected member of the same community as that of the accused.

Rule 59 of the Magistrates' Courts Rules prescribes the procedures for the appointment of assessors and makes provision for the court to compile a list of persons who, "having regard to the nature of the business of the court and their ability and reputation, appear to be qualified and willing to act as assessors." Though lists like these exist at some of the magistrates' courts, most of them are outdated and incomplete. The role of cultural expertise has great potential, but a lack of funding to pay the costs of the assessors and the transformation of the bench, which negates the need for the appointment of assessors coming from other cultural groups, are only two of the reasons why this option is not canvassed to its fullest.

In the high courts, it is within the discretion of a presiding judge to appoint assessors in criminal matters. The Criminal Procedure Act 51 of 1977 explains that an assessor is "a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or *skill* in any matter which may be considered at the trial" (s. 145(1)(b)).⁴¹ The appointment of assessors in civil cases dealt with in the high court is not regulated in terms of legislation but it is generally accepted that the inherent jurisdiction⁴² of the high court gives it the power to appoint assessors in civil matters anyway.

The role of an assessor in criminal cases is completely different from that of an expert witness. As explained earlier, the latter may not make any findings of fact; that is the privilege of the presiding officer. In contrast, the assessor in criminal cases assists the court in fact-finding (s. 145(1)(c)),⁴³ and two assessors can overrule a presiding officer on the facts (s. 145(1)(a)).

Though the functions of assessors are comparable with those of jurors in English law, there are important differences,⁴⁴ most notably in that assessors

must give reasons for their decisions and jurors need not (s. 146(d)). In addition, the assessor becomes a member of the court while the juror is not (s. 145(4)). The practical effect is that the presiding officer and the assessor or assessors, if there are more than one, have deliberations throughout the trial, and the assessors may be guided by the presiding officer regarding legal matters. If only one assessor has been appointed to consider the facts together with the presiding officer, the finding of the presiding officer overrides that of the assessor, but if there are two assessors and their fact-finding differs from that of the presiding officer, their finding overrules that of the presiding officer.

The application of Muslim assessors in cases where the parties adhere to the Muslim faith was considered in the 2003 draft Muslim Marriages Bill, which was proposed by the [South African Law Commission \(2002, p. 110\)](#). Clause 13 (1) of the draft Bill provided for the appointment of experts of Muslim law as assessors who would have the power, together with the presiding officer, to determine disputes of both fact and law ([South African Law Reform Commission, 2003, p. 40](#)).⁴⁵ This would have given them greater powers than their counterparts in other disputes, who can only testify about facts, or who can only advise the court, depending on the type of case. The appointment of assessors remained on the cards in the final Report of the Commission. The Report went even further to propose the appointment of Muslim judges assisted by assessors to determine cases involving Muslim disputes and parties.⁴⁶ However, when the Bill was published in 2011, it no longer mentioned the appointment of judges and Muslim expert assessors.⁴⁷ Thus, for now, the appointment of Muslim judges and assessors is off the table. However, this does not mean that the presiding officers cannot make use of the provisions in the Magistrates' Courts Act, the Criminal Procedure Act, or the inherent jurisdiction of the high courts to appoint Muslim experts as assessors in civil and criminal cases that involve Muslim issues and Muslim parties or accused but they will be regarded in the same way as any other expert witness or assessor depending on the type of situation.

The appointment of assessors as cultural experts definitely has the propensity to achieve greater justice in cases where cultural diversity is germane. Though current legislation makes provision for the appointment of assessors in civil and criminal cases, the evidence suggests that they are not used to their fullest potential. In the context of culture, much more needs to be done in this regard to achieve greater clarity regarding the role and use of cultural expertise in the person of assessors, including the identification and recognition of skilled assessors, the remuneration of assessors, keeping lists of cultural experts, and establishing a tracking system to control their participation in cultural cases.

Cultural Experts as Amici Curiae

There is one more area where cultural expertise has the potential to play an important role in litigation, namely the participation of the *amicus curiae* in legal proceedings in the high courts and the Constitutional Court.⁴⁸ The

notion of the *amicus curiae*, literally meaning a friend of the court, was introduced into the South African courts in the 1990s. Although initially a strange phenomenon in an adversarial system, the participation of the *amicus curiae*, especially in public interest litigation cases, soon became an everyday occurrence.

The Uniform Rules of the High Court confine the participation of an *amicus curiae* to constitutional issues in the high courts, including the Supreme Court of Appeal.⁴⁹ Rule 16A(2) stipulates that “any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings [...] be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.” If the permission of the parties could not be obtained, the *amicus curiae* can apply directly to the court to be admitted. The application must set out the following: the interest of the *amicus curiae* in the proceedings; the submissions which will be advanced by the *amicus curiae*; the relevance of the submissions to the proceedings; the reasons for believing that the submissions will assist the court; and a declaration that the submissions are different from those submitted by other parties (rules 16 (5) and (6)). The final decision to admit or refuse the admission of the *amicus curiae* to the proceedings rests with the court, and the court may also dispense with the prescribed requirements if it is “in the interests of justice” to do so (rules 16(8) and (9)). The procedure for an *amicus curiae* to join the proceedings in the Constitutional Court is more or less the same, except that the *amicus curiae* is not confined to constitutional issues only, but could be of assistance in “any matter” (rule 10(1) of the Uniform Rules of the Constitutional Court).⁵⁰ It is important to note that the *amicus curiae* is generally not allowed to present oral evidence or add new facts (rule 10(8)), though a different approach was followed in the case of *MM v MN*, which is discussed later.

Public interest groups⁵¹ have been using the option to join proceedings as *amicus curiae* as a mechanism to advance the rights of the minority and marginalized cultural groups with varying degrees of success. Although the courts are generally inclined to allow the participation of *amici curiae*, they guard their independence jealously and would not allow themselves to be influenced by their submissions. In the well-known rape case against the former president, Jacob Zuma, *S v Zuma* 2006 (2) SACR 257 (W), three public interest groups⁵² applied to participate as *amici curiae*. The court refused the application. At that moment, the court did not give detailed reasons for its decision except by saying that none of the groups could contribute facts relevant to the rape incident, and that both the state and the defence objected to their participating in the trial. In the final judgment, *S v Zuma* 2006 (7) BCLR 790 (W), the Court made it clear that he regarded the attempts of the *amici curiae* to become part of the proceedings as a breach of the *sub judice* (literally meaning “under judicial decision”) rule.⁵³

Different groups of people and organisations apparently tried to gain some mileage out of this trial. For example I had to deal with the application by three organisations who asked to be allowed as *amici curiae* in this matter. The organisations were represented by highly respected legal representatives and I therefore accept without hesitation that the application was genuine and serious and without any ulterior motive. The application was, however, doomed from the beginning and unnecessarily side-tracked everyone's attention at a time when it was not needed. The organisations, however, succeeded in informing the entire world of their existence and what they stand for. No doubt they do excellent work and may, when asked for, be of great assistance. Pressure groups, non-governmental organisations, governmental organisations, politicians and in some instances some of the media, breached the *sub judice* rule. [...] The pressure on a court in a matter like the present is big enough. It is not acceptable that a court be bombarded with political, personal or group agendas and comments. (at 792)

The Court showed obvious resentment toward the implication that it was not capable of drawing conclusions about the behaviour of women who were raped:

A disconcerting aspect in this trial is the fact that all and sundry were prepared to and apparently claimed the right to, comment on my decision in terms of section 227 of the Act even before they knew the bases on which and the reasons why leave was granted to cross-examine the complainant on her past sexual experience and to lead evidence concerning aspects of that past. People commented on the ruling without having been in court or knowing anything about the contents of the application or the provisions of section 227 of the Act.⁵⁴ (at 802)

These comments and others by the judge clearly illustrate that he viewed the application and the submissions by the *amicus curiae* as “a personal attack on his judicial integrity and that the purpose of the participation was misconstrued” (Spies, 2015, p. 68).

In another example, the court's attitude toward *amici curiae* was much more favorable. The Constitutional Court had to consider the validity of a consecutive customary marriage if the existing wife did not give her permission for the second marriage.⁵⁵ The case first came before the North Gauteng High Court, reported as *MG v BM* 2012 (2) SA 253 (GSJ). It held that the second marriage was invalid because the husband had failed to obtain court approval of the written contract regulating the matrimonial property regime of the subsequent marriage.⁵⁶ Upon appeal to the Supreme Court of Appeal, *MN v MM* 2012 (4) SA 527 (SCA), the latter differed with the finding of the High Court and held that both marriages were valid.

The first wife did not agree with this decision and applied for leave to appeal to the Constitutional Court, *MM v MN* 2013 (4) SA 415 (CC)), where three public interest groups were added as *amici curiae*: the Women's Legal Centre, the Commission for Gender Equality, and the Rural Women's Movement. During the proceedings the “second” wife, and all three *amici curiae* contended that there was not enough information before the court to determine if the consent of the first was indeed required in terms of customary law. The Court directed the parties, including the *amici curiae*, to provide further representations to the court on the question of whether the permission of the first wife was required to conclude a consecutive marriage. After careful consideration of the provisions of Recognition of Customary Marriages Act

120 of 1988 and living customary law, the court came to the conclusion that Tsonga⁵⁷ customary law must be developed to require the consent of the first wife for the validity of a subsequent marriage entered into by her husband. Also, the second marriage concluded without the first wife's permission was declared to be null and void.

A number of aspects of the Constitutional Court judgment dealing with the role of cultural expertise stand out and warrant mentioning. First, the Court elicited further information regarding the content of Tsonga customary law in order to determine if the permission of the first wife was needed for a consecutive marriage or not.⁵⁸ The second wife and the three *amici curiae* made ample use of the opportunity to file additional affidavits and several statements were submitted by various people ranging from individuals involved in polygynous marriages under Tsongo customary law to an advisor to traditional leaders, to various traditional leaders and two expert witnesses – the one a legal anthropologist, Professor Boonzaaier, and the other one a senior lecturer in law, Dr Mhlaba (*MM v MN* 2013 (4) SA 415 (CC), para. 54). Though it is within the discretion of the Court to ask for additional evidence,⁵⁹ the request is strange in the light of the fact that there was already evidence on record from the first wife and her deceased husband's brother that the permission of the first wife was indeed a requirement in Tsonga law, which evidence was not rebutted by the second wife.⁶⁰ In answering its own question, "what the need for further material is," the Court declared that the additional evidence was needed because the "mere assertion by a party of the existence of a rule of customary law may not be enough to establish that *rule as one of law*" (paras. 47 & 62).⁶¹ According to the court, it had a responsibility, among others, to "take steps to satisfy themselves as to the content of customary law and, where necessary, to evaluate local custom in order to ascertain the content of the relevant legal rule" (para. 48).⁶² The fact that the evidence was mutually contradictory did not present a problem to the court because it was, in the words of the court, "a necessary process that courts must go through to give customary law its proper place" (para. 60), which allows for a perspective not of "contradiction, but of nuance and accommodation" (para. 61).⁶³ The implication is that the normal rules of evidence cannot be applied to ascertain the content of customary law, which is, according to the Court, "a matter of law and not fact"; "a court must determine for itself how best to ascertain that content" (para. 61).

Flowing from the first, the second aspect that warrants mentioning is the fact that the majority judgment regarded customary law rules as a matter of law which must be proven by evidence. As already explained, South African courts take judicial notice of the law, and it is not something which must be proven. Though they are allowed to take judicial notice of the rules of the customary law, such law must be "ascertained readily and with sufficient clarity" as already explained in the introduction. In practice, this rule has been applied only in the case of official customary law, because the courts cannot take judicial notice of living customary law, which by its nature is usually an as yet unrecorded social practice, as illustrated in the facts of this case (Rautenbach & Bekker, 2014,

p. 48). As pointed out by the minority judgment of Zondo J (*MM v MN* 2013 (4) SA 415 (CC), para. 126), this contention of the majority that unascertainable customary law is a question of law is against the well-established principle that “customs and usages ‘traditionally observed’ by any group of people” are “a question of fact and not of law.”⁶⁴ The facts which needed to be proven in this case are whether Tsonga custom requires a man to obtain the permission of his wife to conclude a consecutive customary marriage. If there is reliable evidence of such a custom, it could then be regarded as a legal rule. Nevertheless, the majority judgment is an authority, and from now on living customary law will be regarded as a question of law, which places a heavy burden on the courts to determine what those rules are in any given case.

Third, it appears from the record of proceedings that the court went about hearing the evidence produced by the *amici curiae* quite loosely. Of course, the fact that *amici curiae* are also listed as parties to the proceedings enables them to submit affidavits which can be backed up by expert evidence. It is thus possible for expert evidence, which was not available to the court *a quo*, to be sneaked into the proceedings through the affidavits of the *amici curiae*. Rule 31 of the Uniform Rules of the Constitutional Court, however, stipulates that additional factual material relevant to the issues before the court may be produced provided that such facts:

- (a) are common cause or otherwise incontrovertible; or
- (b) are of an official, scientific, technical or statistical nature capable of easy verification.

In terms of this rule, new material or evidence must be undisputed evidence, which was clearly not the case in this instance, especially in the light of the conflicting evidence given by the witnesses and the *amici curiae*. As pointed out in the minority judgment, “[w]e are dealing with an appeal in a matter brought to the High Court by way of motion proceedings. I am unable to see the legal basis upon which we can prefer one version over another on this dispute of fact in a motion matter” (para. 126). Thus, the viewpoint of the minority judgment that the second wife did not prove that her marriage was a valid customary marriage and that it was thus not necessary to develop the Tsonga custom to require the consent of the first wife seems to be the legally sound one (para. 130).

The *MM v MN* case is a good example of an instance where cultural expertise in the form of expert witnesses, members of cultural communities, and *amici curiae* played an important role in assisting the court in adjudicating a complex and culturally sensitive case. Though one cannot agree completely with the loose way in which the court played with the rules of evidence,⁶⁵ it is evident that it wanted to “give customary law its proper place” (para. 60), even if it had to bend the rules somewhat.

CONCLUSION: LESSONS TO BE LEARNED?

In a South African context, cultural expertise plays a role in litigation in both civil and criminal law, and in both state law and non-state law. Cultural experts

can be used as experts, appointed as assessors, or participate in proceedings as *amici curiae*. There are no lists of cultural experts and no minimum requirements. As a matter of fact, in certain cases, no expertise is needed, only experience, as explained in *MM v MN* (para. 98):

A person who gives evidence about [customs and usages] need not be an expert witness nor does such a person need to occupy a particular position of authority in the relevant group of people. Anyone who has knowledge of the relevant custom or customs and usages may give evidence about them.

The role and use of cultural expertise in litigation are a global concern. Some might still remember the young boy named “Adam” whose body was found in the River Thames in central London. It was suspected that he lost his life in a muti-murder.⁶⁶ When police investigations reached a dead end, a London official flew to South Africa to request assistance from, among others, the South African Police Service, which is accustomed to murders of this type. Though the case was never solved and though it does not deal with the role and use of cultural expertise in litigation, it illustrates the importance of global dialogue on cultural expertise. Europe can learn from countries where cultural diversity has been the only consistency in an ever-changing legal landscape. South Africa has been through the motions of trying and failing, and sometimes succeeding, for a very long time. During this process, a lot of mistakes have been made but a few milestones have also been reached. The law does not have perfect solutions to deal with the demands of legal pluralism, and develops as the moment dictates.

If there is one thing Europe can learn from the South African approach, it is that one shoe does not fit all. Cultural diversity in Europe and the challenges it brings to the fore, especially in litigation, demand a re-evaluation of approaches to cultural expertise globally. In this era of globalization, it would be naïve to think that Europe can solve its problems on its own. The influx of immigrants, for whatever reason, coming from countries other than those in Europe, might require a more holistic approach to understanding the issues. As has been shown, the idea of “expertise” is not reserved only for sociolegal, anthropological, and legal scholars, and confining the court to a list of “cultural experts” might exclude the participation of individuals who are not experts in the true sense of the words but are knowledgeable about certain customs, and who might have provided valuable assistance in protecting cultural diversity.

Debating the role of cultural expertise worldwide is necessary and could contribute to policy making and the protection of marginalized cultural groups in Europe and elsewhere. This is one area at least where South Africa can provide valuable input in a comparative context. The strength of the South African legal system lies in the fact that the legal rules pertaining to the utilization of cultural expertise in litigation are not overly regulated but left to the discretion of the judiciary. This allows for the law to develop in tune with the demands of a culturally diverse society which are constantly on the move, such as the South African one.

NOTES

1. In this context, the expression “legal order” refers to the body of laws that make up the legal system of South Africa. South African law is certainly an enigma, but not the only one of its kind. The legal orders of neighboring countries such as Botswana, Lesotho, Namibia, Swaziland, and Zimbabwe have similar traits, though these commonalities can be explained through their historical links with South Africa and its former colonial powers.

2. For the purpose of this contribution, the description of “cultural expertise” as proposed by Holden, 2011, p. 2) is followed: “Cultural expertise is the special knowledge that enables socio-legal scholars, anthropologists 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, litigants or the accused person(s), and in some cases of the victim(s).”

3. In this context, the word “Western” is used as a generic term to refer to the Netherlands and England, whose political involvement in South Africa played a major role in the development of the South African legal system. The “mix” refers to the fusion or mix of Roman-Dutch law and English common law. According to Girvin (1996, p. 9), the mixed legal system in South Africa owes a great deal to the earlier judges of South Africa, who were schooled in either Roman-Dutch law or English common law.

4. In this context, the word “African” refers to the traditional communities in South Africa, who live under a system of customary law – a collective term for all the different “laws” of those communities. In contrast to the common law of South Africa, which is regarded as transplanted law, these laws are community laws stemming from the African continent.

5. The term “common law” used here does not refer to the English common law but to the law common to South Africa, which originates from a wide range of sources of law that have not been systematically recorded. The sources include the Constitution of the Republic of South Africa (No. 200 of 1993; the interim Constitution) which was replaced by the Constitution of the Republic of South Africa, 1996 (the Constitution), legislation, judicial precedent, common law (in the sense of uncodified law), custom, modern textbooks, as well as foreign, international, and regional law. Though many textbooks and case law still use the term “common law,” it preferable to refer to the whole pluralistic mix of laws (Western and African) merely as South African law. However, in order to distinguish between the Western and African legal systems, the words “common law” will still be used to denote the Western legal system and “customary law” to denote the African laws.

6. In this context, “codified” refers to the process whereby the law is contained in statutes in the form of codes, such as the *Burgerlijk Wetboek* of the Netherlands.

7. The Roman-Dutch legal system that existed in the province of Holland during the seventeenth century forms the basis of the South African common law. This system was introduced into South Africa from 1652 onward. After the British invasion, it was proclaimed that the Roman-Dutch law – as it was in force in 1806 – would prevail in the Cape. With the extension of the British Empire and the establishment of the Dutch colonies, Roman-Dutch law expanded to the rest of South Africa. This situation has continued to prevail, even although South Africa became independent from Britain. On December 11, 1931, South Africa became independent from Britain but the British monarch remained the head of state. On May 31, 1961, South Africa severed all ties with Britain and became a Republic, though strong links with the English common law remain.

8. In spite of the policy to retain Roman-Dutch law in the Cape after the British occupation (1795–1803, and again from 1806 onwards), certain areas of law became anglicized, especially in the area of business, government, and procedural law. The Roman-Dutch influence is most visible in criminal and substantive private law. It remains a strong feature of the South African legal system and remains strong despite predictions

in the 1900s that it would be replaced by a “series of South African Codes” (see Craies, 1900, pp. 233–239).

9. After years of controversy regarding the rightful place of customary law in the South African legal system, it finally received recognition in the 1993 Constitution (Constitution of the Republic of South Africa 200 of 1993) – Section 181 – and its continued existence in the final Constitution (Constitution of the Republic of South Africa, 1996) was guaranteed by Principle XIII, which read: “[...] Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.” Section 211 of the final Constitution gives effect to this Principle.

10. The sources of customary law, though controversial and incomplete, include customs and usages, legislation, judicial precedent, and scholarly and other writings. See in general Rautenbach and Bekker (2014, pp. 31–33).

11. “A court takes judicial notice of a fact when it accepts it as established, although there is no evidence on the point. Generally speaking, judicial notice will be taken of facts which are either so notorious as not to be the subject of reasonable dispute, or which are capable of immediate and accurate demonstration by resort to sources of indisputable accuracy” (Zeffert & Paizes 2009, p. 865).

12. In *Jezile v S* 2015 (2) SACR 452 (WCC), the accused appealed his conviction and sentence for various counts of rape, human trafficking, and assault of an underage girl. The accused raised as one of his defences the practice of *ukuthwala*, which entails in general the mock abduction of a girl to marry her. Both the state and the accused called expert witness to explain the meaning and prevalence of the custom and, in addition, the Court elicited the assistance of *amici curiae* to further assist the Court. Also see the discussion of the *ukuthwala* by Rautenbach and Matthee (2010, pp. 118–126).

13. Before this Act came into operation, customary law could only be proven by means of evidence and courts could not take judicial notice of its content.

14. *Lobola* or *bogadi* refers to dowry or so-called bridewealth which is usually paid by the husband’s family to the family of the wife after the two families have agreed on the amount to be paid.

15. Bekker and Van der Merwe (2011, p. 122) argue that Section 1(1) “should no longer be used as authority for calling evidence for ascertainment of customary law,” because referring to customary law “within the same section as foreign law negates the post-democratic status of customary law.”

16. See Clause 2(1) contained in Schedule 6.

17. *Du Plooy v Du Plooy* [2012] 4 All SA 239 (SCA), para. 22.

18. The concept of “living customary law” have been captivating scholars for quite some time (see Nhlapo, 2017, pp. 1–24; Diala, 2017, pp. 1–24). However, it is a reality that has been recognised by the judiciary a long time ago. For example, in *Sigcau v Sigcau* 1944 AD 67, 76, the Court acknowledged that Pondo law and custom is a body of unwritten law and the only way to prove it “is to hear evidence as to that custom from those best qualified to give it and to decide the dispute in accordance with such evidence as appears in the circumstances to be most probably correct.”

19. As pointed out by Bennett (2009, pp. 2–3), the rules of customary law pose no serious problems in the traditional courts; however, they have been known to cause difficulties in the mainstream courts where judges are not trained to deal with customary law issues.

20. These systems are regarded as unofficial legal systems because they are not recognised by the South African legal order, but their existence does not depend on state recognition, and people continue to regard themselves bound to the norms provided by those systems (see Rautenbach, 2016, pp. 107–115).

21. The parties’ experts agreed that the rules of the Shafi’i school had to be applied to the facts in the case.

22. I am fully aware of the fact that “state” and “non-state” are contested concepts. However, for the purpose of this contribution, “state law” refers to those laws or legal

systems that are officially recognized, namely the common law and the customary law. In contrast, those legal systems that are not recognized, such as Muslim, Hindu, or Jewish law, are regarded as “non-state law” and are thus referred to as unofficial law.

23. The concept of “culture” is also highly contested (generally, see Rautenbach, Jansen van Rensburg, & Pienaar, 2003, pp. 1–20). For the purpose of this contribution, it refers to “[...] a people’s store of knowledge, beliefs, arts, morals, laws and customs, in other words, everything that humans acquire by virtue of being members of a society” (Bennett, 2004, pp. 78–79).

24. The Constitutional Court confirmed in *Camps Bay Ratepayers and Residents Association v Harrison* 2011 (4) SA 42 (CC), para 28 that the doctrine is part of South African law, because it creates “certainty, predictability, reliability, equality, uniformity, [and] convenience.”

25. The law of evidence is an instance where English law has been directly incorporated into South African law. The rules are found in a number of statutes and, where these are silent on a specific issue, the English law of evidence which was in force in South Africa on May 30, 1961 is applicable. As pointed out by Schwikkard & Van der Merwe (2014, p. 24), “a South African court need not in each and every instance try to find applicable English cases. In most instances local precedents will suffice on the basis that they accurately reflect the common [English] law position.”

26. This approach is followed in English law also, and has three leading features: the parties are in principle responsible for proving their respective cases; the presiding officer plays a passive role; and the emphasis is on oral evidence and cross-examination (see Schwikkard & Van der Merwe, 2014, p. 9).

27. This is also an important deviation from the Dutch legal system, which is characterised as inquisitorial.

28. The test for relevance is explained in *Gentruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A), 616H: “[T]he true and practical test of the admissibility of the opinion of a skilled witness is whether or not the Court can receive ‘appreciable help’ from that witness on the particular issue.” Also see *Ruto Flour Mills Ltd v Adelson* (1) 1958 (4) SA 235 (T), 237: “An expert’s opinion is received because and whenever his skill is greater than the Court’s.”

29. The court must be satisfied that the expert witness is both theoretically and practically qualified to assist the court. See *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E), 569D-H: “However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. [...] Where, therefore, an expert relies on passages in a text-book, it must be shown, firstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and, secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field. In other words, an expert with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience or knowledge) by referring to passages in a work which has itself not been shown to be authoritative.”

30. This principle was explained as follows in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MbH* 1976 (3) SA 352 (A), 371: “As I see it, an expert’s opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”

31. This principle could be problematic, especially in cases where both parties call expert witnesses who deliver conflicting evidence. In *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (18 July 2012), the Court had to choose between two versions of what constitutes a valid customary marriage. The two expert witnesses essentially agreed

on the requirements of a valid customary marriage but their evidence deviated as to the question whether the marriage was indeed valid or not. According to the plaintiff's expert, it was valid, and according to the defendant's expert, it was not. However, it was not necessary for the Court to choose between the two views of the experts, because it was possible to reach a conclusion that the marriage was valid after evaluation of all the facts and reliability of the witnesses. Price (2006, p. 146) explains: "[...] our judges are less likely to blindly follow expert testimony once it is admitted. They, by virtue of their training and experience, are capable of both evaluating the probative value of admitted expert opinion, and disabusing their mind of its influence where they find it to be unconvincing or of little evidentiary weight."

32. Some authors argue that the accused who cannot afford to obtain the evidence of an expert witness denies him or her the right to a fair trial (see Meintjes-Van der Walt, 2001, pp. 309–310; Mbodla, 2001, pp. 81–87).

33. Civil disputes involve disputes between private actors, such as persons and organizations, while criminal disputes involve the state, which prosecutes individuals for crimes committed.

34. Uniform Rules of the High Court – GN R315 in GG 19834 of 12 March 1999.

35. Rule 24(9) of the Rules of the Magistrates' Courts is almost verbatim the same. See Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa – GN R740 in GG 33487 of 23 August 2010.

36. In both criminal and civil cases, expert evidence may be entered into evidence by way of affidavits.

37. The rights and duties in the context of civil proceedings are spelled out, but according to Zeffert and Paizies (2009, p. 330), the same principles apply to criminal proceedings.

38. References omitted.

39. Emphasis added.

40. Section 93 *ter* (1)(b) also compels a presiding officer in the regional court to appoint two assessors in the case of a charge of murder, except if the accused requests that the trial proceed without any assessors. In *S v Gayiya* 2016 (2) SACR 165 (SCA), the court confirmed that this section is peremptory and an accused must be informed of his right to waive the requirement before the trial commences. If he was not informed, the trial should fail, even if he waives the appointment of assessors after a guilty verdict but before punishment.

41. Emphasis added.

42. Section 179 of the Constitution stipulates: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

43. Only the presiding officer, however, can decide a question of law.

44. See Schwikkard & Van der Merwe (2014, pp. 13–14) for a discussion of the main differences between the two systems.

45. This option was chosen because the creation of separate Shari'ah courts was not possible as a result of limited state resources.

46. See Clause 15 of the draft Muslim Marriages Bill contained in the final report – South African Law Reform Commission (2003, p. 127).

47. Since the publication of the latest Muslim Marriages Bill in 2011, there has not been much movement in this regard. The Women's Legal Centre launched an application for direct access to the Constitutional Court to speed up the promulgation of the legislation to ensure the protection of Muslim women, but the application failed. See *Women's Legal Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC). The Court held that this matter is of such importance that it should not act as the court of final instance. The Women's Legal Centre pursued the issue in the *Western High Court in Women's Legal Centre Trust v President of the Republic of South Africa* [2018] (31 August 2018) in which it ordered the government to prepare, initiate, introduce, enact and bring into operation legislation within the next 24 months to recognize Muslim marriages in South Africa.

48. Magistrates' courts do not have the power to admit an *amicus curiae* to their proceedings.

49. The participation of the *amicus curiae* is regulated in terms of rule 16A of the Uniform Rules of the High Court and rule 10 of the Uniform Rules of the Constitutional Court.

50. See Uniform Rules of the Constitutional Court – GN R1675 in GG 25726 of 31 October 2003

51. "A public interest group may be defined broadly as a free-standing voluntary organization typically established to further a particular cause or simply to provide the poor with access to justice" – see Spies, 2016, p. 251.

52. They were the Centre for Applied Legal Studies (CALs), the Centre for the Study of Violence and Reconciliation (CSVR), and the Tshwaranang Legal Advocacy Centre (TLAC)

53. The Court found that there was not enough evidence to convict the accused, and in the end, he was acquitted.

54. Section 227(2) of the Criminal Procedure Act 51 of 1977 stipulates: "Evidence as to sexual intercourse by, or any sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried."

55. Polygynous customary marriages concluded before and after the commencement of the Recognition of Customary Marriages Act 120 of 1998 are valid in South Africa. The Act commenced on November 15, 2000. Marriages concluded after the commencement of the Act must, however, comply with certain requirements that were not obligatory before, namely both spouses must be above the age of 18 years and both must consent to the marriage (see Section 3(1)). The Act does not require the permission of the first wife to conclude consecutive marriages but requires that the marriage must be concluded in terms of customary law. One thus has to look at the validity requirements to determine if permission is imperative. In this case, the court found that there is nothing in Xitsonga (Vatsonga or Tsonga) law (the law of the community the spouses belong to) which requires the husband to ask permission from his first wife, but the law has to be developed to require consent to be consistent with the Constitution, which prescribes equality and human dignity. The facts of the case were dealt with before three courts. First, the High Court, then the Supreme Court of Appeal, and finally, the Constitutional Court. All three cases were dealt with extensively by a number of scholars for different reasons which are not relevant for this discussion. For more information, see Rautenbach & Du Plessis, 2012, pp. 749–780; Maithufi, 2012, pp. 405–412; Himonga & Pope, 2013, pp. 318–338; Kruuse & Sloth-Nielsen, 2014, pp. 1709–1738; Ozoemena, 2015, pp. 969–992; Spies, 2015, pp. 156–167; Lewis, 2015, pp. 1125–1159; and Bakker, 2016a, and 2016b pp. 231–247 & 357–368.

56. Section 7(6) of the Recognition of Customary Marriages Act 120 of 1998 stipulates: "A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages."

57. Also referred to as the Xitsonga or Vatsonga customary law in the judgment.

58. Zondo J, who delivered a minority decision, was highly critical of the decision of the majority to allow additional evidence because, in the words of the judge himself, "in this matter [the Court] is sitting as a court of appeal and its function is to decide whether on the same evidence that was before the Court a quo was right or wrong" (see *MM v MN* 2013 (4) SA 415 (CC), para. 114).

59. Uniform Rules of the Constitutional Court: Rule 20(1)(c)(v) allows the Court to issue directions for the hearing of additional evidence by way of affidavits or otherwise.

However, as pointed out in the minority judgment, this should be done only in exceptional circumstances which were not present in this case (see *MM v MN* 2013 (4) SA 415 (CC), para. 114).

60. This is also one of the points of critique by Zondo J against the decision of the majority (see *MM v MN* 2013 (4) SA 415 (CC), paras. 103–108).

61. Emphasis added.

62. Other reasons for the Court's decision were also advanced – see paras. 49–53.

63. According to the minority judgment, this conflict could be resolved only by means of cross-examination and should not have been allowed at all – *MM v MN* 2013 (4) SA 415 (CC), paras. 112, 118–126.

64. Emphasis added.

65. *MM v MN* 2013 (4) SA 415 (CC), para. 130: “[Customary law] does not depend on rules of evidence: a court must determine for itself how best to ascertain that content.” It is evident from the case law that the courts are struggling with the challenges of proving custom as part of living customary law, and they have not been consistent in doing so. Also see *Mabena v Letsoalo* 1998 (2) SA 1068 (T), where the court accepted the evidence of a friend as evidence of a custom which allowed a mother to negotiate the payment of *lobolo* (bridewealth) in the absence of a husband. In *Maisela v Kgolane* 2000 (2) SA 370 (T), the High Court held that a litigant who wishes to have an action determined by customary law must prove that it is applicable by leading expert evidence. In *MM v MN* 2013 (4) SA 415 (CC), the court had to consider lay and expert evidence regarding the question if the permission of the first wife was needed to conclude a consecutive marriage. Eventually, the court was confronted with a large amount of conflicting evidence which it had to sift through.

66. The killing of someone to harvest body parts to be used in traditional rituals.

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Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise

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BEYOND ANTHROPOLOGICAL EXPERT WITNESSING: TOWARD AN INTEGRATED DEFINITION OF CULTURAL EXPERTISE

Livia Holden

ABSTRACT

This chapter explores expert witnessing in anthropology and the raison d'être of cultural expertise as an integrated socio-legal concept that accounts for the contribution of social sciences to the resolution of disputes and the protection of human rights. The first section of this chapter provides a short historical outline of the occurrence and reception of anthropological expertise as expert witnessing. The second section surveys the theoretical reflections on anthropologists' engagement with law. The third section explores the potential for anthropological expertise as a broader socio-legal notion in the common law and civil law legal systems. The chapter concludes with the opportunity and raison d'être of cultural expertise grounded on a skeptical approach to culture. It suggests that expert witnessing has been viewed mainly from a technical perspective of applied social sciences, which was necessary to set the legal framework of cultural experts' engagement with law, but had the consequence of entrenching the impossibility of a comprehensive study of anthropological expert witnessing. While this chapter adopts a skeptical approach to culture, it also argues the advantages of an interdisciplinary approach that leads to an integrated definition of cultural expertise.

Keywords: Cultural expertise; expert witnessing; common law and civil law; international private law; engaged anthropology; law and culture

INTRODUCTION

Political agendas and governmental policies in post-war America, Europe, and Australia have frequently featured social diversity as a goal whose accomplishment has time and again proved difficult. Yet, social sciences and applied social sciences have been deeply involved with the notion of social diversity. Socio-legal scholarship has developed articulated reflections on the accommodation of ethnic and religious minorities. Experts with a variety of backgrounds have been instructed in legal proceedings involving members of ethnic minorities and diasporic communities. Anthropologists have acted as experts for a range of cases, which have consistently expanded, ranging from indigenous rights to asylum rights, including migration laws and many other subfields in both public and private law. Anthropological expertise, mainly in the form of expert witnessing, has even acquired a role in those legal systems, that do not specifically provide for it or are reluctant to consider non-Western laws as bearing any kind of extra-territorial impact. However, cultural expertise as a socio-legal concept that defines the contribution of cultural anthropology as expertise beyond the legal institution of expert witnessing has not yet been fully theorized.

ANTHROPOLOGICAL EXPERT WITNESSING

Anthropological expertise in the form of expert witnessing and consultancies for providing an expert opinion, or expert information, has been one of the activities, if not *the* activity par excellence, of applied anthropology. In fact, the use of anthropological knowledge for dispute resolution, law making, and governance, for good or bad, has been frequent throughout the history of anthropology. Yet, as we will see, whilst actual records of an extended engagement of anthropologists with law are few and sparse, the criticism against it has been unwavering. Grillo (1985), Grillo and Stirrat (1997) and Sillitoe (2006) have all remarked that applied anthropology has been a source of trouble more than anything else. In fact, anthropologists, and anthropology have been the object of criticism on the one hand for unethical collaborationism with colonialism and dictatorial regimes, and on the other for radical relativism that would condone unacceptable practices (Gellner, 1985; Sandall, 2001). This chapter will evoke some of the most well-known cases of expert witnessing including also the policy-related use of anthropological knowledge. For limitations linked to the paucity of sources this excursus is patchy. Since historians of anthropology have usually focused on either the United States or Britain, and sometimes on France, the factual variety of anthropologists' involvement with law across the world has not been recorded systematically. Other contributions in this same issue provide good examples of the various extents and modalities of anthropologists' engagement with law but to date no systematic attempt has been made to review it beyond specific cases. This section will nevertheless attempt to devise a timeline, which relies mainly on the history of British and American anthropology with the inclusion of Australian and Continental European sources. It intends to position the practice of expert witnessing and related activities, within

a broader framework that exceeds the legal approach. This extended framework will constitute the grounds on which to articulate the notion of cultural expertise.

From “Anthropology before Anthropology” to Colonial Anthropology

The engagement of travelers, missionaries, and sometimes colonial administrators, in activities that today would be considered as “cultural” mediation, dates back to the so-called “anthropology before anthropology” (Kuklick, 2008). Yet, it was only in the mid-nineteenth century that the American Bureau of Ethnology and the London Ethnological Society were established with government facilitations. American applied anthropology evolved quite early into “savage ethnology,” that is, the documentation and record of First Nations’ cultures that were perceived as heading toward extinction. The use of anthropological expertise in Indian tribal claims was recorded as early as 1895 with *Choctaws v. United States* in the United States (Gormley, 1955). In the mid-nineteenth century, British anthropology also started to play an official role in the formulation of social policies in England (Kuklick, 2008).

At the end of the nineteenth century both the British colonial administration and the US government consolidated the practice to fund applied research. Thus, social scientists and anthropologists in particular, shifted toward applied anthropology and became consciously involved with policy making and colonial ruling. Kuklick (2008) dates the beginning of the twentieth century, as the time when the first use of anthropologists as expert witnesses for policy making in England took place. Since 40% of volunteers for military service were rejected on health grounds, the Inter-departmental Committee on Physical Deterioration called on anthropologists for advice. The subsequent report that was published in 1904 argued for social welfare policies because “apparent signs of decline of the population’s collective hereditary potential were transient, circumstantial phenomena – functions of deficient diets, housing, and exercise” and in particular, D.J. Cunningham emphasized that “enlarged opportunities for women did not lead to a decline in reproductive capacity; liberated women, freed from restrictive corsets and encouraged to exercise, were healthier.” (Kuklick, 2008, p. 58).

Whilst the involvement of social scientists for policy making in Britain has remained overall poorly scrutinized, British anthropology has been criticized for its unreserved collaboration with colonial administration. The Colonial Social Sciences Research Council, founded in 1944, was done so in order to allocate funds to anthropological research connected with colonial administration. Yet, Malinowski (1926, 1929, 1930) at least initially maintained that anthropologists should use their expertise in defense of “subject” peoples. Additionally, Kulick says that despising applied anthropology, senior committee members served the academic discipline more than colonial government officials (Kulick, 2008). Concomitantly, Evans-Pritchard and Firth (1949) lamented that the British administrators either did not ask for anthropologists’ assistance or, eventually would not use their findings. We will see that this curious ambivalence is still

present today regarding the current reluctance of some anthropologists toward applied anthropology.

Anthropologists and Foreign Politics

Toward the end of WWII the United States Office of War invited Ruth Benedict to write a book that could provide an understanding of Japanese culture, with the intent to predict Japanese behavior. *The Chrysanthemum and the Sword* was published in 1946, and to date, there are no records of its actual role in US–Japan relations. Criticism was, however, almost immediate, but not necessarily from an ethical perspective. Rather, Benedict was reproached to offer a monolithic perspective of Japanese society that would undermine its complexity, especially for what concerns the intertwined relationships between tradition and modernity (Stoetzel, 1959; Watsuji, 2016).

Almost at the same time, the very capacity of anthropology to provide expert knowledge was refuted by Hogbin (1957, p. 245) who argued that to the difference of civil engineers and plants breeders the anthropologist is not qualified more than the average citizen for advising on the solutions to social problems. Such was the conundrum between political pressures, social engagement, and ethics: the appropriateness of anthropology for a meaningful contribution to society on the one hand and on the other, the incapacity of anthropologists to scientifically and ethically engage in the resolution of social problems. Far from being discouraged, in 1964 the United States conceived the project Camelot as a more explicit way to use anthropological knowledge and hire anthropologists with the aim to facilitate specific political changes in developing countries. Project Camelot was prepared by a committee of social scientists as a feasibility project aiming to envision models of social systems that would predict and influence social change in the developing world. This time, the response was a neat refusal by the scientific community. In Chile, scientists reacted indignantly and the matter was brought to international attention with the result of the project being canceled for fear of diplomatic embarrassment (Solovey, 2001; Wakin, 1992).

Anthropologists as Expert Witnesses in First Nations Litigation

Since the 1950s, anthropologists started to appear as expert witnesses in the United States with increasing frequency for cases concerning racial segregation, miscegenation laws, child custody, paternity, religious communities, and the cultural background of the defendants. Particularly remarkable was the intervention of socio-linguists in the so-called Ann Arbor trial which was initiated by members of the black community following discrimination suffered by their children at a local school. Labov (1982) described how linguists, who are notorious for academic disagreement, engaged in the defense of black children against those who argued that black children's poor achievement was connected to the supposed inferiority of their language skills. Yet, the case of anthropological expert witnessing that has attracted most attention in the United States, and was

meticulously recorded by anthropologists, is the *Mashpee Tribe v. New Seabury Corp.*, regarding the possession of about 16,000 acres of land. The possession of the land depended on the Mashpee identity being regarded as a tribe, hence the entire trial sought to ascertain whether or not the Mashpee were indeed an Indian tribe. Clifford (1988) presents verbatim the 41 days of testimony, detects the arguments that were developed and the kinds of witnesses that were instructed, and compares the concluding evidence of the trial with his own opinion. Clifford argues that identity has two meanings: one linked to how each single individual imagines oneself and the other which is linked to the group and pertains to a social and collective meaning. While the defense (New Seabury Corp) availed the support of historians as expert witnesses, the plaintiffs (Mashpee) depended on anthropologists. Hence, the trial is also seen as a disciplinary struggle between history and anthropology (Clifford, 1988, p. 317). With hindsight it appears clear why anthropologists found their role difficult under the circumstances. The discipline seemed not to have rigorous or even commonly accepted definitions, its conclusions appeared to be historically limited and politically enmeshed, and eventually loose concepts of culture were applied to the very category of tribe on which rested the land rights on trial (Clifford, 1988, p. 317 and f.). The verdict concluded that the people living in Mashpee did not continuously exist as a tribe or a nation and they were thus denied the right to the contended land. The same verdict was confirmed in the 1975 appeal and proceedings came to a conclusion only in 2007 when the tribe and the town of Mashpee reached an agreement. In *Bingham v. Massachusetts*, the Mashpee were designated as a federally recognized tribe and received a portion of the claimed land in exchange for waiving all other claims on Mashpee town.

Post-colonial Criticism against British Anthropology and Applied Anthropology

Since the 1960s and especially from the 1970s onward, trends from inside and outside anthropology consolidated a denunciation against the discipline for providing the conceptual and theoretical models that justified colonial powers (Diamond, 1964; Maquet, 1964) and racism (Jordan, 1968; Memmi, 1969; Memmi & Greenfeld, 1967). Equally important was the criticism developed against the anthropologists who were perceived as working in the applied field and therefore not contributing to anthropological theories. Anthropologists were criticized both for providing theories that justified colonialism and, when in the field, for not engaging against colonial powers. Asad (1973, 1979) argued that colonialism allowed the anthropological study of non-European cultures and peoples by providing safe physical access to other parts of the world; and that while anthropologists have helped record and document different cultural traditions, they have also reinforced the unbalance of power introduced by colonialism.

Adam Kuper (2014) in *Anthropology and Anthropologists: The British School in the Twentieth Century* shows how the connection between anthropology and colonialism has been often subtle, nuanced, and sometimes ineffective

irrespective from the intellectual honesty of the anthropologists, or the lack thereof. Applied anthropology in particular was attacked for being suspected of unethical alliances with regard underlying financial gains (Lewis, 1988). As a consequence, the discipline as a whole suffered from poor credibility. Lewis (1973) alerted that anthropologists' reluctance to ethically engage with people might also be imputed to the general low regard held for applied anthropology. Diamond (1966); Foster (1969) and Memmi and Greenfeld (1967) have argued that anthropologists, who, generally speaking, seem to have a lower status in the countries of their origins, tend to develop romanticized views of the "primitive" with a self-serving purpose of career advancement and personal revenge against their own societies. Lewis (1973) writes:

When the anthropologist combines the idealization of primitive culture with the notion of cultural determinism, the result is an attitude that is both paternalist and hypocritical. The very qualities of primitive life which the anthropologist romanticizes and wants to see preserved are attributes which he finds unacceptable in his own culture. The personal freedom and self-determination he insists upon for himself he withholds from the "primitive" on the basis of cultural conditioning and the need for accommodation of the individual within the community. He writes enthusiastically of the highly integrated life of the "primitive," of the lack of stress experienced when there is little freedom of choice and few alternatives from which to choose; yet he defends for himself the right to make his own decision and his own choices.

However, the criticism was not only directed against unholy alliances between anthropologists and British colonizers. The use of anthropological knowledge in the French colonies did not lead to any less criticism even though this was directed at the quality of knowledge more than at its political stance. Wooten (1993) describes the corpus of legal ethnographies that colonial administrators felt to be of particular assistance to colonial power. These were compilations of "native" customs, mainly family law, by the so-called administrators-ethnographers, or evolutionary thinkers who thought that the Africans would evolve in the same way as the Europeans. Wooten (1993) and Rodet (2007) reported that the application of "native" law in French Colonial Africa through the use of ethnographic experts contributed to nothing but the "invention of tradition." Hobsbawm and Ranger (1983) and Vanderlinden (1996) have shown, respectively, in the fields of history and law that anthropologists have most often than not contributed together with other scholars to the construction of imperial grandeurs in Africa and Asia. As a notable exception, Luc De Heusch, a Belgian anthropologist and filmmaker, denounced colonialism and the perverse effects of nationalism and in particular exposed the role of Belgians in the exacerbation of ethnic rivalries that led to the Rwandan genocide (De Heusch, 1995). Around the same time neo-Marxist anthropology stressed the connection between inequality and access to resources but its arguments developed essentially on a theoretical level.

Anthropologists as Expert Witnesses in Aborigines Litigation

Toward the end of the twentieth century, while in Europe and in North America positioning regarding colonialism and anthropology became pivotal in the academic scrutiny that led to the reflexive turn of the discipline, in Australia

anthropologists consolidated the practice of expert witnesses without attracting much attention from the broader scholarship. The bulk of litigation for which anthropologists were instructed as expert witnesses had started in the 1970s following the land rights legislation in the Northern Territory. The admissibility of anthropologists' testimony in Australia was sanctioned in *Milirrpum v Nabalco* by Justice Blackburn who discussed whether the evidence presented by the anthropologist was hearsay because it was based on what the anthropologist had been told by other people, specifically in this case indigenous informants. Justice Blackburn concluded that "[t]he anthropologist should be able to give his opinion based on his investigation by processes normal to his field of study, just as any other expert does."

Expectedly, anthropological expert witnessing in Australia has also been fraught with a sentiment of failure and uneasiness the epitome of which was the *Hindmarsh Island* case. In 1994 a group of Aboriginal women who were opposing the construction of a bridge on the basis of the religious and cultural significance of the area, were accused of fabrication. Anthropologists were appointed as expert witnesses and submitted their representations. Deane Fergie, the anthropologist who submitted an appendix report which was marked as "Confidential Appendices 2 and 3: To be read by women only" was also sued for fabrication. The Hindmarsh Island Royal Commission refused the women's claims and the bridge was completed in 2001. Additionally, the confidentiality of Fergie's report was not taken seriously and to the adverse conclusion of the trial added the shame of disclosure of sensitive information for the proponents. This case made newspaper headlines, and also disclosed professional rivalries and gender perceptions in academia. Philip Jones who had been appointed as expert by the Royal Commission argued that Fergie was acting for self-serving purposes linked to her feminist and anarchist agenda, and that she was not an expert (Lucas, 1996). The *Hindmarsh Island* case was declared as the failure of anthropology for not conveying the nature of anthropological fieldwork and the specificity of the knowledge that it produces (Lucas, 1996, p. 51). Positions on this particular case remain polarized but one thing seems clear: the difficulty, and in this case, the impossibility to translate anthropological data into evidence in court.

Criticism against Colonial Attitudes of Applied Anthropology in North America

Pinkoski (2007) argues that while much has been written regarding the link between British colonialism and anthropology, there has been a gap in the literature concerning colonialism and anthropology in North America. Pinkoski examines Julian Steward's theory and the role that Steward played in helping the US government in legal cases before the Indian Claims Commissions. Pinkoski concludes that Steward – by acting as the expert witness and advisor for the US government – played an important role in the US colonial strategy to deny land rights to Native Americans. Furthermore, as expert witness before the Indian Claims Commission, Steward portrayed the Indians of the Great

Basin as being at the lowest rung in social evolution, which was further used to deny Native Americans their land rights. Pinkoski uses the example of Steward to highlight the connection between anthropology and colonialism in the US and the role that anthropology continues to play in North America concerning the issue of land rights of indigenous peoples. Pinkoski calls on anthropologists in the US and Canada to reconsider the role that their discipline has played and continues to play in the struggle between colonial authorities and indigenous communities regarding issues of land rights. Gough (1968), Lewis (1973), George Stocking (1991), and Peter Pels (1997) have deconstructed the intimate connection between colonialism and anthropology by stressing the need for a new method of self-reflection in anthropology to recognize and address the imbalance of power between the anthropologist and their subjects.

*Scrutiny of Anthropologists' Involvement in the
Development Industry*

As a new turning point, French anthropologists of law Le Roy (2004) and Kuyu (2001) overcame, to some extent, the criticism against anthropologists' involvement with colonial power. As such, they argue for an increased use of ethnography in Africa in order to fight against the oversimplification of development studies that adapt the legal systems inherited from Europe to traditional legal realities in Africa. Similarly, British and American anthropology have developed a criticism toward development aid without completely undermining its benefits. By critically looking at the ways in which international aid operates, this scholarship indicates that the action of development aid is informed by the need to support certain formats of economy more than actually reaching development goals (Escobar, 1995; Grillo & Stirrat, 1997; Mosse & Lewis, 2005). Interestingly, two opposite approaches which had an impact on the way anthropology itself has expanded in America and in Europe have been detected: whereas anthropologists in America have been more interested in differences, anthropologists in Europe have been more interested in similarities (Mattei & Nader, 2008, pp. 107–110). This is also due to a long-standing tension within Europe's own colonial venture between autonomy, subjection and assimilation (Lechat, 1994). As such, its evolution toward assimilation in the late stages of colonialism (Betts, 2005) can explain the anthropological trend consisting of finding similarities within the European tradition and forcing specific stages of development.

Anthropology of Human Rights

The relatively recent involvement of anthropologists in social causes has largely concerned international human rights, and overall, it was received positively both within and outside academia. Even though this kind of involvement is better identified with advocacy and to a great extent exceeds the scope of this chapter, it is necessary to survey it briefly in view of the integrated definition of cultural expertise that this chapter will suggest in its conclusions.

Until 1987 there were no anthropological publication published that contained the term “human rights” in their title. Yet anthropologists have been involved in the development of new categories of collective rights and many also engaged with human rights activism. Anthropologists contributed to UN formulations of genocide and discrimination against women. It was also thanks to the contribution of anthropology that the principle of the interdependence and indivisibility of civil-political and economic social-cultural rights gained significance. The collection of essays edited by MacClancy (2002) entitled *Exotic no more*, suggests that anthropologists’ engagement with human rights make a strong argument against the misleading or at least outdated stereotype of the anthropologist in search of exoticism. Anthropologists Clay and Holcomb (1986) have spoken out against the human rights abuses of political dictators in Africa and Latin America but also about the complicity of US and European aid. Anthropologists Diskin (1991) and Smith (1996) have elucidated the ideologies and the dynamics of elite culture that marginalize and abuse indigenous people for what concerns the right to self-determination. To a great extent it seems that anthropologists have definitively confronted the limits of cultural relativism without shying away from adopting a critical approach on their own discipline. Goodale (2006) and Goodale and Merry (2017) have successfully re-claimed the important role of anthropology both scrutinizing the ways in which international human rights should be framed in order to serve their original purpose, and the part it plays in law making and expert witnessing.

The Human Terrain System: The Embedded Anthropologist

Unfortunately, neither the failures of anthropologists’ engagement with colonial and imperialist enterprise or the widespread self-reflection that characterized the discipline were an effective deterrent for the Human Terrain System (HTS) involving the engagement of anthropologists in counterinsurgency operations in Iraq and Afghanistan. The anthropologist Montgomery McFate was the initiator of the HTS program pleading for the need of the military to know the “adversary culture” and for anthropologists to abandon the ivory tower of academia (McFate, 2005). The HTS came almost immediately under criticism from a host of anthropologists (Forte, 2011). In 2009, the Commission on the Engagement of Anthropology with the US Security and Intelligence entrusted by the American Anthropology Association for formulating an official position on the members’ participation in the HTS program issued a statement of firm condemnation (CEAUSSIC, 2009).

Summary of Key Themes

As we have seen through this short excursus, there is no consistent history of expert witnessing in anthropology even though there have been many such cases, which date back to the second half of the nineteenth century, and perhaps even earlier in America. The engagement of anthropologists with applied

anthropology, even though not always inappropriate, has nevertheless generated two main reproaches regarding the close relationship between British anthropology and colonialism and the unethical co-option of American anthropologists into counterinsurgency programs in Latin America and Southeast Asia. From a wider perspective, critics who have deconstructed the role of anthropologists as experts, in general, have gone as far as to suggest the inadequacy of anthropology vis-à-vis other disciplines and appear to have a general disregard for applied anthropology. A lack of professional cohesion as well as a vulnerability to political and financial pressure also transpires from the debates that have developed internally within the discipline of anthropology. This is particularly true in those countries where anthropology as a discipline is still affected by a lack of credibility (Colajanni, 2014). This chapter argues that the lack of systematic records on anthropological expert witnessing, in combination with the absence of specific socio-legal tools to appraise its impact, renders any position in favor or against anthropological expertise unsupported by evidence. However, before outlining the possibility of a research that investigates expert witnessing beyond its narrow legal definition, this chapter will now delve more into the scholarship that has recorded anthropological expertise and reflected on its best practices.

EXPERT WITNESSING AND THE LAW

Deontology of Expert Witnessing

The most important contributions of anthropological and socio-legal scholarship to expert witnessing have focused on what I call as the deontology of expert witnessing: both the procedural requisites of expert witnessing and their limitations for an effective use of anthropological knowledge. Rosen (1977) with his seminal article “The anthropologist as expert witness” is among the first scholars to have recorded expert witnessing as a professional contribution to the implementation of self-determination and land rights claims by indigenous groups. Adopting the same auto-critical approach that has featured in much of the anthropology of the second half of the twentieth century, Rosen spelled out the central factors affecting cultural expertise: the appropriateness of anthropological knowledge to legal proceedings and the concomitant ethical issues of expert witnessing. Rosen’s arguments unfold on a pragmatic level and his reflection heavily relies on North American history. Rosen traces the use of expert witnesses in the Anglo-American legal system to argue that its use developed alongside the appearance of the jury system. While between the twelfth and the fourteenth century, the jury functioned as a group of neighbors who already had knowledge of the facts surrounding the case, this changed in the sixteenth century when the jury became a group of arbiters who were not aware of the facts. It was then that experts began to play a greater role in the legal system as they presented and explained to the jury the facts that were relevant to the case. Rosen signals that the use of social science in court is a fairly recent development and that courts increasingly cite social scientists in support of their decisions. Rosen describes vastly different cases, mainly touching

on the management of ethnic diversity, in which anthropologists have been called upon to act as expert witnesses and identifies three main sets of issues. The first set of issues scrutinizes the findings that the anthropologist can submit to the court; the second delves into the reciprocal influence between lawyers and anthropologists, while the third set concerns how the anthropologists themselves view their role as expert witnesses in legal cases. While the first encompassing question concerning the adequacy of anthropological knowledge to legal proceedings have resonated with European anthropology, the three sets of questions which concern the practice of expert witnessing have remained crucial preoccupations of anthropologists acting as expert witnesses in the Anglo-Saxon legal systems.

Lawyers and Anthropologists

Anthropological scholarship has often argued for a collaboration between lawyers and anthropologists whilst also pointing at the intrinsic differences between lawyers' and anthropologists' thinking (Frances, Rigby, Severeid, Davidson, Wright, Alvarez, and Loucky 1992). Some legal scholarship has also fostered interdisciplinary collaboration by providing support to anthropologists involved in expert witnessing (Twining, 1973). Mertz (1994), in a talk during the Annual Conference of the Alaska Anthropological Association examined the reciprocal expectations between anthropologists and lawyers in the legal process and was particularly concerned by the potential misuse of anthropological expertise in court. His chapter entitled "The Role of the Anthropologist as Expert Witness in Litigation" remains of actuality in that it addresses another recurrent concern among anthropologists: the requisite of neutrality which to some extent contradicts the duty of anthropologists to be close to the participants in their research (Vatuk, 2011). Mertz offers advice on how anthropologists may interpret the legal requirement of neutrality and how they should ensure that it is respected. Mertz's position is explicitly liberal in that it analyzes expert witnessing as a component of the industry of litigation: while good lawyers will ask experts for their honest evaluation, others feel that experts can be paid to support a particular position under the veneer of scientific rationality. There are also experts who will agree to be paid to support a particular position. Mertz's views may be a bit too clear cut for the debates that animate today's anthropology in relation to the rights of vulnerable groups. Nevertheless, this author values the integrity of the expert witness in the legal process and offers useful advice for anthropologists in this regard. Yet, whilst for Mertz, the use of anthropological expertise for advocacy constitutes a misuse of the anthropologist's expertise, more recent scholarship attracts also the attention to the social duty of social scientists to employ all in their power to ensure substantial protection to subaltern and vulnerable groups. Scholars have also pointed out the imbalance of power in the context of anthropological expertise, where anthropologists need to cope not only with hectic rhythms and a forced pace but also politics and bureaucracies that put the language of social science at a disadvantage (Bell, 1998; Campbell, 2017; Haviland, 2003; Holden, 2011; Lucas, 1996; Ramos, 1999).

Anthropologists and Aboriginal Land Rights

Australian scholarship on native titles has demonstrated the importance for the anthropologist to become acquainted with the legal requirements of expert witnessing and shows that long-term cooperation between lawyers and anthropologists, albeit difficult, can generate a tangible impact. Rummery (1995) alerts that in spite of Blackburn's precedent on the admissibility of anthropological evidence and the principle according to which the rules of evidence do not apply with legal force in the context of the Native Title Act of 1993, the hearsay rule and the rule regarding the use of opinion remain troublesome for anthropologists. According to the law of evidence in Australia, hearsay and opinions are in principle inadmissible as evidence. Hence, the court might not admit as evidence written or oral statements made by someone who is not called in as a witness as well as evidence that constitutes inferences drawn from facts. While acknowledging that in most litigation regarding native titles, the rules of evidence are relaxed to a considerable extent, Rummery argues that, from an anthropological perspective, the line between inferences drawn from facts and facts themselves is not always obvious. Rummery signals also that if the rules of evidence are strictly enforced, these will ensure that indigenous witnesses cannot give their opinion regarding their native customs and laws, no matter how knowledgeable they are about them.

Trigger (2004) reflects on the legal requisites of anthropological expertise from the point of view of social sciences. He maintains that, whereas lawyers are *instructed* by their clients, anthropologists are *appointed* by the litigants or defendants or by the court. This means to stress on the neutral position of the anthropologist acting as an expert witness. Trigger acknowledges that political engagement is felt by some as an integrant component of the academic profession, but sees political involvement and expert witnessing as incompatible activities. Trigger's contribution that best responds to the general questions asked by Rosen in 1977 regarding the adequacy of anthropological knowledge in court is an in-depth analysis of the difference between hearsay and expert opinion. Triggers (2004) cites *Daniel v. Western Australia* where the judge considered whether key data used by an anthropologist, that is, talk among the informants or subjects of the research, could be used as part of an expert report. The court was uncomfortable with anthropological first-hand data because these would lead to conclude that the anthropologist's conclusions are hearsay. Trigger also signals that Australian precedents have evolved to specifically consider evidence from anthropological expertise according to two types: anthropological theory and admissible hearsay because the ordinary law of evidence does not apply in hearings of statutory land claims. Australian precedents have remained somewhat ambiguous on the admissibility of hearsay in anthropological expertise. As Trigger notes, this is a potential pitfall of the use of anthropological knowledge in court.

As far as my own experience goes as an expert witness in the UK, I can attest to the fact that courts in the UK may engage in similar ambiguity by rejecting the anthropologist's conclusions if these are based on first-hand data, that is,

hearsay according to the legal doctrine. This principle is, however, often mitigated by the application of a lower standard of evidence in certain proceedings such as those regarding asylum and, sometimes, a surprising capacity of law courts to appreciate anthropological methods.

Super-diversity Scholarship

A rather specialized but multidisciplinary branch of scholarship which has been in favor of applying socio-legal/anthropological expertise in Britain has based its considerations on the fact that globalization has led to a shrinking of the world, migration across the globe is becoming common, and countries are becoming more and more culturally pluralistic. This scholarship draws from Vertovec's notion of super-diversity to argue for an academic engagement in substantial respect for British minorities. Ballard (2007) Menski (2011) and Shah (2007) have all maintained that European countries can no longer look at ethnic communities as foreign since they form an intrinsic part of European society. They argue that while these ethnic communities have learned to adapt to the culture of the majority they have retained many of their own traditions, customs, and values. Menski maintains that these ethnic groups tend to cluster together and form their own communities partly in order to adapt to the exclusion and hostility from the dominant culture and partly because they possess distinctive religious and cultural traditions. Ballard suggests that law is itself a social construct, which reflects the social realities of society and subsequently the law changes as society and culture undergo changes. In this sense, law cannot be applied universally. Shah (2007; 2009) goes further in describing how non-British laws recognize private arrangements and customs that are not listed among state-sanctioned sources of law. In so doing, he has greatly contributed to relativize monolithic interpretations of law that tend to favor by default state law in the litigation of private international law.

Non-state Law and Legal Pluralism

At the end of the twentieth century, talk about law beyond the state was still linked with criticism regarding social inequalities and power asymmetries (Griffiths, 1997). Yet, the conceptualization of the plurality of laws had already started to gain consensus (Baxi, 1986; Chiba, 1986). Notwithstanding, both notions of legal pluralism characterized as being in opposition to legal centralism and legal pluralism as multiple rather than a unique sovereign system have been challenged on several accounts. Such criticism revolves around the fear that equal acknowledgment of the diverse practices of law would irremediably inflate the notion of state law (Tamanaha, 1993) because of the inclusion of forms of resistance to it (Fuller, 1994) thus further blurring the supposedly necessary boundaries between state and non-state law (Tamanaha, Sage, & Woolcock, 2012). While Woodman (1998) and de Sousa Santos (2002) have responded by questioning the ontological nature of the opposition between state and non-state law, others have taken forward conceptualizations revolving around the plurality of

law and the examples of integration of counter-hegemonic instances within the state (Benda-Beckmann & Benda-Beckmann, 2006).

Anthony Good (2007) does not address the debate on legal pluralism but does provide a partial response focusing on the struggle between anthropologists and lawyers. His study is grounded on first-hand data on expert witnessing within the process of asylum and is still to date the only systematic analysis of the praxis of anthropological expertise in the United Kingdom. The originality of Good's work lies also in his reflection regarding the peculiar contribution of anthropology to conflict resolution thanks to a set of knowledge that has its roots outside state law. Good pragmatically sees his own involvement as an anthropologist in the legal process in terms of the "lesser evil" (2007, p. 259) and in view of ensuring vital support to the victims of violations of human rights (2007, p. 265). His views reinforce the point that anthropologists and lawyers think differently and that such differences might also be related to competition between the two professional orders (2007, p. 12).

Anthropological Expertise in Continental Europe

While anthropological expertise developed widely throughout Anglo-Saxon countries, it further extended to Continental Europe in the second half of the twentieth century with the recent migration flux. European jurisdictions have been increasingly confronted with the necessity to evaluate legal facts originated in the countries of the global South but generating new rights in the global North (Holden, 2008; 2013). Sometimes, anthropological expertise has been incorporated at the pre-judicial stage in counselling services or incorporated into mediation aiming to prevent judicialization. At other times, it has been reformulated in order to provide new fora for alternative dispute resolution in the hands of lawyers and notaries inspired by intercultural law (Ricca, 2014). In a similar vein, some jurists have designed new instruments, such as questionnaires that the judge self-administers to the case in order to treat the facts and the litigants in a culturally sensitive manner (Ruggiu, 2012). In France, cultural mediators and translators are called to provide assistance to the courts that very often exceeds their own competences (Bouillier, 2011) but attests to an increasing awareness of the judiciary toward the notions of culture (Barranger and De Maximy, 2000; Garapon, 1997).

Summary of Key Themes

This survey shows that major concerns regarding the use of anthropological expert witnessing have been prescriptive. On the one hand, experts have tended to reshape their knowledge into the language of the law while on the other members of the legal profession have incorporated some notions of culture without much reflection of any potential epistemological clash. As an example of the above mentioned point, a scholarly statement regarding the non-existence of divorce among certain social groups is likely to be interpreted more cogently in a court of law than in academia. In other words, the epistemological weight of

anthropological discourse varies owing to the different kinds of inferences in anthropological and legal reasoning. Whilst the legal profession has increasingly showed an interest in understanding non-state law and foreign laws, the epistemological difference between anthropological and legal discourse seems to rarely figure among the current preoccupations regarding anthropological expert witnessing. As Riles (2005) argues the danger of using ethnographic texts in court lies in their unsuitability to be transformed into legal instruments. Rosen (2017, p. 82) again stands out for signaling how science is itself part of culture, saying that “So long as the legal system itself is based on the proposition that truth emerges from adversity, and that science is about truth and not workable interpretations, the value of experts and the structuring of their role in court will doubtless remain as ambivalent as is our contemporary attitude toward the many kinds of experts who populate our lives.”

In a nutshell, the existing scholarship on anthropological expertise, as scattered as it is, but points at four alarming aspects:

- (1) Neutrality as a crux. Although social scientists have developed articulated methodologies regarding relationships with informants in the field and are constantly preoccupied with professional deontology, in court they have often been accused either of not being ideologically disengaged from the parties or, of being nothing other than hired guns, saying whatever their lawyers want them to say.
- (2) Lack of predictability of how expert witnessing is used or assessed by courts in the UK. While it is not clear what the role of anthropological expertise is in the legal outcomes of asylum proceedings, expertise is seen as the lesser evil in view of ensuring vital support to the victims of violations of human rights.
- (3) Potential epistemological clashes regarding the interpretation of ethnographic data by anthropologists and lawyers.
- (4) An expectation of an increasing tension between the ever-greater regulation of mass migration and the unrecorded adjudication of cases through expert witnessing.

ANTHROPOLOGICAL EXPERTISE IN COMMON LAW AND CIVIL LAW TRADITIONS

More research should be carried out on anthropological expert witnessing in Continental Europe. However, from the most recent involvement of anthropologists in connection with the management of big migrations fluxes of the twenty-first century expert witnessing does not emerge as frequent in Continental Europe. The essays in this special issue show, on the one hand, a significant concern from the European legal profession with matters that could be qualified as “cultural” together with the emergent role of anthropologists but also a widespread reticence toward their acknowledgment. Instead, in Australasia, North America, and the UK, anthropological expertise has become highly formalized as an instrument that, at least formally, should contribute to a better protection

of minorities' rights and self-determination. This should facilitate the study of expert witnessing beyond its legal technicalities and toward the understanding of the practice from a socio-legal perspective. However, the exclusive focus on common law countries would eventually undermine the scope of cultural expertise in civil law countries and carry the risk of a reading of similar phenomena through common law lenses. Hence, before proposing a way to systematically scrutinize anthropological expertise, this chapter needs to delve into the features of the legal traditions that may impact on the use of anthropological expertise.

Due to the higher systematization of anthropological expert witnessing in Anglo-Saxon countries, I suggest that the analysis of the characteristics of common law and civil law legal traditions may be of help. The difference between common law and civil law dates back to the Middle Ages and has been scrutinized in depth, reformulated, and criticized by jurists. Here, it should not be interpreted strictly but can serve as an analytical reference from an interdisciplinary perspective. Common law is generally uncodified and relies on precedents, whilst civil law rests on written law and codes. Thus, the common law tradition has kept its practical grounding whereby despite the recent influx of statutes, legal principles, statutory interpretations, and cases, decisions tend to be made on a factual basis; on the other hand, the French legal system and to a larger extent European civil law systems remain closer to an overarching theoretical construct within which each case fits into a specific legal logic beyond its factual implications.

The tension between common law and civil law, which should not be interpreted in terms of being in opposition to one another, has been aptly represented as the difference between the hedgehog and the fox (Berlin, 1953). European countries vary widely with regard to the acknowledgment of foreign laws (i.e., statutes, precedents, religious laws, customs) and especially the extent to which non-European legal rules and customs apply in European courts. Hence, the use of the concept *ordre public* in European private international law, acts as an implicit refusal of the recognition of foreign legal statuses, or the application of foreign legal rules, which are deemed to be in conflict with majority norms (see for example the controversies regarding Sharia law and Islamic banking). As Bruno Latour observed in his ethnography of the French Conseil d'État regarding the non-social character of the French legal discourse: “[I]earn the entire *Lebon* [French law report] by heart and you will know nothing more about France. You will have learned only law, occasionally punctuated by more or less moving complaint of a few actors with colourful names” (Latour, 2010, p. 268).

Perhaps resonating with the civil law tradition, the social sciences scholarship of Continental Europe tends to point at a body of literature, mostly authored by legal scholars and lawyers, which is expected to assist with the management of foreign law, especially Islamic cultural concepts, in European law and law courts (Hoekema, van Rossum, Foblets, Gaudreault-Desbiens, & Dundes Renteln, 2010; Rutten, 1988, 1999, 2011, 2012; van der Velden, 2001). Most of this literature focuses on how European judges deal with – or should deal with – non-European legal concepts, and culture-based legal claims. Often taking a legal pluralist perspective, this body of literature stresses concepts of inclusion and

argues that migrants and other minorities may wish to have their “own” customs and culture recognized or accommodated by European laws. These studies include empirical data, socio-legal analysis, and case law of various European courts as well as the European Court of Human Rights. However, while these studies may mention the impact of migrant minorities on European legal systems, attention is not directed at anthropological expertise, which nevertheless exists, although inconsistently, both in the legislation and in case law. Rather, the focus is on the decision-making process in which judges would use or expand their own knowledge to include non-European laws (Ruggiu, 2012). Hence, important projects of translation have been funded to make authoritative precedents from non-European law available to European judges¹ Yet, some other studies have also shown how lawyers, embassies, translators, NGOs and private offices provide legal aid and lobby for legal change to protect the rights of minorities in Europe (Bouillier, 2011; Ricca, 2014; Sportel, 2014; Sbriccoli & Jacoviello, 2011).

If common law seems much more permeable to social and cultural evidence and civil law much more resistant to it then international private law appears to be the only site for the resolution of conflicts in a multicultural setting. The contributions to this special issue confirm on the one hand the divide between common law and civil law systems for what concerns the different consideration of cultural evidence, and on the other suggests also the existence of cultural evidence in ways other than formal expert witnessing (see in this issue Ciccozzi and Decarli, Cooke, Rethimiotaki, and Teixeira Lopes, Leão and Ferro). In both common law and civil law traditions, however, it is evident that written laws and for that matter private international law, do not exhaust the domain in which socio-anthropological studies contribute to the resolution of conflicts. This chapter argues that in order to assess the contribution of social sciences, in particular anthropology, to conflict resolution in multicultural settings, it is crucial to include all those interactions that revolve around the relationship between culture and law. Hence, the potential formulation of cultural expertise for grasping law beyond the written text will form the conclusion of this chapter.

CONCLUSION: THE *RAISON D'ÊTRE* OF CULTURAL EXPERTISE

Clifford and Rosen have provided crucial inputs in the history of expert witnessing and both highlight, from different angles, the difficulty to talk authoritatively on complex concepts such as identity and belonging, which are also part of lay people's conception of self. The historical excursus of expert witnessing shows that if anthropological expertise has, with time, become acknowledged beyond its specialized circuits, disbelief, however, has developed quickly around its merit. This long-standing polarization is revived today in the gap between the discourse of human rights and sudden acts of violence, disclosing large-scale tensions and structural differences that have gone unnoticed so far. To complicate the picture, legal pluralism, the accommodation of non-western laws and customs, and measures of protection of minorities have all been criticized, because they tend to be associated with condoning abhorrent customs and justifying

inequalities. Among the most controversial examples is female genital mutilation/female genital circumcision where the practice is criminalized and generating international protection (see Mestre i Mestre and Johndotter in this special issue). To this also adds the image's drawback accused by minority groups whenever law courts adopt international measures of protection for individuals who are victims of culture-related discrimination and violence, as in the case of so-called honor killing (Abu-Lughod, 2012; Visweswaran, 2010). Another potential drawback lies in the disregard of power relationships within the social group itself which may cause the perpetuation of power-based discrimination (Dequen, 2013; Sportel, 2014). For these reasons, feminist and Marxist scholarships have greatly contributed by signaling the potential downsides of accommodating non-European laws and customs (Okin et al., 1999; Parashar, 2013, 2015; Saharso & Prins, 2008).

The second section of this chapter has shown the prevalent preoccupation of socio-legal scholarship with the legal conformity of anthropological expert witnessing. The focus on the legal requisites of expert witnessing has been often accompanied by ethical and deontological considerations. Whilst many anthropologists have doubted the very adequacy of anthropological knowledge to legal proceedings, some urge law courts to strive for a better knowledge of cultural contexts in order to provide better justice for minorities if necessary by challenging decision-making authorities (Campbell, 2017). However, continental scholarship appears at this time inclined to re-interpret non-European laws in light of the European legal system and without the involvement of social scientists or, ideally to seek solutions that prevent judicialization. Interestingly, it is a jurist and not an anthropologist who formulates an alert on the legal colonization of which anthropology is the object (Edmond, 2004). Yet, so far it was not possible to take a position from within the discipline of anthropology because attention was directed mainly to the conformity of anthropological expertise within the black letter law. A critical assessment of anthropological expertise was never carried out systematically because of the tendency of the anthropologists engaged with law to overestimate the need for compliance to legal technicalities. Hence, the reluctance of some anthropologists toward an engagement in court and the conundrum between the anthropologists who are critical of applied anthropology and the ones who complain that lawyers do not take anthropologists seriously that lawyers do not take anthropologists seriously. The few scholars who have tried to overcome this dilemma have argued not only for collaboration but also for interdisciplinarity. These scholars have focused on the language of expert witnessing and on the production of evidence, ethics, truth, and authority but have struggled to reach out beyond the applied sciences.

The third section of this chapter has shown that in common law countries the role of the expert witness has been expanded to systematically use cultural expertise when the litigants belong to minorities while, in countries of civil law, the judge remains reluctant to depart from the principle of being the only one cognizant of the law. Notwithstanding this tension, Anglo-Saxon scholarship that has focused on the conformity of expert witnessing with procedural requisites, and Continental Europe scholarship that has focused on the translation of non-

European laws have at least one point in common: both have ignored the potential contribution of anthropological expertise to a better understanding of “inter-legalities” beyond the black letter law (Santos, 2002, p. 437). This ignorance, I argue, leads to a dangerous misunderstanding in particular when using sources of law and legal concepts, with which the deciding authority is not familiar with. The most frequent misunderstanding in this regard is the prescriptive interpretation of the anthropological description of customs which, depending on the audience conveys different meanings (Holden & Chaudhary, 2013). Closely linked to the misunderstanding between prescription and description is also the danger of cultural essentialism according to which social groups are labeled and very often stigmatised with simplistic generalisations ((Grillo, 2003). Eventually, the urgent need for an in-depth research on cultural expertise is supported by the use of cultural knowledge in litigation which increases by the day and ranges from civil law to penal law including banking law, migration and asylum law, family law, and business law. Furthermore, there is also a growing array of out-of-courts dispute resolution systems that use cultural knowledge, especially in the countries of civil law. As preliminary data from the field show the typology of cultural experts is extremely varied, ranging from independent experts to cultural mediators, and including witnesses, interpreters, assistants to the prosecution, educationists, and security agents.

Although the definition of cultural expertise is new, and I argue, already in need of scrutiny for an integrated formulation, the engagement of anthropologists as expert witnesses is not a new phenomenon but needs to be accounted for systematically. The conceptualisation of cultural expertise was hindered so far by the overvaluation of the legal requisites of cultural expert witnessing on one hand, and on the other by the prevailing interest of academic institutions to have a short term impact on policy making. It should now be possible to reformulate the notion of cultural expert witnessing from a broader socio-legal perspective to stress the connection between culture as it is mundanely perceived by social actors (Pollner, 1987) and law within and outside state jurisdiction in order to acknowledge and assess the contribution of social sciences within and outside state law both in common law and civil law countries. This approach would not only apply what Rosen (2017) says about scientific – and legal – truths as being themselves part of culture but also confirm what Hannerz (2010) says about diversity as being the “business” of anthropologists. Yet, this chapter suggests, that in light of the uncertain history of anthropological expert witnessing, a skeptical approach that combines with social responsibility is crucial to the assessment of the occurrence and significance of cultural expertise. If cultural expertise has a sense today it should be within a de-colonizing approach that re-engages with people and addresses power unbalance (Bringa & Synnøve, 2016; Sillitoe, 2015; Uddin, 2011). An integrated definition of cultural expertise that includes in-court and out-of-court settings in both common law and civil law traditions requires a shift from an ontological to a pragmatic approach. Hence, the threshold definition of cultural expertise could be used as a stepping stone with a double purpose: to systematically appraise the use and impact of all the diverse activities in which social scientists have engaged in connection with

expert witnessing; as well as to re-acknowledge, scrutinize, and reformulate the engagement of social sciences to the understanding of law and the resolution of conflicts. Therein lies the *raison d'être* of a reformulation of cultural expertise.

NOTE

1. See The Moroccan Family Code – an analysis of the application of the provisions of the Code that relate in particular to transnational family situations and/or Moroccan nationals residing abroad (hereafter MNAs) under the direction of Marie-Claire Foblets (<http://www.eth.mpg.de/3413882/current-project>).

CASE LAW

- Bingham vs Massachusetts*, 2009 WL.
Choctaw Nation vs United States, 119 US 1 (1886).
Mashpee Tribe vs New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).
Milirrupm vs Nabalco Pty Ltd (1971) 17 FLR 141, 161.

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