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3 CULTURAL EXPERTISE AND
5 SOCIO-LEGAL STUDIES:
7 INTRODUCTION

9 Livia Holden

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15 This special issue is the outcome of the *Cultural Expertise in Socio-legal Studies*
17 *and History* conference held on December 15–16, 2016, in Oxford, at the
19 Centre for Socio-legal Studies and Maison Française. It was the inaugural
21 conference for the project titled “Cultural Expertise in Europe: What is it useful
23 for?” (EURO-EXPERT) funded by the European Research Council. This
25 special issue includes contributions by scholars specializing in law and culture in
27 civil and common law traditions both in and outside of Europe. Although the
29 stress of EURO-EXPERT is on the European context, the inclusion of contri-
31 butions from non-European contexts suggests the necessity for a global
33 understanding of cultural expertise. The aim of this special issue is to explore in-
35 country socio-legal approaches revolving around the use of cultural expertise
37 whose threshold definition was formulated as follows: “the special knowledge
39 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 spe-
cial 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

1 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
3 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
5 test (Eisenberg, 2006) and cultural defense (Renteln, 2004). Eventually, I suggest
that whilst various forms of cultural expertise have been studied in-depth, cul-
7 tural expertise has remained undetected so far because of the lack of an ade-
quate conceptual formulation.

POWER AND CULTURE

11 In order to proceed toward an assessment of cultural expertise as a theoretical
13 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
15 though both concepts evidently elude an adequate treatment here. The history
of human rights shows quite clearly that discrimination and abuse have been jus-
17 tified both by egalitarian and discriminatory agendas. Regrettably, anthropology
has known both these phenomena and has thus been associated with both.
19 However, it is hoped here, that the initial interest in similarities – intended as
subjection and assimilation – which characterized some anthropological and
21 socio-legal scholarship of colonial Europe, should have been abandoned by
now. This is how I interpret the widespread reluctance of anthropologists to
23 become involved with applied sciences. This absence is, however, particularly
painful to the ones who genuinely engage today in societal problem-solving. In
25 my chapter, I hint at the fact that anthropology and anthropologists have some-
times been on the wrong side of history but have seldom been powerful. More
27 than 20 years ago, Lucas (1996) and more recently Colajanni (2014) and Grillo
(2016) have pointed at a widespread pessimism within the discipline itself
29 regarding the ability of anthropology to influence institutional decision-making
and to set the agenda in the public domain.

31 Yet, there is increasing scope for social sciences to contribute to the resolu-
tion of conflicts in multicultural settings. Practices of law that travel alongside
33 various kinds of diasporas and mass migration are now routinely scrutinized by
the decision-making authorities in Western countries. Euro-American authorities
35 are formally invested in the prerogative to evaluate the legality of migrants'
actions and the authenticity of their accounts. The validity of informal or polyg-
37 amous marriages can become relevant in migration procedures when people
travel to Europe and, after their deaths, inheritance and taxes may need to be
39 decided upon. Through the development of private international laws and inter-
national and bilateral treaties, European countries have each found different
41 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
43 situations thanks to the assistance of country experts, translators, mediators,
and academicians; other jurisdictions engage directly in argumentations revolv-
45 ing around culture. The treatment of culture in a legal setting is nevertheless elu-
sive regarding its role in litigation and impact on justice. It is unclear, in

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

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

29 Whilst the role of the cultural expert witness appears as consolidated in
30 American socio-legal studies (Sarat & Rodriguez, 2018), this special issue shows
31 that European scholarship is cautious but highly interested. Several studies on
32 law and culture re-evaluate the importance of social anthropology in dispute res-
33 olution especially if combined with other approaches that emphasize the role of
34 ethnicity, immigration, and political debates. Scandinavian scholarship argues
35 the need for a renewed engagement of social studies with society, precisely
36 through cultural expert witnessing in a great variety of contexts and situations
37 ranging from international tribunals to civil litigation and including war
38 (Bringa & Synnøve, 2016). By reviving the attention to the link between law and
39 culture, this special issue also takes up the challenge launched by Ulf Hannerz in
40 *Diversity is Our Business* (2010) where he argues that in spite of all the pessimis-
41 tic predictions, anthropology is alive and well regarding its consistent emphasis
42 on diversity. I suggest that an integrated definition of cultural expertise is possi-
43 ble with the help of an ethnomethodological perspective in which culture is not
44 defined ontologically but rather pragmatically in a mundane framework
45 (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

1 legal process seen as being connected or associated with everyday life. Rosen
 3 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
 5 on cultural contexts. This is the challenge that this special issue takes up
 when engaging in an interdisciplinary dialogue between lawyers and social
 scientists.

7 9 THE CONTRIBUTIONS TO THIS SPECIAL ISSUE

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

14 The first section titled *Cultural Expertise With(out) Cultural Experts* takes us
 15 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
 17 praxis that rarely acknowledge their existence. Both chapters of this section
 adopt an anthropological approach to note that cultural arguments in court risk
 19 undermining claims and recommend a certain level of professionalization in cultural
 expertise. These chapters include mention of the legislative framework
 21 allowing or disallowing cultural expertise but also analyze the gaps and silences
 in which de facto cultural expertise develops in spite of institutional disregard.
 23 This section opens with “From Invisible to Visible: Locating ‘Cultural
 Expertise’ in the Law Courts of Two Finnish Cities” by Taina Cooke. Here, she
 25 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
 27 Finnish courts do not appoint cultural experts systematically, interpreters and
 eyewitnesses can be used as cultural experts informally. Her data collected
 29 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
 31 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
 33 stereotypes. Although Cooke concludes that cultural expertise is a challenge that
 not all social scientists are ready to confront, being more open to talk about culture
 35 and cultural expertise in Finnish courts would have the advantage of
 addressing dangerous oversimplifications by non-experts.

36 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
 39 expertise. Ciccozzi and Decarli describe the paradoxical situation in which
 Italian cultural experts provide various types of assistance to courts but, regret-
 41 tably, without or only marginal institutional acknowledgment. Their chapter is
 divided into two parts: the first part is a survey of the extraordinary variety of
 43 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
 45 first part, Decarli laments the absence of anthropologists in the registers of
 experts in Italy, which is contradictory to their informal assistance as mediators,

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

17 The second section entitled the *Sites of Cultural Expertise* highlights the vari-
 19 ety of sites of cultural expertise within state and non-state jurisdiction, NGOs,
 21 and other sites of conflict resolution, that is, mediation, adjudication, and alter-
 23 native dispute resolution. The first chapter of this section is “Assessing Cultural
 25 Expertise in Portugal: Challenges and Opportunities” by João Teixeira Lopes,
 27 Anabela Costa Leão, and Lígia Ferro who take us to Portugal. The authors of
 29 this chapter argue for a broader definition of cultural expertise that includes
 31 cultural arguments in legal reasoning pointing at the fact that state law is not
 33 culturally neutral per se. They refer to academic controversies concerning the
 35 definition of culture and, as all the other authors of this special issue, express
 37 preoccupations regarding the risk to perpetuate essentialized concepts of culture.
 39 However, they also argue that it is the duty of the state to respect and protect
 41 cultural identity and lament the low level of professionalization of cultural medi-
 43 ators. This chapter connects with both Cooke, and Ciccozzi and Decarli whose
 45 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.

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

17 The third section of this special issue entitled *Comparative Perspectives on*
 19 *Cultural Expertise* draws from the comparative methodology that has histori-
 21 cally developed almost as an inherent ingredient of anthropology. Whilst compar-
 23 ative law has conventionally involved the comparison of legal systems, the

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

15 The second chapter of this comparative section entitled “Between Norms, **AU:2**
17 Facts, and Stereotypes: The Place of Culture and Ethnicity in Belgian and
19 French Family Justice” by Caroline Simon, Barbara Truffin, and Anne Wyvekens
21 focuses on similarities between French and Belgian family litigation which
23 both feature an unsatisfactory treatment of cultural arguments. The authors
25 uncover the paradoxical coexistence of the statutory refusal of cultural
27 arguments in the name of equality before the law with a de facto recurrence of
29 cultural components in the everyday discourse of judges, lawyers, and litigants.
31 Simon, Truffin, and Wyvekens argue that a praxeological approach to law is
33 necessary to understand the relationship between law and culture without falling
35 into the widespread stereotypes propagated by the virtual absence of satisfactory
37 cultural expertise. Similar to Cooke, the authors’ findings are that cultural
39 arguments are likely to disadvantage litigants mainly in connection with the
41 reification of culture used for undermining ethnic minorities. Hence, the
43 authors express a wish toward a more fluid and dispassionate formulation of
45 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.

33 The last section of this special issue entitled *Cultural Expertise in Non-*
35 *European Contexts* engages with cultural expertise in Australia and in South
37 Africa. The reason for this section in a special issue whose primary focus is
39 Europe is a theoretical one with concrete ramifications regarding the applied
41 outputs of EURO-EXPERT. I argue, in fact, that cultural expertise in Europe
43 can hardly be discussed in isolation and that Europe would benefit from greater
45 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

1 non-European diasporas. Evidently, much of her discussion resonates with
 3 many of the issues and concerns that are also felt as pressing in the European
 5 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.

7 The second chapter of this section is "The Role and Use of Cultural
 Expertise in Litigation in South Africa: Can the Western World Learn Anything
 9 from a Mixed, Pluralistic Legal System?" by Christa Rautenbach. Her chapter
 deals with the flexibility of the South African legal system, which skillfully navi-
 11 gates common and customary law, broadly designating both local and imported
 customary laws. Rautenbach focuses, in particular, on the processes of ascer-
 13 tainment 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
 15 judges when special knowledge is needed. This chapter provides a fascinating
 typology of experts ranging from formal to more informal appointments. The
 17 author has no qualms in attesting to the usefulness of cultural expertise that
 does not need minimal requirements and professionalism and warns Europe that
 19 "one shoe does not fit all." Her chapter concludes with an explicit offer for col-
 laboration with multicultural Europe in order to look at cultural diversity from
 21 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
 23 a chapter authored by myself and titled "Beyond Anthropological Expert
 Witnessing: Toward an Integrated Definition of Cultural Expertise." It seems to
 25 me that the widely shared skepticism toward reified notions of culture and the
 danger of its perpetuation through damaging stereotypes might be productively
 27 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
 29 witnessing and its reception. The second part of my chapter outlines the theoret-
 ical approaches that have characterized the scholarly treatment of cultural expert
 31 witnessing, and in the third part of the chapter, I look at the different position-
 ing of systems of common and civil law vis-à-vis cultural expert witnessing.
 33 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
 35 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
 37 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.
 39 The chapter concludes by suggesting that an integrated definition of cultural
 expertise, although challenging, would serve the purpose of assessing its useful-
 41 ness in de facto multicultural Europe.

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