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Cultural Expertise and Law in Ancient and Modern History

Introduction: Why a history of cultural expertise?

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This forum develops within the European Research Council's *Cultural Expertise in Europe: What is it useful for?* (EURO-EXPERT) project. EURO-EXPERT aims to reformulate the emergent notion of cultural expertise as a concept that might extensively account for the use of social sciences in dispute resolution and in connection with rights claims. A threshold definition of cultural expertise was formulated as “the special knowledge that enables socio-legal scholars, or, more generally speaking, cultural mediators - the so-called cultural brokers-, to locate and describe relevant facts in light of the particular background of claimants and litigants and for the use of the court”.¹ However, this definition is too restrictive because it does not account for the broader range of out-of-court procedures in which social sciences knowledge is applied to the resolution of conflicts, litigation, and the formulation of rights. EURO-EXPERT argues that a strictly legal approach to cultural expert witnessing undermines the array of socio-legal instruments that could be better appraised with the help of a broad concept of cultural expertise. Hence, the need for an integrated definition of cultural expertise that covers the larger range of phenomena explored throughout socio-legal studies.²

This forum is one of the outcomes of the workshop entitled *Cultural Expertise in Ancient and Modern History* held in Oxford in July 2018 and aims to make explicit the interdisciplinary components of cultural expertise from a historiographical perspective in order to open up the discussion to the history of law. It must be pointed out that cultural expertise, in the form of expert witnessing involving the appointment of social scientists in legal proceedings, is not different from other kinds of expert witnessing. Expert witnessing by social scientists, in particular, can be traced back for centuries. For more than two hundred years social scientists have played an active role in policy making in the United Kingdom and the United States. Going further back, to the 19th century, sees the appointment of social scientists as expert witnesses, especially anthropologists for matters involving First Nations and aborigines in specialised fields of law, such as native land titles in North America and Australia. In contemporary management of migration fluxes the appointment of anthropologists as country experts has become increasingly frequent in common law and civil law countries for immigration proceedings and in other fields of law as well. Socio-legal studies and legal anthropology have delved into cultural expert witnessing. However, it is still difficult to extensively and systematically appraise the involvement of social

¹ Holden, L. ed. *Cultural Expertise and Litigation*, Routledge, p.2.

² Holden, L. ed. (2019) *Cultural Expertise and Socio-Legal Studies*, special issue in *Studies of Law, Politics, and Society*, Emeraldinsight.

sciences in dispute resolution, law making, and policy making from an all-encompassing perspective.

This forum aims on the one hand to scrutinize whether the emergent concept of cultural expertise can diachronically account for in-court and out-of-court resolutions of conflicts in the history of law, and on the other hand to synchronically trace the historical developments of contemporary trends of cultural expertise. This forum adopts a new interdisciplinarity, which not only combines history and law but also uses the tools of anthropology in order to overcome some of the challenges of the global historiographical perspective of the 21st century. Authors in this forum share the view that European legal histories cannot be understood in isolation. Some papers have experimented with the use of cultural expertise as a socio-legal concept that might contribute to bridge some of the gaps that conventional legal history has sidelined, in particular the difficult commensurability between common law and civil law and the problems of the cultural translation of law.³

The concept of cultural expertise in the history of law is explored from diachronic and synchronic perspectives in ancient and contemporary history. Cultural expertise is scrutinized as a historical sequence of narratives and discourses, which connect historical sources with everyday life. Thus, the history of cultural expertise unfolds from its experimental applicability to the arguments developed by historians in order to interpret historical evidence.⁴ By shifting the focus from the difficult comparison of European legal cultures to global similarities and differences that include the reflexive approach of anthropology, this forum aims to show that a new interdisciplinarity including socio-legal tools such as the emergent concept of cultural expertise can contribute to a better understanding of global law. Authors in this forum focus on what social actors think culture, both synchronically and diachronically, is in dispute resolution; namely, what are the documents that contribute to the construction of evidence? What kinds of information are omitted or included? How historiographic narratives have changed with the passage of time? Which social actors are officially acknowledged as experts in the construction of evidence? Why certain narratives have acquired legal status whereas some others have been discredited over time? Contributions range from Roman law to modern interpretations of ancient law in China, and include overviews of cultural expertise in Iran and colonial India, but also retrace the contemporary criticism toward applied anthropology, the unholy alliance between some social scientists and colonial justice, and the attempts to use culture for political interference.

³ Duve, T. (2018-07-05). Global Legal History: Setting Europe in Perspective. In (Ed.), *The Oxford Handbook of European Legal History*. : Oxford University Press.

⁴ Whittle, A., & Wilson, J. (2015). Ethnomethodology and the production of history: Studying 'history-in-action'. *Business History*, 57(1), 1-23.

The forum opens with a paper by Soazick Kerneis entitled “Cultural Expertise in the Roman Courts (2nd-4th centuries)” which addresses the crucial question of the usefulness to experiment the applicability of a new socio-legal concept to the ancient past of Roman law. Kerneis argues that we should not expect to find a Latin translation of cultural expertise. Nevertheless Roman law can still help to understand the position of the cultural expert in today’s common law and civil law. Adopting an anthropological perspective, Kerneis finds the equivalent of cultural expertise in the Roman Empire: judges in ancient Rome had the difficult task of ascertaining the customs of minority groups that were allowed to follow non-Roman laws and experts were called to support such decision making. In ancient Rome the coexistence of law and customs was possible until and unless there was an evident conflict. Kerneis shows that the delicate balance between law and custom heavily depended on the capacity of the experts and judges to understand and interpret customs. However, Kerneis also suggests that cultural expertise was a powerful instrument, and one that helped the Roman Empire to negotiate between governance and governability in the sense of allowing people to follow non-state law but at the same time maintaining law and order, and tight control over the territory.

In “The Indian Panchayat as Cultural Expertise in Criminal Prosecutions in Colonial Bombay, 1827-1861” Jaffe brings us to colonial justice in India where non-state jurisdictions, such as panchayat or village or caste councils, were incorporated in the mechanisms of colonial dispute resolution. Jaffe describes the myth developed around the idea of panchayat as an indigenous institution that would provide better justice to the people of India because inherently holding to identity values. Jaffe shows that whilst panchayats were almost never satisfactory instruments of dispute resolution, they have been revived at different periods of time by the British colonisers, who used them as cultural expert witnesses to ascertain the existence of customs. Modern reformulations of traditional jurisdictions in India show indeed that the myth of panchayat has been further appropriated by nationalist parties, which similarly to British colonisers have an interest in perpetuating local instruments of dispute resolution as convenient means of governability (Holden 2013). But, the historiographic interpretation of panchayat as cultural expert witnesses provides us with a new perspective that acts as the perfect counterpoint to Kerneis’s interrogation regarding the role of cultural expertise in the Roman Empire. Jaffe shows us that traditional jurisdiction, similar to the experts during the Roman Empire, has proved as a successful instrument for ascertain legal truth during colonial times.

“Cultural Expertise in Iran: From the Pahlavi dynasty to contemporary diasporas” by Soudabeh Marin adopts a macro-approach to suggest that cultural expertise is nothing other than the ‘natural’ cultural competence developed in some multicultural settings among which Iran is a privileged example. Marin provides a breathtaking survey of laws and socio-legal approaches throughout the history and the evolution of the ancient Persian Empire: Zoroastrian law in pre-Islamic times, imāmi legal theories,

the judicial context ruled by Shi'i scholars, qāzis and mujtahids, the new French-inspired constitution, the reception of the Napoleonic codes, and socio-legal expectations among contemporary diasporas. Marin shows that many amongst the above mentioned changes were possible only thanks to the extreme flexibility and adaptation of the socio-legal settings in which cultural expertise developed to mediate among the variety of laws and languages in Iran. Throughout these changes cultural expertise has been a powerful tool to negotiate social instances vis-à-vis the modern central authority, which struggled to unify Iran under the same language and the same law. Hence, the modern socio-legal set up in Iran resonates well with the concept of cultural expertise, which would eventually make explicit a latent but salient feature of Iranian society.

“Historians at the Court. How Cultural Expertise in Qing Law Contribute to the Invention of Hong Kong Chinese Customary Law” by Jerome Bourgon retraces the experience of two reputed historians of Qing law, one from Taiwan and the other from the People’s Republic of China who appeared before today’s Hong Kong High Court as expert witnesses in Chinese customary law. The hearing, which lasted one week, saw these two historians confronting one another with an impressive array of knowledge in Chinese history, culture, and law. Bourgon minutiously describes the arguments developed by both experts around apparently minor issues that were strategically leading to support one or the other legal outcome. Bourgon scrutinizes the legal claims that revive Chinese foregone legal culture as glorious legal past which is supposedly common to all Chinese people. The paper also records the reluctance of the Hong Kong High Court to abandon colonial law and English language which are ultimately more familiar and perhaps easier to use in today’s Hong Kong. Bourgon concludes with considerations on cultural expert witnessing as process which materializes “Chinese customary law” as legal truth for the purpose of dispute resolution.

“Cultural expertise: An Historical Overview of Criticism” written by myself focuses on the criticisms that the involvement of sociologists and anthropologists have attracted in various fields since the beginning of applied anthropology and applied sociology. I adopt an interdisciplinary approach that takes stock of the criticism attracted by the involvement of social scientists outside the walls of academia in order to account for the contribution of social sciences to dispute resolution, law making, and policy making as well as policy implementation. Throughout, this paper shows that components of scepticism, fear, and uncertainty toward what I propose to call cultural expertise, have been similar over times and across different geographic areas. The first part of this paper focuses on the theoretical approaches that have based on the relationship between law and culture: from legal comparativism to legal pluralism and international human rights. The second part of this paper proposes a selection of notorious cases that illustrates the major kinds of criticism against the involvement of social scientists with law. I address the three main reproaches that the engagement of

anthropologists with law has generated over time: 1) the close relationship between anthropology and colonialism 2) the unethical co-optation of anthropologists by governments and 3) the initial fall-out between anthropology and human rights. My paper concludes by suggesting that holding on a healthy scepticism toward the imprudent involvement of social sciences with governmental agencies, this historical survey confirms that the notion of cultural expertise will help to provide a scientific assessment of the various kinds of involvement of social scientists in conflict resolution, law making and policy making and eventually support responsible engagement.