HAL open science

Cultural Expertise, Law, and Rights: A comprehensive guide

Livia Holden

To cite this version:

Livia Holden (Dir.). Cultural Expertise, Law, and Rights: A comprehensive guide. Routledge, 2023, 978-0-367-76027-4. hal-04081739

HAL Id: hal-04081739

https://hal.science/hal-04081739v1

Submitted on 1 May 2023

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

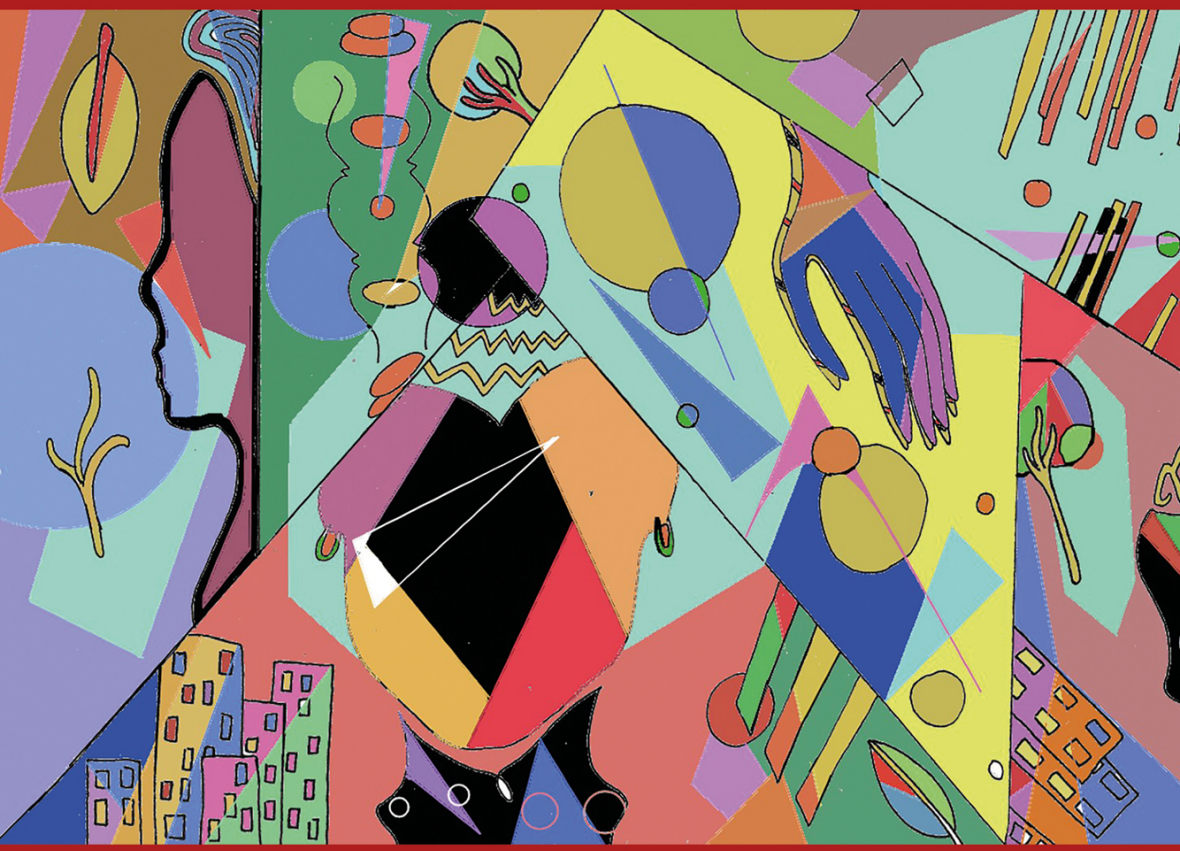
L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Distributed under a Creative Commons Attribution - NonCommercial - NoDerivatives 4.0 International License

a GlassHouse Book

Cultural Expertise, Law, and Rights

A Comprehensive Guide



Edited by Livia Holden

ROUTLEDGE

"In this unique and original volume the authors face realistically the roles that experts – particularly those in the 'soft' sciences – play in legal and administrative proceedings. With careful regard for issues of race, colonialism, and gender, the essays cover immigration, journalism, and indigenous rights at the highest professional level. It is a book for specialists and the concerned public alike." **Lawrence Rosen**, *Princeton University, NJ*

"Social scientists across a broad range of disciplines – as well as lawyers, judges and paralegal professionals – but most importantly students and their teachers will find this volume of essays an excellent pedagogical resource for their work across a global array of international cultural and legal settings." **Carolyn Fluehr-Lobban**, *Rhode Island College, RI*

"Livia Holden's trailblazing work on cultural expertise demonstrates that socio-legal scholarship is now an integral part of the study of cultures. This groundbreaking and comprehensive volume shows how anthropologists deploy knowledge for the protection of basic human rights, thus playing a crucial role for diverse and inclusive societies." **Sandra Laugier**, *Université Paris 1 Panthéon Sorbonne, France*

"With theoretical clarity, conceptual precision, and rigorous ethics, this book offers readers powerful methodological and case study examples of the ways that, as part of our service to the courts as cultural experts, we secure vital space in legal processes for a justice that is sensitive to diversity and inclusion as well as structural inequality and disadvantage." **Emma Varley**, *Brandon University, President of the Canadian Anthropology Society (CASCA)*

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

CULTURAL EXPERTISE, LAW, AND RIGHTS

Cultural Expertise, Law, and Rights introduces readers to the theory and practice of cultural expertise in the resolution of conflicts and the claim of rights in diverse societies.

Combining theory and case studies of the use of cultural expertise in real situations, and in a great variety of fields, this is the first book to offer a comprehensive examination of the field of cultural expertise: its intellectual orientations, practical applications and ethical implications. This book engages an extensive and interdisciplinary variety of topics – ranging from race, language, sexuality, Indigenous rights and women's rights to immigration and asylum laws, international commercial arbitration and criminal law. It also offers a truly global perspective covering cultural expertise in Africa, Asia, Australia, Europe, Latin America, the Middle East and North America. Finally, the book offers theoretical and practical guidance for the ethical use of cultural expert knowledge.

This is an essential volume for teachers and students in the social sciences – especially law, anthropology, and sociology – and members of the legal professions who engage in cross-cultural dispute resolution, asylum and migration, private international law and other fields of law in which cultural arguments play a role.

Livia Holden is Director of Research at the CNRS, University of Paris I Panthéon Sorbonne, France.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

CULTURAL EXPERTISE, LAW, AND RIGHTS

A Comprehensive Guide

Edited by Livia Holden

Routledge
Taylor & Francis Group
a GlassHouse Book

Designed cover image: Fuochi d'Artificio by Jane Fryer

First published 2023
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

a Glasshouse book

© 2023 selection and editorial matter, Livia Holden; individual chapters, the contributors

The right of Livia Holden to be identified as the author of the editorial material, and of the authors for their individual chapters, has been asserted in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

The Open Access version of this book, available at www.taylorfrancis.com, has been made available under a Creative Commons Attribution-Non Commercial-No Derivatives 4.0 license.
Funded by EURO EXPERT – CNRS/Sorbonne.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-0-367-76027-4 (hbk)
ISBN: 978-1-032-49860-7 (pbk)
ISBN: 978-1-003-16707-5 (ebk)

DOI: 10.4324/9781003167075

Typeset in Bembo
by Deanta Global Publishing Services, Chennai, India

CONTENTS

Acknowledgements *x*
Contributors *xi*
Preface *xiv*
Kamari Maxine Clarke

Introduction 1
Livia Holden

PART I
Cultural Expertise: Definitions and Positioning 9

1 What Is Cultural Expertise? 11
Livia Holden

2 Cultural Expertise and Ethics 20
Charmaine Cole

3 Cultural Expertise as Decolonization 32
Rama Srinivasan

PART II
Debates and Boundaries of Cultural Expertise 45

4 Cultural Expertise and Race 47
ChorSwang Ngin

5 Cultural Expertise and LGBTQIA+ 62
Victoria McCloud

6 Cultural Expertise and Female Genital Mutilation/Cutting 73
Ruth M. Mestre i Mestre, Lotta Wendel and Sara Johnsdotter

7 Cultural Expertise and Multiculturalism 86
Ralph Grillo

8 Cultural Expertise and Language 98
Patrick Heinrich

9 Cultural Expertise and the Media 110
Małgorzata Lisowska-Magdziarz

10 Cultural Expertise and Investigative Journalism 123
Ticky Monekosso

PART III
Cultural Expertise in the Fields of Law 131

11 Cultural Expertise and Procedural Justice 133
Stanisław Burdziej

12 Cultural Expertise and Asylum and Refugee Laws 141
John R. Campbell

13 Cultural Expertise and Terrorism Investigations 151
Ariel Planeix

14 Cultural Expertise and Extreme Speech 158
Max Steuer

15 Cultural Expertise and Commercial Arbitration 166
Giorgio Fabio Colombo

16 Cultural Expertise and International Criminal Law 177
Joshua Isaac Bishay

17 Cultural Expertise and International Human Rights Law 188
Noora Arajärvi

18 Cultural Expertise and Indigenous Rights 201
Noelle Higgins

19 Cultural Expertise and Conflict Resolution 215
Susan F. Hirsch and Brigit R. A. Moore

PART IV
Cultural Expertise in the World **229**

20 Cultural Expertise in Europe 231
Livia Holden

21 Cultural Expertise and Indigenous People in Australia 244
David S. Trigger

22 Cultural Expertise and History in Australia 256
Tanya Josev

23 Cultural Expertise in South Africa 265
Christa Rautenbach

24 Cultural Expertise and Indigenous Ecologies 275
Aurélien Bouayad

25 Cultural Expertise in the United States 288
ChorSwang Ngin

26 Cultural Expertise in Chile 301
Roberto Álvarez San Martín

27 Cultural Expertise in South Asia 309
Mary Kavita Dominic

28 Cultural Expertise in the Arab Middle East 319
Dina Haddad

29 Cultural Expertise in Islamic Courts in Indonesia 329
Euis Nurlaelawati and Witriani

30 Afterword: Cultural Expertise Within – and Beyond – the Boundaries of Law 339
Mark Goodale

Index *343*

ACKNOWLEDGEMENTS

This volume is a primary output of Cultural Expertise in Europe: What Is It Useful for? (EURO-EXPERT), project n. 681814, funded by the European Research Council. Special thanks go also to the Home Institutions that have hosted EURO-EXPERT during the preparation of this volume: the University of Paris Nanterre, the University of Oxford and the University of Panthéon-Sorbonne. The chapter titled "Cultural Expertise as Decolonisation" is part of a project that has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No. 890826. Special thanks go to Joshua Bishay and Anna Ziliotto for the assistance provided to the editor of this volume.

CONTRIBUTORS

Noora Arajärvi is Post-Doctoral Fellow at EURO-EXPERT and Associate at the Hertie School, Germany.

Joshua Isaac Bishay is Research Assistant at EURO-EXPERT and Doctoral Researcher at the University of Paris I Panthéon-Sorbonne, France.

Aurélien Bouayad is a Lecturer at Sciences Po Paris, France.

Stanisław Burdziej is Professor of Sociology at Nicolaus Copernicus University, Poland.

John R. Campbell is Emeritus Reader of Anthropology at SOAS, University of London, UK.

Kamari Maxine Clarke is the Distinguished Professor of Transnational Justice and Socio-Legal Studies at the University of Toronto, Canada.

Charmaine Cole is Researcher at the Centre for Socio-Legal Studies at the University of Oxford, UK.

Giorgio Fabio Colombo is Professor of Law at Nagoya University Graduate School of Law, Japan.

Mary Kavita Dominic is a Rhodes Scholar at the University of Oxford, UK.

Mark Goodale is Professor of Cultural and Social Anthropology at the University of Lausanne, Switzerland.

Ralph Grillo is Emeritus Professor of Social Anthropology at the University of Sussex, UK.

Dina Haddad is Associate Professor of Public International Law at Kuwait International Law School, Kuwait.

Patrick Heinrich is Professor of Sociolinguistics and Japanese Studies at Ca' Foscari University, Italy.

Noelle Higgins is Associate Professor in International Law at Maynooth University, Ireland.

Susan F. Hirsch is Lynch Chair and Professor of Conflict Resolution and Anthropology at George Mason University, VA, US.

Livia Holden is Director of Research at CNRS, University of Paris I Panthéon-Sorbonne, France.

Sara Johnsdotter is Professor of Medical Anthropology at Malmö University, Sweden.

Tanya Josev is Senior Lecturer of Legal History at the University of Melbourne, Australia.

Małgorzata Lisowska-Magdziarz is Professor of Semiotics and Media Studies at Jagiellonian University, Poland.

Victoria McCloud is Judge in the UK High Court and Senior Associate Research Fellow at the University of London, UK.

Ruth M. Mestre i Mestre is Professor of Philosophy of Law and member of the Women's Studies Institute at the University of Valencia, Spain.

Ticky Monekosso is an Investigative Journalist.

Brigit R. A. Moore received her PhD in Conflict Resolution from George Mason University, VA, US.

ChorSwang Ngin is Professor of Anthropology at California State University, Los Angeles, CA, US.

Euis Nurlaelawati is Professor of Islamic Law at Sunan Kalijaga State Islamic University, Indonesia.

Ariel Planeix is Research Associate in Anthropology at the University of Paris I Panthéon-Sorbonne, France.

Christa Rautenbach is Professor of Law at North-West University, South Africa.

Roberto Álvarez San Martín is Assistant Professor at the Universidad Santo Tomás, Chile.

Rama Srinivasan is a Visiting Faculty at the International Institute of Information Technology in Hyderabad, India.

Max Steuer is Assistant Professor at the O. P. Jindal Global University, Jindal Global Law School, India.

David S. Trigger is Emeritus Professor of Anthropology at the University of Queensland and Adjunct Professor at the University of Western Australia.

Lotta Wendel is Lecturer of Criminology at Malmö University, Sweden.

Witriani is Director of the Women Studies Centers at Sunan Kalijaga State Islamic University, Indonesia.

PREFACE

Kamari Maxine Clarke

At a time when questions about *truth* and *knowledge claims* are increasingly fraught – amid the rhetoric of fake news, the spread of conspiracy theories and demands for culturally responsible decision-making – the call for "cultural expertise" could not be more urgent. Not only is expert knowledge increasingly being contested, but the avenues through which such knowledge forms are vetted are also becoming more diverse and thus more controversial (Holden 2011, 2021). Yet, with increasingly globalized social worlds, the growing poverty that attended the structural adjustment policies of the late twentieth century and widespread dispossession contributing to internal and external migration, new challenges are facing the nation-state (Dasgupta 2018). Facing some of these challenges requires understanding the changing nature of the social. Relating social transformations to their root causes – from accusations of witchcraft (Comaroff and Comaroff 2004) to murder, sexual violence or cruel and unusual punishment in the name of "culture" – remains a necessary precondition of social justice in our world.

Today, amid a need to understand social complexity and diversity, the field of cultural expertise is on the rise. And there could be no better time for a concerted effort to operationalize forms of expertise that explain how competing cultural truths live alongside each other. Such is the terrain of the call for cultural expertise: a domain of testimony and contextualization that seeks to clarify the knowledge forms underlying questionable practices. On the one hand, the call for cultural expertise involves demands for political decision-making that can address sociocultural dynamics. On the other hand, it also involves an effort by scholars, practitioners and legal and technical experts to clarify sociocultural practices that shape meaning and which, at times, offend other social or legal norms.

Yet, despite these emerging demands, certain forms of cultural expertise can be seen as handmaidens of adjudicatory decision-making in a world that is

sidelining alternatives to criminalization and attempts to uncover the root causes of violence. Cultural expertise is also aligned with the increasing judicialization of justice – an advance that has not gone unchallenged. And there are questions to answer regarding how (post)colonial assumptions shape the deployment of expert knowledge in the Global South, often with highly unintended outcomes (Mitchell 2002). In this regard, cultural experts are not only interested in the role and agency of culture but are also themselves purveyors of power and knowledge. Debates over who can find and release information about "culture" lead to ongoing and far-reaching contestations over what is admissible and influential within the realm of justice (Good 2006; Clarke 2017; Thuen 2004), raising not only political questions about power but also substantive and ontological questions related to the nature of knowledge itself.

And yet what would our world be without cultural expertise? What tropes and fictions would be used to generalize human experience? What exclusions and injustices would be – or are – underway? Scholars of expertise have revealed how the people in such roles generate and validate knowledge (Latour 1988; Latour and Woolgar 1986), socialize new experts (Matoesian 1999; Mertz 2007), represent specialized knowledge to society more broadly (Lynch and Woolgar 1990; Coopmans et al. 2014; Collins and Evans 2007; Randalls 2017) and imbue institutional structures (Carr 2009; Good 2004, 2007) and political movements and processes (Epstein 1996; Collier 2017; Newman 2017) with knowledge. Recent analysis also shows that experts do not offer counsel to political projects from the sidelines but are in fact central to shaping the legitimacy of institutions (Carroll 1996). In the US, for example, think tanks are commonly leveraged for political purposes (Smith 1993; Medvetz 2012). These contemporary developments raise questions about the role of experts and cultural analysis in a world in crisis. In response, this commendable and ambitious volume, *Cultural Expertise, Law, and Rights: A Comprehensive Guide*, takes up case studies from across Asia, Africa, Australasia, the Middle East, Europe and North and South America to provide scholars and practitioners with an interdisciplinary collection on cultural expertise in and beyond the law.

As outlined by the book's editor, Livia Holden, cultural expertise is the "special knowledge of experts in laws and cultures, who provide evidence in court and out-of-court dispute resolution … for the use of decision-making authority" (see Holden, Chapter 1 in this volume). By making a case for the value of cultural expertise in relation to culturally oriented crimes and cultural defence, this remarkable tome offers a never-before-seen toolkit for articulating a range of ethical and pragmatic, theoretical and historical approaches to expert participation. Providing accessible theory and focusing on case studies, the 29 chapters in this volume tackle some of the most troublesome issues of our time. The collection offers an exhaustive and interdisciplinary platform for establishing an inclusive agenda concerning the place of culture in legal, nonlegal and quasi-legal decision-making. It also provides a range of conceptual, theoretical, pragmatic and juridical-legal arguments for cultural expertise's potential to help us understand and know our world.

In this volume, we see the emergence of a new canon of expertise that foregrounds the cultural complexities of diverse social lives and the need to clarify the role of cultural meaning inside and outside of adjudicatory processes. Each essay highlights the range of possibilities and challenges entailed in cultural expertise's emergence as a tool for social change. In a collection committed to detailing an exhaustive spectrum of cultural values and approaches as well as a wide array of ethical and pragmatic approaches, Holden and her contributors are engaged in an ongoing project of democratic inclusivity. And yet it is also clear that the chapters reflect the dialectical demands of the state, fictions of objectivity and the need to rethink the political. *Cultural Expertise, Law, and Rights* takes on such challenges, providing a toolkit for a future in transition, a world not yet ready for idealized justice. The volume therefore provides ways of thinking otherwise, ways of strategizing, developing cultural consciousness and advancing ethical standards in an imperfect world. The text is diverse and productive and marks an important moment, not only in cultural analysis but also in the emergence of a new domain of inquiry concerning the potential for social justice.

Kamari Maxine Clarke
University of Toronto
May 2022

References

Carr, Summerson. 2009. "Anticipating and Inhabiting Institutional Identities." *American Ethnologist* 36, no. 2: 317–36.

Carroll, Patrick. 1996. "Science, Power, Bodies: The Mobilization of Nature as State Formation." *Journal of Historical Sociology* 9, no. 2: 139–67.

Clarke, Kamari Maxine. 2017. "Beyond Genealogies: Expertise and Religious Knowledge in Legal Cases Involving African Diasporic Publics." *Transforming Anthropology* 25, no. 2: 130–55.

Collier, Stepeh. 2017. "Neoliberalism and Rule by Experts." In *Assembling Neoliberalism: Expertise, Practices, Subjects*, edited by Vaughan Higgins and Wendy Larner, 23–44. New York: Palgrave MacMillan.

Collins, Harry M., and Robert Evans. 2007. *Rethinking Expertise*. Chicago, IL: University of Chicago Press.

Comaroff, John, and Jean Comaroff. 2004. "Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa." *Law & Social Inquiry* 29, no. 3: 513–45.

Coopmans, Catelijne, Janet Vertesi, Michael E. Lynch, and Steve Woolgar, eds. 2014. *Representation in Scientific Practice Revisited*. Cambridge, MA: The MIT Press.

Dasgupta, Rana. 2018. "The Demise of the Nation State." *The Guardian*, April 5, 2018.

Epstein, Steven. 1996. *Impure Science: AIDS, Activism, and the Politics of Knowledge*. Berkeley, CA: University of California Press.

Good, Anthony. 2004. "'Undoubtedly an Expert'? Anthropologists in British Asylum Courts." *The Journal of the Royal Anthropological Institute* 10, no. 1: 113–33.

———. 2006. "Gender-based Persecution: The Case of South Asian Asylum Applicants in the UK." In *Gender, Conflict and Migration*, edited by Navnita Chadha Behera, 274–99. New Delhi; London: SAGE Publications Ltd.

Holden, Livia, ed. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.

———. 2021. "Anthropologists as Experts: Cultural Expertise, Colonialism, and Positionality." *Law & Social Inquiry* 47, no. 2: 1–22.

Latour, Bruno. 1988. *Science in Action: How to Follow Scientists and Engineers Through Society*. Cambridge, MA: Harvard University Press.

Latour, Bruno, and Steve Woolgar. 1986. *Laboratory Life*. Princeton, NJ: Princeton University Press.

Lynch, Michael, and Steve Woolgar, eds. 1990. *Representation in Scientific Practice*. Cambridge, MA; London: The MIT Press.

Matoesian, Gregory M. 1999. "The Grammaticalization of Participant Roles in the Constitution of Expert Identity." *Language in Society* 28, no. 4: 491–521.

Medvetz, Thomas. 2012. *Think Tanks in America*. Chicago, IL: The University of Chicago Press.

Mertz, Elizabeth. 2007. *The Language of Law School: Learning to "Think Like a Lawyer."* Oxford: Oxford University Press.

Mitchell, Timothy. 2002. *Rule of Experts: Egypt, Techno-Politics, Modernity*. Berkeley, CA: University of California Press.

Newman, Janet. 2017. "The Politics of Expertise: Neoliberalism, Governance, and the Practice of Politics." In *Assembling Neoliberalism: Expertise, Practices, Subjects*, edited by Vaughan Higgins and Wendy Larner, 87–105. New York, NY: Palgrave MacMillan.

Randalls, Samuel. 2017. "Assembling Climate Expertise: Carbon Markets, Neoliberalism and Science." In *Assembling Neoliberalism: Expertise, Practices, Subjects*, edited by Vaughan Higgins and Wendy Larner, 67–86. New York, NY: Palgrave MacMillan.

Smith, James A. 1993. *The Idea Brokers: Think Tanks and the Rise of the New Policy Elite*. New York, NY: The Free Press.

Thuen, Trond. 2004. "Anthropological Knowledge in the Courtroom: Conflicting Paradigms." *Social Anthropology* 12, no. 3: 265–87.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

INTRODUCTION

Livia Holden

Cultural Expertise, Law, and Rights: A Comprehensive Guide is an edited volume for social sciences students, members of the legal professions, and social workers who engage or plan to engage with cultural expertise in dispute resolution and the development of cultural arguments for the protection of basic human rights. This book proposes an overview of the theoretical and practical skills that make the use of cultural expert knowledge useful and ethical in a comprehensive but non-exhaustive list of fields and geographical macro-areas where various forms of cultural expertise have been observed and deployed.

This book makes frontier knowledge accessible thanks to a mix of theory and practice with specific attention to the questions that are relevant for experts and members of the legal and para-legal professions in the process of resolving conflicts and assisting with applications for international protection. The authors of this volume have striven to connect the theoretical framework of cultural expertise with practical cases for fostering the development of the necessary skills in real-life engagement with cultural expertise. This volume is also proposed as a way to responsibly disseminate innovations in research to the educated wider public because it stresses the ethical principles that should guide anyone who engages with cultural expertise professionally.

Outline and Structure of the Book

This book is divided into four parts: (1) "Cultural Expertise: Definitions and Positioning", (2) "Debates and Boundaries of Cultural Expertise", (3) "Cultural Expertise in the Fields of Law", and (4) "Cultural Expertise in the World". Although this book is broadly conceived as an itinerary from theory to practice, all chapters include both theory and practice and can be read either as stand-alone introductions to cultural expertise or overviews of the fields

DOI: 10.4324/9781003167075-1

and geographic macro-areas within which cultural expertise occurs. Readers can start this book with the chapter that most appeals to them. All chapters are structured to include learning objectives; theory and concepts; three case studies; further reading; questions and answer keys; and references. Our hope is that readers may start with the aspect of cultural expertise that is closest to their interests but may be enticed to read many of the other chapters of the book. Nonetheless, even a single chapter will provide the readers with a contextualised introduction to the most important components that any legal and para-legal professional or expert will want to familiarise themselves with, when engaging with cultural expertise.

Part I, entitled "Cultural Expertise: Definitions and Positions", retraces the genesis of cultural expertise as an umbrella concept and its ideological engagement with the process of decolonisation and ethics, both of which can be seen as components of the specific awareness that requires experts to examine their own position in court. The concept of cultural expertise which generated its current formulation dates back to 2009 and came from the need ccountt for the contribution of experts on laws and cultures to the ascertainment of rights in multicultural Europe. After 2009, the concept of cultural expertise evolved to incorporate a greater variety of types of cultural expertise and to strengthen its procedural neutrality. Part I of this book positions the concept of cultural expertise vis-à-vis cultural defence and culturally oriented crimes; the variety of fields in which cultural expertise plays a role; and the ethics of cultural expertise.

CULTURAL EXPERTISE: DEFINITIONS AND POSITIONS

"Cultural Expertise: Definitions and Positions" identifies the components and positioning of cultural expertise: (1) the definition of cultural expertise as a diverse and evolving field whose contents and extent change with the nature of the conflicts and the options for their resolution; (2) questions that social scientists should ask themselves before engaging as experts, as well as the risks and considerations surrounding cultural expertise where conflicting obligations result in ethical, deontological or legal dilemmas; and (3) the ways in which cultural expertise can build on the conceptual strengths of decoloniality.

Part II of this volume, titled "Debates and Boundaries of Cultural Expertise", explores the scope of cultural expertise regarding crucial questions that have featured in debates around law and culture since the 20th century: definitions of race, sexuality and the interpretation of social practices that have been considered to be contrary to human rights, such as FGM/C. This part identifies race, racism, and racialisation as distinct concepts and phenomena, showing the risks

of reconciling the widely assumed reality of race with the socially constructed idea of race, as well as the precautions needed for conflict resolution in these areas. It outlines how sexual and gender diversity is not evenly grasped in court and argues that the acknowledgement of LGBTQIA+ people is facilitated by the recognition of their specific cultural experience as a demographic group and by the existence of a more diverse judiciary. It shows that the role of anthropologists acting as experts has been fraught with difficulties since their first involvements within multicultural Europe. This section also explores the boundaries of cultural expertise and ventures outside the conventional disciplines of anthropology and socio-legal studies to include history, media, journalism and the sciences of language. It explores the use of cultural expertise in the assessment of harm to mental and physical well-being caused by the loss of Indigenous languages, as well as the impact of technology and the media in the changing perception of what is offensive depending on time and context, and the potential of investigative journalism to produce cultural evidence in court.

DEBATES AND BOUNDARIES OF CULTURAL EXPERTISE

"Debates and Boundaries of Cultural Expertise" posits the principles of cultural expertise whilst also suggesting its potential for creativity: (1) race and gender as social constructs that need to be contextually understood and positioned vis-à-vis the facts and the experts themselves; (2) ethical positioning of cultural experts to support not only formal equality but also substantial equality of treatment; and (3) cultural expertise as a theoretical framework that has the potential for application beyond the conventional fields of anthropology.

Part III of the volume, "Cultural Expertise in the Fields of Law", surveys the fields of law where cultural expertise has developed prominently: procedural justice, asylum and refugee laws, terrorism investigations, extreme speech, commercial arbitration, international criminal law, international human rights, and Indigenous rights. This section is descriptive, outlining the ways experts engage with cultural expertise to produce evidence in court in the various fields of law, but also analytical to highlight the frequent miscommunications between lawyers and experts regarding culture and evidence connected with cultural arguments. The choice of the fields of law was guided by existing academic thinking on the adoption of cultural expertise in specific fields and shows the significant extent of the application of cultural expertise. However, these chapters are suggested as stepping-stones for further experimentation in an even greater variety of fields of law.

CULTURAL EXPERTISE IN THE FIELDS OF LAW

"Cultural Expertise in the Fields of Law" fosters a creative approach to cultural expertise which should nonetheless always be positioned within a solid ethical framework that values the following principles: (1) attention to the litigants' voices and understanding of what happens in court; (2) careful engagement of the experts with the justice system, especially when the experts' independence is challenged; and (3) inclusive identification of experts. This section suggests the importance of diversity within the pool of experts so as to value and acknowledge the role and voices of the beneficiaries of cultural expertise, and of Indigenous people both as regards national and international law and the world heritage framework.

Part IV of the volume, "Cultural Expertise in the World", proposes a voyage through selected areas of Africa, the Americas, Asia, Australia, Europe, and the Middle East to explore how cultural expertise as an umbrella concept resonates with the diverse tools developed to produce evidence connected with cultural knowledge in court. This section includes a survey of the perception and the occurrence of cultural expertise in Europe, examples from the long experiences of Australia and the United States, South Africa's plurality of sources of law, the management of overlapping and intersecting legal systems in South Asia, selected examples of cultural defence in Chile, the reformulation of the cultural expertise framework in the legal contexts of the Middle East, and the reading of cultural expertise by Islamic courts in Indonesia. The practical examples of this part highlight the specific interpretations of culture and evidence in the social context and justice system of each area to show that the theoretical framework of cultural expertise needs to be flexible enough to adapt to a great variety of social contexts and legal systems.

CULTURAL EXPERTISE IN THE WORLD

"Cultural Expertise in the World" provides an overview of the skills that experts need to have: (1) the capacity to consider the impact of one's own cultural background, and the ways it might be perceived by the parties to the conflict; (2) multi-level inclusivity as regards both the voices of the parties and multiple readings of the conflict by various sections of the social context; and (3) the ethical duty of the experts to independently work for the respect of basic human rights and justice.

Sources and Further Readings

Whilst several other books, including textbooks, examine some of the topics addressed by *Cultural Expertise, Law, and Rights*, this volume proposes cultural expertise as an innovative framework that benefits from interdisciplinarity and offers an umbrella concept for all those tools and methods that cultural experts and the legal and para-legal professions have creatively developed as part of their practices. Although all chapters of this volume provide a list for further reading, I list hereafter a sample of the most significant books, including textbooks, that touch on aspects of cultural expertise without necessarily mentioning the concept of cultural expertise explicitly. This list is not exhaustive but selects books across different genres and disciplines to show the interdisciplinary nature of the concept of cultural expertise in relation to rights. Because of their value for the scholarship of cultural expertise, these books are both a source of inspiration for our overall engagement with cultural expertise and a proposal for further reading to those amongst our readers who will want to engage in more depth with the academic positioning of the umbrella concept of cultural expertise.

Anthropology and Expertise in the Asylum Courts, by Anthony Good (2007), remains one of the most accomplished academic contributions to the practice of anthropologists acting as expert witnesses in the United Kingdom. Applied anthropology has often been considered a minor non-academic branch of anthropology, which almost implies that as an applied science it does not need theory. Against this background, Good shows that most anthropologists and socio-legal scientists who have acted as experts in court were unable to rely on mentorship or training. Experts have been learning by doing, through what have been very often lonely struggles between the ethics of their own discipline and the formalism of law. *Cultural Expert Witnessing*, edited by Austin Sarat and Leila Rodriguez (2018), focuses on the work of expert witnesses in connection with asylum laws in America. It covers judicial ethnocentrism, political asylum, race identity, and cultural defence, and it helps to position the development of the concept of cultural defence in the American context. Cultural expertise, as a cognate but epistemologically distinct concept from cultural defence, proposes a new theoretical framework that includes cultural defence. *Law's Anthropology: From Ethnography to Expert Testimony in Native Title* by Paul Burke (2011) examines the structure and *habitus* of both the field of anthropology and the field of law and how they have interacted in four cases. This book is crucial for understanding the relationship between various sources of law, and the history of the relationship between law, power, and culture in Australia. Readers who have taken an interest in the chapters about cultural expertise in Australia in the present volume will be interested in deepening their knowledge of the relationship between ethnography and expert testimony in Australia. *Expert Knowledge: First World Peoples, Consultancy and Anthropology* by Barry Morris and Rohan Bastin (2004) is a critical forum

on expert knowledge which tackles issues connected with the use of cultural expertise for dispute resolution and the claim of rights in various fields. The focus on expert knowledge in connection with consultancy makes *Expert Knowledge* an important reference for everyone interested in cultural expertise, specifically for the genesis of the engagement of anthropologists and ethical issues for expert consultants for Indigenous people and First Nations.

The Culturalization of Human Rights Law by Federico Lenzerini (2014) positions the use of cultural arguments vis-à-vis international human rights and, together with *Surrendering to Utopia: An Anthropology of Human Rights* by Mark Goodale (2009), helps readers to understand the terms of the initial fall-out between anthropology and human rights and the subsequent positioning of anthropologists as being amongst the best-equipped scholars to provide knowledge for the protection of basic human rights. The ethical positioning of the theoretical framework of cultural expertise in this volume, is closely linked to Lenzerini's and Goodale's perspectives on the relationship between culture and human rights. *The Cultural Defense* by Renteln (2004) and *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* by Foblets and Renteln (2009) are both seminal contributions on the right to culture and cultural defence in court and are cited by this volume, especially when focusing on the definition of cultural expertise. Both books provide exhaustive information and discussions on the expansion and development of cultural defence from tools for the mitigation of the sentence to methods of informing criminal courts on the cultural background of the defendants.

Almost all the aforementioned books have pointed to the difficulty for anthropologists of engaging with law and governance, but *Identities on Trial: Asylum Seekers from Asia* by ChorSwang Ngin (2018) shows that lawyers and anthropologists can collaborate for the successful protection of the basic human rights of asylum seekers in the United States. ChorSwang Ngin, an anthropologist, and Joann Yeh, an immigration attorney who co-authored two chapters in Ngin's book, are excellent examples of the potential for interdisciplinary and interprofessional collaboration in court. Similarly, but from a broader and more theoretical perspective, *Comparative Law* by Mathias Siems (2018) develops the idea of implicit comparative law using examples from comparative politics, economics, sociology, anthropology and psychology. Siems's approach should interest readers who want to use the case studies of this volume for a comparative approach to cultural expertise. *Affective Justice: The International Criminal Court and the Pan-African Pushback* by Kamari Maxine Clarke (2019) has been a source of inspiration for the authors who have focused on cultural expertise in international law and international jurisdictions to show the role of power relationships in the management of justice, and how cultural expertise might help in uniting competing interpretations of justice. *Culture as Judicial Evidence: Expert Testimony in Latin America* edited by Leila Rodriguez (2021) is the most recent example of the value of interdisciplinary collaboration between law and the social sciences and shows that many countries in Latin America have developed their approach to evidence in court to make admissible forms of cultural expertise that value

the voices of litigants and claimants and strive to redress systemic imbalances of power. The cross-sectoral framework adopted by Ngin, Clarke and Rodriguez, and which is also adopted by *Cultural Expertise, Law, and Rights*, has the potential to overcome the frequent miscommunication between lawyers and social scientists by suggesting ways to pave the paths of intersectoral collaboration and systematic inclusivity.

References

Burke, Paul. 2011. *Law's Anthropology: From Ethnography to Expert Testimony in Native Title*. Canberra: ANU Press.

Clarke, Kamari Maxine. 2019. *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*. Durham, NC: Duke University Press.

Foblets, Marie-Claire, and Alison Dundes Renteln, eds. 2009. *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Oxford; Portland, OR: Hart Publishing.

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

Goodale, Mark. 2009. *Surrendering to Utopia: An Anthropology of Human Rights*. Redwood City, CA: Stanford University Press.

Lenzerini, Federico. 2014. *The Culturalization of Human Rights Law*. Oxford: Oxford University Press.

Morris, Barry, and Rohan Bastin. 2004. *Expert Knowledge: First World Peoples, Consultancy and Anthropology*. New York: Berghahn.

Ngin, ChorSwang. 2018. *Identities on Trial in the United States: Asylum Seekers from Asia*. Lanham, MD: Lexington.

Renteln, Alison Dundes. 2004. *The Cultural Defense*. Oxford: Oxford University Press.

Rodriguez, Leila. 2021. *Culture as Judicial Evidence in Latin America*. Cincinnati, OH: University of Cincinnati Press.

Sarat, Austin, and Leila Rodriguez. 2018. *Cultural Expert Witnessing*. Bingley: Emerald Publishing Ltd.

Siems, Mathias. 2018. *Comparative Law*, 2nd ed., Cambridge: Cambridge University Press.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

PART I

Cultural Expertise

Definitions and Positioning

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

1

WHAT IS CULTURAL EXPERTISE?

Livia Holden

LEARNING OBJECTIVES

After reading this chapter, you will understand cultural expertise as an umbrella concept and will have learned about the fields in which cultural expertise plays a role. You will also understand how cultural expertise relates to but is also distinct from cultural defence and culturally oriented crimes; the ethical principles that should inform cultural expertise; how the positionality of experts impacts the provision of cultural expertise; and the conditions for the engagement of social scientists with cultural expertise.

Theory and Concepts

The concept of cultural expertise, from which its current formulation comes, dates back to 2009 and responds to the need to acknowledge and scrutinise the contribution of socio-anthro-legal scientists, experts in laws and cultures, to the resolution of disputes and the ascertainment of rights. This chapter positions the concept of cultural expertise vis-à-vis cultural defence and culturally oriented crimes, identifies the danger of bias in cultural expertise, offers ways to minimise this, and proposes three cases that highlight the conditions for the ethical engagement of anthropologists as experts.

DOI: 10.4324/9781003167075-3

CULTURAL EXPERTISE DEFINITION

Cultural expertise is the special knowledge deployed by the experts of laws and cultures for assisting decision-making authorities in the assessment of evidence with information on the socio-legal backgrounds of facts and persons involved. Cultural experts must be independent and afford a position of critical affirmation which translates into the possibility to counter the position of the institutions and to affirm the priority of the voice of the beneficiaries of cultural expertise.

The Genesis of Cultural Expertise

Cultural expertise offers a theoretical framework for all types of engagement of social scientists with law in court and out of court for the resolution of disputes and the ascertainment of rights. Cultural expertise inspires theoretically from the trends of multiculturalism and interculturalism because of the assumption that cultural diversity is a positive feature of human societies (see Grillo, Chapter 7 in this volume) but has been significantly informed by new legal pluralism, critical studies, gender studies, and the decolonial approach for what concerns the engagement against discrimination and structural inequalities (see Srinivasan, Chapter 3 in this volume).

Culturally Oriented Crimes and Cultural Defence

Cultural expertise offers a comprehensive theoretical framework which includes also the concepts of culturally oriented crime and cultural defence, but is supported by a strengthened ethical framework to overcome the limitations of the early multiculturalism.

Strijbosch (1991) pointed out the potential conflict between the principles of the majority groups and the principles of minority groups. Van Broek (2001) defined culturally motivated crime as an act by a member of a minority group or culture, which is considered an offence 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 or even endorsed and promoted in the given situation.

Cultural defence has been developed alongside the concept of culturally oriented crime but in the broader context of First Nations and minorities' claims in America, whose laws and courts have made room for cultural evidence since the 19th century (Holden 2019a; Rodriguez 2021; see also Álvarez San Martín, Chapter 26 in this volume). In the late 1990s, cultural defence developed theoretically in connection with the concept of culturally oriented crime and has made itself known especially in adversarial jurisdictions.

CULTURAL DEFENCE

Initially, cultural defence was conceived as the use of cultural arguments for the purpose of mitigation of sentences in criminal cases that would necessitate cultural considerations (Renteln 2004) but it was afterwards reformulated as information provided to the courts on the cultural background of people and facts in criminal law (Foblets and Renteln 2009). Cultural defence is therefore interpreted here as a specific form of cultural expertise which applies primarily to criminal law but, by extension, can be used also in other fields of law, mainly in adversarial jurisdictions.

The Ethics of Cultural Expertise

Whilst cultural expertise, as a conceptual framework for all those tools and methods that value cultural diversity, has the potential to pursue substantial equality and systematic inclusivity, it is also fraught with potential biases and risks, which can be minimised by critical approaches and a sound ethical positioning (see Cole, Chapter 2 in this volume).

Among the most relevant risks that all experts should assess are the reification of cultures, the disregard of power relationships both within minority groups and among diverse social groups, and the risk of stigmatisation of minority groups. The reification of cultures is the risk of attributing simplistic cultural components to all members of a certain social group without considering variations over time and space, and other variables such as class, gender, and sexuality. The disregard of power relationships both within a certain social group and among diverse social groups concerns the variation of cultural references and interpretations which depend on the authority and social acknowledgement that specific groups have within a certain society. The risk of stigmatising minority groups in a process of cultural determinism occurs if the expertise connects certain behaviors with certain social groups.

ETHICAL MATTERS

Paramount ethics for social scientists are the "do no harm" principle and engagement in support of vulnerable groups, minorities, and First Nations/Indigenous Peoples/Aborigines as a service to the communities. The following non-exhaustive list of approaches, developed by feminist studies, engaged anthropology and the anthropology of human rights, help cultural experts to deploy cultural expertise responsibly: strategic essentialism, problem-solving, social watchdog activity, and decoloniality. However, all these approaches should be complementary to the "do no harm" principle. Additionally, procedural neutrality in combination with critical affirmation is proposed as the specific positioning of cultural experts in court to ensure their independence.

Strategic essentialism has been formulated as a political strategy that allows simplistic descriptions of social groups for the sake of achieving political goals of equality and resisting oppression (Spivak 2003).

Anthropologists have increasingly engaged in social problem solving, and anthropology associations have endorsed the engagement of anthropologists as social watchdogs to identify and denounce inequalities (Goodale 2009; Sillitoe 2015).

Decoloniality as an encompassing and intersectoral approach is a reference for cultural experts to fight against the explicit and implicit privileges that have affected social institutions including universities and the production of knowledge, and make space to the voices of the beneficiaries of cultural expertise (see Srinivasan, Chapter 3 in this volume). In the contexts of Indigenous rights, cultural expertise has been considered as a prerogative of Indigenous people and separated from anthropological expertise (see Trigger, Chapter 21 in this volume). The stress on the primacy of the voices of the beneficiaries of cultural expertise is proposed here as integral part of the theoretical framework of cultural expertise, to re-affirm and extend the priority of the perspectives and roles of those for whom cultural expertise is provided in all types of use of cultural knowledge for dispute resolution and the ascertainment of rights (see also Higgings, Chapter 18; Bishay, Chapter 16; Dominic, Chapter 27; Haddad, Chapter 28; and Nurlaelawati and Witriani, Chapter 29 in this volume).

PROCEDURAL NEUTRALITY AND CRITICAL AFFIRMATION

Procedural neutrality combined with critical affirmation is formulated as the position of the expert witnesses who abide by the procedural requirement of legal neutrality and secure for themselves a legitimate role in court to dissent and provide knowledge-based evidence that can contribute to correcting the structural unbalances that are inherent in legal systems (Holden 2022).

Case Studies

Although cultural expertise as a theoretical framework is new, research shows that with or without the appointment of experts, cultural expertise, as special knowledge, is routinely used in Europe, America and Australia for an increasing range of cases from criminal to civil law, including also labour law, banking law, immigration law and many others: asylum, entry permits, family reunions, adoptions, business disputes, citizenship, child custody, extradition, deportation, validity of marriage and divorce, customary financial transactions, insurance, employer–employee relationships and many others (Holden 2019a, 2019b). Cultural expertise plays a role not only in migration and asylum laws but also for matters concerning First Nations and linguistic minorities that enjoy semi-autonomous rights sanctioned

by treaties and constitutions. New fields of application of cultural expertise are constantly discovered. Three case studies highlight the need for experts to clearly position themselves ethically before engaging with cultural expertise.

Colonial Justice: *Rex v. Kumwaka s/o of Mulumbi and 69 Others*

EXPERT WITNESSES IN *REX V. KUMWAKA S/O OF MUMBAI AND 69 OTHERS*

Rex v. Kumwaka s/o of Mulumbi and 69 Others was decided in 1932 in Kenya, which between 1920 and 1963 was part of the British East Africa Protectorate. A group of 60 men was sentenced to death for murdering a woman believed to be a witch who had cast a spell on one of the men's wives, rendering her mute. The colonisers of the early 20th century asked themselves the following questions: should customary law apply in cases such as the murder of a witch and therefore should leniency be afforded; or should state law, in this case the law of England, remain sovereign in matters of penal law? Two experts were appointed: the Deputy and Provincial Commissioner in Kenya, Frederick Lugard, a British soldier and colonial administrator, and Bronisław Malinowski, the anthropologist. The experts argued, respectively, against and for the application of customary law. The reaction at the time of the public and the media in Africa and in England was in favour of a lenient sentence, which was eventually adopted.

Whilst anthropology has officially distanced itself from its colonial heritage and actively engaged with decolonial approaches, this case is useful to scrutinise the role of the anthropologists who engage with government policies. Was Malinowski's engagement with law dictated by colonial policies? Should anthropologists engage in a situation where they cannot secure a position of independence? Did Malinowski have any room to fight against colonialism "from the inside"? Whilst we assume that today anthropologists can and must be afforded independence vis-à-vis state authorities, the analysis of Malinowski's stance is important to highlight the role of governance as a component of the position of anthropologists engaging with the law.

Embedded Anthropologists

USE OF CULTURAL EXPERTS FOR ARMIES AND GOVERNMENTS

The use of cultural expertise for armies and governments is not only against the ethical principles of the social sciences but defeats its very purpose of being special knowledge from an independent and neutral source.

There is a long history of armies and governments co-opting social scientists both in France and in the United States. All have been met with the disapproval of scientific communities and professional associations.

In the first half of the 19th century, the French administration attached three substantial scientific missions to military operations in Greece, Algeria and Mexico (Broc 1981). In 1844, ethnopolitical expertise was developed to separate the Arab population from the Kabyles (Lacoste-Dujardin 1986). More than a century later in Opération Oiseau Bleu, anthropological expertise was applied by the French Army against Algerian insurgents (Lacoste-Dujardin 1986).

Toward the end of WWII, the United States invited Ruth Benedict to write a book that could provide an understanding of Japanese culture, with the intention of predicting Japanese behaviour. *The Chrysanthemum and the Sword* (Benedict 1946) was published, and although to date there are no records of its actual role in US–Japan relations, the question is whether such an engagement is ethical.

In 1964 the United States conceived Project Camelot which would use anthropological knowledge and hire anthropologists with the aim of facilitating specific political changes in developing countries. Chilean scientists reacted indignantly, and the project was cancelled.

Shortly after the US occupation of Afghanistan in 2001, the anthropologist Montgomery McFate voluntarily proposed the Human Terrain System (HTS), which engaged social scientists and in particular anthropologists with the purported intention of reducing the loss of human lives on both sides through anthropological knowledge (McFate 2005). The HTS was immediately questioned by the American Anthropology Association (AAA) for the ethical issues that it raised and was eventually condemned (CEAUSSIC 2009).

Anthropologists as Expert Witnesses and Anthropological Knowledge in Court

The appointment of anthropologists as expert witnesses has developed widely throughout North America, the United Kingdom and Australia in connection with First Nations/Aboriginal land titles and treaties since the 19th century. It further extended to continental Europe in the second half of the 20th century in connection with migration fluxes. European jurisdictions have been increasingly confronted with the necessity of evaluating legal facts arising in the countries of the Global South but generating new rights in the Global North (Holden 2015). Sometimes, anthropological expertise has been incorporated at the pre-judicial stage in counselling services or incorporated into mediation aiming to prevent litigation. At other times, it has been reformulated to provide new fora for alternative dispute resolution in the hands of lawyers inspired by intercultural law (Ricca 2018).

Jurists have designed new tools and methods, such as the cultural test in the format of a questionnaire that judges self-administer to treat the facts and the litigants in a culturally sensitive manner or to identify the need to appoint an expert (Ruggiu 2018, 2019). The legal professions have experimented with ethnopsychological expertise and mediation in criminal law and juvenile justice (De Maximy 2021; see Holden, Chapter 20 in this volume). In many European countries, cultural mediators and translators have been called to respond to questions that very often go beyond their own areas of competence, touching on the socio-cultural background of facts and people involved in the case.

Conclusion

Cultural expertise as an umbrella concept proposes a strengthened ethical framework that enhances the ethical references of socio-anthro-legal scientists appointed as experts in court, as well as acknowledging the variety of tools and methods that fall within the broad domain of cultural expertise.

Rex v. Kumwaka s/o of Mulumbi and 69 Others spotlights not only the former acceptance by certain anthropologists of colonialism, which has been explicitly condemned by anthropology, but also the need to scrutinise one's own engagement today vis-à-vis government policies and assess the risk of explicitly or implicitly endorsing political agendas that are contrary to the ethical principles of anthropology.

All the attempts to use anthropological knowledge to the benefit of armies failed because of the ideological incommensurability between the anthropological and the military projects: the fundamental contradiction between the aims of anthropology as a discipline which is governed by the "do no harm" principle and the aims of governments willing to occupy and colonise (Price 2011).

The variety of tools and methods that fall under the umbrella concept of cultural expertise attests to an increasing awareness on the part of the legal professions of notions of culture which have encouraged a creativity in the legal practices to which the theoretical framework of cultural expertise can now respond. The independence of anthropologists in court is supported by procedural neutrality. The anthropologists who work for governments, or with the defence, or with the investigation teams, can hardly claim neutrality and, if they so chose, must explicitly adopt adequate measures that ensure their independence (see Cole, Chapter 2 and Plainex, Chapter 13 in this volume). The anthropologists acting as independent experts should not advocate for any specific result of the legal process. However, for anthropologists to express an independent expert opinion truly and fully, they must be in the position to disagree with the legal authorities and be allowed to contradict, if necessary, institutional reports such as the Country of Origin Information or other evidence on which the court or the public prosecutor and the parties rely.

Further Reading

Holden, Livia. 2020. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1: 29–46.

This paper traces the history of the relationship between law and culture and proposes a reformulation of the concept of cultural expertise as an umbrella concept that encompasses the existing array of socio-legal tools and methods that use cultural knowledge for conflict resolution.

Holden, Livia, ed. 2021. *Cultural Expertise and the Legal Professions*. Special Issue in *NAVEIÑ REET: Nordic Journal of Law and Social Research* 11.

This special issue offers a selected sample of first-hand experiences about the use and usefulness of cultural expertise by a pool of legal professionals and expert witnesses in various jurisdictions ranging from immigration and asylum to Indigenous rights and spanning family law, international human rights and criminal law, including also the opinions of a criminal law judge, with a rejoinder by the expert in the well-known "context case" in the Netherlands.

Holden, Livia. 2022. "Anthropologists as Experts: Cultural Expertise, Colonialism, and Positionality." *Law & Social Inquiry* 47, no. 2: 669–90.

This article argues that the concept of procedural neutrality and its reformulation in the form of critical affirmation help anthropologists to carve out an independent role for themselves in the legal process.

Q&A

1. What is cultural expertise and where does cultural expertise apply?

Key: Students should articulate the definition of cultural expertise and list the most common fields of application.

2. How do the concepts of cultural defence and culturally oriented crime connect with the definition of cultural expertise?

Key: Students should explain that the concept of cultural expertise is recent but connects with other concepts such as cultural defence and culturally oriented crime and analyse how cultural expertise differs from these concepts and is an umbrella concept that includes several tools and methods deployed by socio-anthro-legal scholars for assisting in the resolution of disputes.

3. What kinds of potential biases and risks should be considered when engaging with cultural expertise? Use real cases to formulate the ethical questions and potential biases to overcome.

Key: Students should outline the potential biases and risks such as the reification of culture and stigmatisation of minority groups and centre their analysis on the potential solutions such as social and political engagement, and specific tools or methods proposed by socio-anthro-legal scientists. Some cases chosen from this textbook could be used to outline the ethical considerations and individual stances to be adopted if acting as an expert.

References

Benedict, Ruth. 1946. *The Chrysanthemum and the Sword: Patterns of Japanese Culture*. Cambridge, MA: Houghton Mifflin.

Broc, Numa. 1981. "Les grandes missions scientifiques françaises au XIXe siècle (Morée, Algérie, Mexique) et leurs travaux géographiques." *Revue d'Histoire des Sciences* 34, no. 3/4: 319–58.

CEAUSSIC. (2009). "Final report on the army's human terrain system proof of concept program." Submitted to the Executive Board of the American Anthropological Association October 14, 2009. Available at https://s3.amazonaws.com/rdcms-aaa/files/production/public/FileDownloads/pdfs/cmtes/commissions/CEAUSSIC/upload/CEAUSSIC_HTS_Final_Report.pdf

De Maximy, Martine. 2021. "Intercultural Justice in France: Origins and Evolution." *NAVEIÑ REET: Nordic Journal of Law and Social Research* 11: 43–62.

Foblets, Marie-Claire, and Alison Dundes Renteln, eds. 2009. *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Oxford; Portland, OR: Hart Publishing.

Goodale, Mark. 2009. *Surrendering to Utopia: An Anthropology of Human Rights* (Stanford Studies in Human Rights). Stanford, CA: Stanford University Press.

Holden, Livia, ed. 2015. *Legal Pluralism and Governance in South Asia and Diasporas*. London: Routledge.

———, ed. 2019a. *Cultural Expertise and Socio-legal Studies*. Bingley: Emerald.

———. 2019b. "Cultural Expertise: An Emergent Concept and Evolving Practices." *Laws* 8, no. 4: 28.

Lacoste-Dujardin, Camille. 1986. "Opération «Oiseau bleu», 1956. Géostratégie et ethnopolitique en montagne kabyle." *Revue de l'Occident musulman et de la Méditerranée* 41, no. 1: 167–93.

McFate, Montgomery. 2005. "Anthropology and Counterinsurgency: The Strange Story of Their Curious Relationship." *Military Review* 85, no. 2: 24–38.

Price, David H. 2011. *Weaponizing Anthropology: Social Science in Service of the Militarized State*. Petrolia, CA: CounterPunch; Oakland, CA: AK Press.

Renteln, Alison Dundes. 2004. *The Cultural Defense*. Oxford: Oxford University Press.

Ricca, Mario. 2018. "Cultures in Orbit, or Justi-fying Differences in Cosmic Space: On Categorization, Territorialization and Rights Recognition." *International Journal for the Semiotics of Law = Revue Internationale De Sémiotique Juridique* 31, no. 4: 829–75.

Ruggiu, Ilenia. 2018. *Culture and the Judiciary: The Anthropologist Judge*. 1st ed. Cultural Diversity and Law. London: Routledge.

Rodriguez, Leila. 2019. "The 'Cultural Test' as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges." *Laws* 8, no. 3: 15.

———. 2021. *Culture as Judicial Evidence: Expert Testimony in Latin America*. Cincinnati, OH: University of Cincinnati Press.

Sillitoe, Paul. 2015. *Indigenous Studies and Engaged Anthropology: The Collaborative Moment*. Farnham: Taylor & Francis.

Spivak, Gayatri Chakravorty. 2003. "Can the Subaltern Speak?" *Die Philosophin* 14, no. 27: 42–58.

Strijbosch, Fons. 1991. "Culturele delicten in de Molukse gemeenschap." *Nederlands Juristenblad* 16: 666–72.

van Broeck, Jeroen. 2001. "Cultural Defence and Culturally Motivated Crimes (Cultural Offences)." *European Journal of Crime, Criminal Law and Criminal Justice* 9, no. 1: 1–32.

2

CULTURAL EXPERTISE AND ETHICS

Charmaine Cole

LEARNING OBJECTIVES

This chapter focuses on the professional ethics of cultural expertise. This chapter aims to encourage reflection on the risks and unintended consequences that arise from the engagement of anthropologists with cultural expertise. You will learn the risks and considerations revolving around cultural expertise where conflicting obligations result in moral, professional, and legal dilemmas.

Introduction

Professional ethics concern the principles of professionals. They prescribe the ethical duties linked to specific professions. Their aim is to ensure that professional skills are used responsibly. Frequently, the regulation of professional behaviour concerns self-imposed rules that maintain integrity and reputation. Such codes include statements regarding values, ethical principles, key responsibilities and expected conduct. They may be mandatory, with disciplinary consequences for breaches, or voluntary, simply offering a framework to guide decision-making.

Theory and Concepts

Anthropology intersects with many professions with different obligations. Ethical standards specific to anthropology have served to establish its distinctness

DOI: 10.4324/9781003167075-4

and develop its reputation. In the 1970s social scientists started to scrutinise ethnographic research that intertwined with colonisation and thereby contributed to perpetuating a power imbalance between researchers and their interlocutors (Campbell 2010, 3; Fluehr-Lobban 2003, 2013, 14). Berreman advocated a set of principles including accountability and transparency (see Berreman 2003). Asad advanced the political dimension of research methods by suggesting the relinquishment of structural empiricism and functionalism, while Fabian re-examined the relationship between anthropologists and subjects, stressing reflexivity and participation (Asad 1973; Fabian 1983). The shift towards postmodernism was a pivot in the discussion on ethics. Consensus grew on the principle that anyone doing anthropology should be guided by professional ethics.

EMPHASIS ON CODES OF ETHICS

The emphasis on professional codes stems from the increase in anthropology graduates and cultural experts working in applied branches alongside policymakers, lawyers, military officers, and corporations. Yet, no mandatory professional registration or code of ethics applies to anthropologists. Instead, various national associations exist with voluntary codes designed to establish the basis on which research is undertaken and conducted and to promote an ethically conscious profession.

The Society for Applied Anthropologists' statement of ethics begins with the need to disclose goals, methods and sponsorships, then focuses on the relationship with research participants and outlines duties, such as treating them with respect and dignity. Additionally, it summarises responsibilities to colleagues and employers. As Shore (1999, 124) noted, "Ethical codes […] are likely to become more important as anthropological research develops new fields, particularly those that bring it into contact with policymakers and other professionals". The basis of anthropological ethics is that the protection of the research subject is the anthropologist's primary responsibility. The codes vary but demonstrate a universal approach to establish the ethical foundations of the discipline. Common principles across the codes include not causing harm to the study participants, obtaining voluntary informed consent from relevant parties, being open regarding research goals and applying anonymity or confidentiality. As with other deontological codes, the aim is to regulate the relationship between professionals and their more vulnerable interlocutors. Built into the codes are the concepts of rights, respect, responsibility, and trust. They include both abstract ideals, such as doing no harm, and practical duties, such as keeping sources confidential.

Anthropologists are obliged to adhere to the rules of scientific and scholarly conduct regarding honesty, not falsifying data and respecting obligations to colleagues. Ethics for cultural experts and applied anthropologists go beyond

abiding by published guidelines whilst undertaking field and academic research and extend to what purpose and for whom their expertise and research are used. The principle of doing no harm has been widely interpreted by the various branches of social sciences and is particularly relevant for the engagement of anthropologists in court (see Holden, Chapter 1 in this volume). The crux of the ethical dilemmas of applied anthropology concerns the basis on which experts work and the extent to which the obligations owed to their research participants can be maintained in practice. The American Anthropological Association (AAA) Ethical Guidelines state: "anthropological researchers must do *everything in their power* to ensure that their research does not harm the safety, dignity, or privacy of the people with whom they work, conduct research, or perform other professional activities" (AAA 1998, 2). For cultural anthropologists engaged as experts, this duty is complicated but nonetheless important. Their own morality, informal ethics and situation-specific considerations can assist in decision-making. The knowledge of cultural experts is valued for the assistance it can provide in situations such as multicultural and international negotiations, legal disputes, defence planning, aid commitments and welfare policy; however, whenever cultural expertise is used beyond academia, questions are raised about its appropriateness. In this regard, objectivity and independent perspective are the major issues.

Case Studies

The Judiciary – Anthropologists as Expert Witnesses

As expert witnesses, cultural experts are called to provide evidence on matters relevant to their expertise but providing expertise in court presents a dichotomy. Duty to the court takes precedence over obligations such as protecting the research subject or the right to privacy. This may cause feelings of disloyalty or conflict, which may be interpreted by the court as unwillingness to tell the truth. Witnesses are legally bound to testify honestly and truthfully, without excluding relevant information. Other professionals face similar conflicts, but there are noteworthy differences. Lawyers, doctors and priests enjoy professional privilege, which does not extend to anthropologists. Even under oath, doctors are not required to disclose confidential information regarding patients. Anthropologists, however, can be subpoenaed to testify in court and disclose communications, hitherto confidential. There should be no conflicts of interest, actual or potential, between the witness and the legal proceedings, or any person involved. A conflict will undermine the witness's credibility and their evidence will either not be accepted or be given less significance. An expert witness is required to provide evidence according to precise and restrictive or onerous rules of legal procedure regarding the admissibility of evidence. The tension that exists in the courtroom might be explained by the fact that, according to some scholarship, "anthropologists and lawyers think differently and […] such differences might

also be related to competition between the two professional orders" (Good cited by Holden 2019, 194). Different training results in different ways of reasoning and different deontologies. Anthropologists fulfil the requirements of scientific research by applying a methodology that allows both closeness and distance from the research subjects. In court, any method that results in closeness to the parties can be interpreted as impacting the witness's objectivity. Courts hear complex, contradictory narratives to reach a decision. The dilemma for anthropologists is that fieldwork is undertaken to comprehend and relate to a culture or society, and not to arrive at a conclusion or judgement. Anthropologists study cultures and relationships according to an epistemology that may not translate to the judicial domain where they are required to separate facts from opinions and present a unequivocal interpretation of field data. Witnesses are often compelled to provide yes–no answers to questions on which they have spent years researching.

Using cultural knowledge to establish legal facts, along with procedural requirements and limitations, leads to potential miscommunication between anthropologists and lawyers. Judges have addressed issues of relevance, timetables and evidence. Anthropologists have spoken about how demanding and emotional the work is. Courts are increasingly required to evaluate legal facts, originating in a range of cultures, which may generate new rights in diasporic settings (Holden 2019).

Anthropologists as expert witnesses in common law countries have an established, if somewhat uneasy, relationship with the judiciary. While differences remain in European legal traditions there is an increasingly greater acknowledgement of expert witnesses. A Polish case (Judgement of the Supreme Court of 2 March 2017) stated that, whenever extra-judicial knowledge is required, even if a judge has specialist knowledge, they remain obliged to instruct an expert. In that case, the Supreme Court held that the lower courts had violated their obligation to consider expert opinions.

The political situations in Syria, Afghanistan and Iraq resulted in a European refugee crisis in 2015. While many refugees returned home after the crisis eased, a number applied for asylum in Europe. The law on international protection requires that judges assess the credibility of the asylum seeker's narrative to grant refugee status and asylum. The expert's testimony is decisive in many cases. Judges usually respect the first-hand and historical experiences they possess and may cite them in their decisions (see also Holden, Chapter 20 and Campbell, Chapter 12 in this volume). However, a conflict of obligations may arise: an anthropologist may be required to identify sources, provide observation notes and records of conversations and disclose information that according to their professional code should remain confidential. Without such evidence, their opinion is considered unreliable and refusal to provide such evidence is contempt of court and could result in fines or prison. Cultural experts have also been criticised for being advocates for a particular party in a dispute (see *AAW v. The Secretary of State for the Home Department* 2015; see also Campbell, Chapter 12 in this volume).

The Australian case concerning the project to build a bridge to Hindmarsh Island which would impact a site of Aboriginal heritage shows the intersectional stakes at play in cultural expertise. In response to the Ngarrindjeri tribe's opposition to the bridge, anthropologist Deane Fergie was commissioned to produce an evaluation. Her report provided new evidence that the island held sacred significance, particularly for secret women's knowledge, and included appendices that were to be read by women only. As a result of the evidence, a 25-year ban on construction was imposed. However, the ban was overturned by the Federal Court and a subsequent Royal Commission questioned Fergie's methodology and interpretation and found the women's business to be a fabrication to prevent the bridge's construction. Despite further legal challenges, the bridge was completed in 2001; however, during parliamentary debates, the Royal Commission and the court challenges, it became apparent that Fergie's directions had been disregarded and the confidential information had been read by men. This case highlights the potential loss of control of data in court and the fact that confidentiality of sensitive information cannot be guaranteed once part of judicial evidence. Fergie was criticised by the academic community for her lack of competence (Tonkinson 1997, 6; Merlan 2001), but Holden (2019) identifies power and gender inequalities within academia as additional variables that are often overlooked in the assessment of evidence in court.

In 2015, Dutch anthropologist Martijn De Koning was appointed as an expert witness, owing to his expertise on Salafism, in a terrorism trial, known as the Context case (ECLI:NL:RBDHA:2015:16102). De Koning had had close contact with some of the accused for a significant period and could provide details about them and their ideas. De Koning wrote an extensive report for the trial and was cross-examined. The court considered De Koning an exceptionally valuable witness and used his evidence to reach a guilty verdict against six defendants, despite his opinion being that they were not guilty of inciting terrorism and that, instead, their provocative speech was a form of dialogue, not to be taken literally. Legal decisions are made by judges, but this example demonstrates how the expert's evidence influences a research subject's future. Because his knowledge was gained through spending time with the accused and building trust, the public prosecutor felt De Koning to be an apologist and in the decision, the point was made that he was not an expert in law and his opinion regarding the outcome, as opposed to his evidence, was of "limited significance". De Koning felt his scholarship had been used in a process of categorisation and closure (Wiersinga 2022; De Koning 2022).

Providing expertise in court raises ethical concerns as to the boundary between expertise and advocacy. The mainstream position (see Trigger, Chapter 21 in this volume) is that there should be a separation, but reflexive critical anthropology argues there is a need to deploy anthropological methods to redress the structural power imbalance inherent to the legal system (see Campbell, Chapter 12 in this volume). Holden (2022) proposes the position of critical affirmation in which "procedural neutrality, in the context of cultural expertise in court, refers to

the capacity of anthropologists to carve out a place for themselves in the legal process, including also the claims for Indigenous expertise and the denunciation of structural inequalities".

The Government – Anthropologists' Considerations in Developing Policy

This case study considers dilemmas faced by anthropologists working as government consultants. Australian Aboriginal land rights law requires that Aboriginal groups prove a historical relationship to the land. Native title claims are managed by the attorney-general's department – which engages anthropologists, in full-time employment and contractually on shorter assignments, using their research as a basis for policy decisions. State and territory governments in Australia also employ anthropologists to collect data, explain culture and prepare reports. Ethical dilemmas have arisen for anthropologists doing work on behalf of governments which include the power relationship between the government and Aboriginal people, time constraints for conducting research, obligations of an employee to an employer, as well as the future use of their research and the risk of potential harm.

Awareness of the historical power inequality between initially the British and later the state and Commonwealth governments and the Aboriginal community is essential for anthropologists conducting fieldwork on behalf of the government, as is the role of the government in providing welfare and other benefits to these communities. This imbalance affects data, how they ought to be collected and collated, the value of historical data and records, and the willingness of participants, depending on their past experiences and the research practices of earlier government representatives.

The government appoints anthropologists to prepare for negotiations, reply to cultural experts retained by the applicants and assist in the development of issues for cross-examination if the claim is contested (Palmer 2007). Government anthropologists also facilitate the negotiation of voluntary binding agreements concerning land use, including access to land, and the relationship between native title rights and the rights of others such as miners.

Participant observation or full immersion in a culture to understand its nuances, social relationships and structures has been considered a necessity of professional anthropology, but this is not always possible for government-contracted experts.

> Such extended periods of fieldwork are unlikely to be practical in the context of a native title inquiry. Not only are applications increasingly subject to court orders seeking to expedite matters that, in some cases, have been a decade or more in the preparation, but funding constraints are unlikely to support such a relatively expensive process.
>
> *(Palmer 2011, 6)*

When acting as the respondent in native title claims, sometimes no fieldwork is undertaken, and anthropologists are expected to rely on previous experiences or related fieldwork to save time and money. This may cause a dilemma regarding competence and consent, in consideration of the changed purpose for which the research is being used. Brief and formulaic reports are required, often with input from, or co-authored with, government lawyers (as recommended by Judge Lindgren in *Harrington Smith obo Wongatha People v. State of Western Australia* [no 7]), which only represent a glimpse, in terms of the complexity of a culture, its history and ethnography. Anthropologists may feel professionally compromised if unable to fully represent the society studied, and instead are required to choose, or are instructed by their governmental employer, which aspects of their research to prioritise or highlight.

Fundamental to academic scholarship is its independence from external or third-party interests. Fieldwork conducted on behalf of the government inevitably raises the question of whether, and to what extent, independence is compromised. Not only is the anthropologist required to gather data for one specific purpose, but the way the data are subsequently handled may prove problematic. Anthropologists who have spent significant time working within a community become well-known within it, and mutual trust often develops. The ethical issue that arises is whether this trust is betrayed if the anthropologists subsequently use the data as evidence in court.

Anthropologists employed by the government for native title research are required to assess the work of other anthropologists acting on behalf of the claimant groups, regarding methodology, procedures, interpretation and conclusions. This potentially causes a violation of confidentiality, which attracts the question of whether in doing so, anthropologists violate their professional ethical code.

Since land title claims require sovereignty to be established by the claimant group, government-contracted anthropologists are sometimes requested to provide expert views on Indigenous society at the time of early white settlement. Historical ethnographic accounts of traditional customs are used. The consideration is whether it is ethical to provide meaning to an earlier interpretation, made by a non-expert within a historical context characterised by violence and discrimination, and on data presumably obtained without informed consent. The points of concern are the methodology used to acquire the historical knowledge, the power imbalance between the parties, the validity of the data, and their subsequent use and ownership.

Additional considerations relate to communicating the results of research to the community, confidentiality of the sources and cultural sensitivities regarding, for example, deceased kin or gender-specific knowledge. A final issue is the ownership of research and field notes and what future use of the research may be permitted. Reports and research may be published and retained by the government and issues of consent and copyright should be carefully considered. Reports prepared by anthropologists are used as part of the government programme for

land conservation and Indigenous land management schemes, which include mining rights, tourism and other non-traditional land use. Anthropologists' ethical considerations must include how they are affecting the culture studied.

The Military – Anthropologists in the Global War on Terror

Military confrontations since the early 19th century have involved anthropologists. The recent military deployment of anthropologists gathering information as part of the US War on Terror has given rise to the most significant debate on ethics for a generation, since it goes to the core of how anthropology is defined and its *raison d'être*. The concerns that arise include whether the use of anthropological research for partisan purposes is appropriate, whether collecting information during conflict is ethical, whether the work is done honestly, not secretly, and whether reports and the research are available openly, including to the research participants.

The Human Terrain System (HTS) programme was developed in response to the recognition of a deficit of socio-cultural expertise in the senior ranks of the US military, post-9/11. It launched in 2006 and deployed social scientists to Iraq and Afghanistan, in groups called Human Terrain Teams (HTT), to exercise professional skills and knowledge in collecting socio-cultural data during the conflict for the benefit of the military commanders. The programme's aim was to create effective strategies and tactics and to minimise casualties and misunderstandings.

There may be legitimate reasons for providing anthropological skills to the military but at what cost to professional ethics and potential harm to research participants? The priorities of the HTS programme were those of the military commanders, so inevitably there was a loss of independent perspective – yet objectivity and independent perspective are vital to anthropology's value.

Undertaking work for any military programme places anthropologists in an irreconcilable situation, ethically, because their duty to the professional discipline is consumed by the national interest. Salaried soldiers are required to swear an oath of allegiance to their country that supersedes all others, but the anthropologists employed by the HTS programme remain contracted civilians. Anthropologists on a military assignment need to remain aware of the influence that their employer will retain in terms of instructions, demands, expectations, ownership, and control of research. The anthropologist must consider the competing allegiances to one's employer and the people who may comprise the community of research. Military and academic anthropological values and goals are different. The aim of military activity is national security, gaining an advantage and winning wars, and this may conflict with the view that the people and cultures should exist outside and beyond international politics or national boundaries. "You are trying to be loyal to two communities – your subjects, and to the brigade you are attached to. It puts you in an impossible situation", claimed a civilian anthropologist working within the military (Shay 2009).

Other considerations include the fact that being allied to US military personnel can eradicate the trust gained over decades and the community of research may refuse to cooperate with any anthropological researchers in the future. Critics of the use of anthropologists as part of the HTS focus on the primary rule of not doing harm to the research participants. The question is whether it is appropriate to provide cultural expertise regarding a group of people, in a context where that knowledge might ultimately be used to subjugate or kill those same people, as happened in Iraq. Given that several of the HTT were killed whilst on assignment, personal risk should also be considered prior to undertaking military work.

Questions were raised about whether ethnographic investigations conducted during military conflicts were not only inappropriate but also violated professional responsibilities concerning methodology, such as ensuring that the true, informed consent of the people studied was obtained, as a considerable amount of investigation and data collection was reportedly conducted clandestinely.

Further, anthropological knowledge has been used in developing interrogation strategies focusing on cultural sensitivities – as used in US military prisons (Lucas 2009; Hersh 2004). The reality is that once sensitive social-cultural data and knowledge are passed to the military hierarchy, they are beyond the control of anthropologists, who are powerless to ensure appropriate use or correct interpretation. Since the information collected by the anthropologist is used to make tactical decisions or even extract further information, there is an unavoidable separation between the collection and the use of data. Cultural modelling takes place, which likely assumes certainty and reduces "culture to classifiable, comparable and equivalent traits in ways radically distinct from any meaningful context of culture for its members" (Albro 2010, 23). In these cases, it is evident that the engagement of anthropologists and the use of anthropological knowledge is unethical and must be discouraged.

The AAA issued a statement indicating that the use of anthropologists in the conflicts in Iraq and Afghanistan violated its Code of Ethics and that the HTS programme was not a legitimate use of anthropology. Participants were criticised by their peers. The HTS programme was dropped in 2014; however, anthropologists continue to be used in African programmes of the US and other NATO countries. The additional threat such programmes create is that any anthropologist is suspected of being a spy and all anthropological fieldwork risks being undermined in the absence of mutual trust. The issue of the military application of anthropology continues to be a hot topic. Sluka and González argue it is a backward step for the profession (Sluka 2010; González 2009).

Conclusion

Anthropological ethics are centred on the do not harm principle and professional anthropologists must respect this fundamental principle. Professional codes of ethics can assist in decision-making when applying cultural expertise to a variety of situations outside academia.

Further Reading

Caplan, Pat. 2003. *The Ethics of Anthropology: Debates and Dilemmas*. London: Routledge.
A series of papers and case studies demonstrating how ethics are at the heart of anthropology.

Fluehr-Lobban, Carolyn, ed. 2003. *Ethics and the Profession of Anthropology: Dialogues for Ethically Conscious Practice*. 2nd ed. Walnut Creek, CA; Oxford: Altamira Press.
A historic overview of issues and principles, including the AAA's code.

Stewart, Pamela J., and Andrew Strathern, eds. 2005. *Anthropology and Consultancy: Issues and Debates*. New York; Oxford: Berghahn.
First-hand experiences of the dilemmas when practising anthropology outside of academic settings.

The codes of ethics of anthropological associations are worth reading for an overview of the requirements of professional applied anthropology.

American Anthropological Association. "Principles of Professional Responsibility". Accessed February 19, 2023. https://www.americananthro.org/LearnAndTeach/Content.aspx?ItemNumber=22869
Association of Social Anthropologists of Aotearoa/New Zealand. "Code of Ethics". Accessed February 19, 2023. https://www.asaanz.org/code-of-ethics
Association of Social Anthropologists of the UK and Commonwealth. "The ASA Ethical Guidelines 2021". Accessed February 19, 2023. https://www.theasa.org/ethics/
Australian Anthropological Society. "AAS Code of Ethics". Accessed February 19, 2023. https://www.aas.asn.au/content.aspx?page_id=22&club_id=143481&module_id=395252
Dutch Anthropological Association. "Ethical Guidelines". Accessed February 19, 2023. https://antropologen.nl/ethical-guidelines/

Q&A

1. What is the rationale for a professional code for anthropologists? What are the ethical challenges for anthropologists providing cultural expertise?

Key: Students should outline the history of ethics in anthropology and the foreseeable ethical challenges in providing cultural expertise, including that they can be subpoenaed.

2. Is there, or should there be, a universal professional deontology for anthropologists? If so, what are the most important ethical considerations for doing anthropology today?

Key: Anthropologists do not need to subscribe to an institutional professional body and are not obliged to take an oath regarding professional conduct. Various ethical codes exist, and professional associations provide directions for conduct. Students should identify these bodies and the main ethical principles of anthropology.

3. What are the risks when anthropologists apply their knowledge beyond academia? Are anthropologists inappropriately used to justify policies and legal decisions?

Key: Students should consider the appointment of anthropologists in arenas such as courtrooms, defence and other government departments and what ethical concerns arise that need careful decision-making.

References

AAA – American Anthropological Association. 1998. "Code of Ethics of the American Anthropological Association." Accessed February 19, 2023. https://s3.amazonaws.com/rdcms-aaa/files/production/public/FileDownloads/pdfs/issues/policy-advocacy/upload/ethicscode.pdf.

Albro, Robert. 2010. "Anthropology and the Military: AFRICOM, Culture and Future of Human Terrain Analysis." *Anthropology Today* 26, no. 1: 22–4.

Asad, Talal, ed. 1973. *Anthropology and the Colonial Encounter*. London: Ithaca Press.

Berreman, Gerald. 2003. "Ethics versus 'Realism' in Anthropology: Redux." In *Ethics and the Profession of Anthropology, Dialogues for Ethically Conscious Practice*, edited by Carolyn Fluehr-Lobban, 2nd ed., 51–84. Walnut Creek, CA; Oxford: Altamira.

Campbell, John R. 2010. "The 'Problem' of Ethics in Contemporary Anthropological Research." *Anthropology Matters Journal* 12, no. 1: 1–17.

De Koning, Martijn. 2022. "An Anthropologist in Court and Out of Place: A Rejoinder to Wiersinga." *NAVEIÑ REET: Nordic Journal of Law and Social Research* 11: 169–88.

Fabian, Johannes. 1983. *Time and the Other: How Anthropology Makes Its Object*. New York: Columbia University Press.

Fluehr-Lobban, Carolyn, ed. 2003. *Ethics and the Profession of Anthropology: Dialogue for Ethically Conscious Practice*. 2nd ed. Walnut Creek, CA; Oxford: Altamira Press.

———. 2013. *Ethics and Anthropology: Ideas and Practice*. Lanham, MD: AltaMira Press.

González, Roberto. 2009. "Embedded." In *Counter-Counterinsurgency Manual: Or, Notes on Demilitarizing American Society*, edited by Network of Concerned Anthropologists, Catherine Lowe Besteman et al., 97–113. Chicago, IL: Prickly Paradigm Press.

Hersh, Seymour. 2004. "The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib." *The New Yorker*, May 16.

Holden, Livia. 2019. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

———. 2022. "Anthropology and Colonialism: What Can We Learn for the Use of Cultural Expertise Today?" *Law & Social Inquiry* 47, no. 2: 669–90.

Lucas, George R. 2009. *Anthropologists in Arms: The Ethics of Military Anthropology*. Lanham, MD: AltaMira Press.

Merlan, Francesca. 2001. "An Assessment of von Doussa on Anthropology." Panel discussion held Australian National University, October 31, 2001, Centre for Aboriginal Economic Policy Research.

Palmer, Kingsley. 2007. "Anthropology and Applications for the Recognition of Native Title." *Land, Rights, Laws* 3, no. 7: 1–17.

———. 2011. "Anthropologist as Expert in Native Title Cases in Australia." *AIATSIS: Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit*: 1–16.

Shay, Christopher. 2009. "Should Anthropologists Go to War?" *Time*, December 13. https://content.time.com/time/nation/article/0,8599,1947095,00.html

Shore, Chris. 1999. "Comment on Pels." *Current Anthropology*, 40, no. 2: 123–4.

Sluka, Jeffrey A. 2010. "Curiouser and Curiouser: Montgomery McFate's Strange Interpretation of the Relationship between Anthropology and Counterinsurgency." *PoLAR: Political and Legal Anthropology Review* 33, no. S1: 99–115.

Tonkinson, Robert. 1997. "Anthropology and Aboriginal Tradition: The Hindmarsh Island Bridge Affair and the Politics of Interpretation." *Oceania* 68, no. 1: 1–26.

Wiersinga, Hermine. 2022. "The Judge and the Anthropologist: Cultural Expertise in Dutch Courts." *NAVEIÑ REET: Nordic Journal of Law and Social Research* 11: 151–68.

Cases Cited

AAW v. The Secretary of State for the Home Department, [2015] UKUT 673 (IAT), Upper Tribunal Immigration and Asylum Chamber.

ECLI:NL:RBDHA:2015:16102 [2015], District Court of the Hague.

Harrington Smith obo Wongatha People v. State of Western Australia (no 7), 130 FCR 424 [2003], Federal Court of Australia.

The Judgement of the Supreme Court of 2 March 2017, II KK 358/16 [2017], Supreme Court of Poland 2017.

3

CULTURAL EXPERTISE AS DECOLONIZATION

Rama Srinivasan

LEARNING OBJECTIVES

This chapter discusses decolonization, its theory and praxis, and outlines the role of cultural expertise as an effective instrument for the dismantling of inequitable colonial structures. After reading this chapter you will have learnt about: (1) the main intellectual traditions that have shaped the field of "decoloniality", including the concurrent trend of postcolonial studies, and (2) ways in which cultural expertise can build on the conceptual strengths of decoloniality without inheriting its shortcomings.

Introduction

Decolonization represents a conceptual shift in analysing the late 20th-century world and persistent global inequalities where scholars argued that the liberation of formerly colonized nation-states was incomplete since the ideas and structures that defined the terms of subjugation had persisted through years of ostensible self-rule. Aditya Nigam (2020, 3) envisages decolonizing theory as affording people from non-European milieus a range of strategies to think about the present independently, that is, without borrowing framing concepts from the West.

According to Walter Mignolo, decoloniality started as a counterpoint to the rationality/modernity discourse and its salvationist rhetoric. This moral purpose, that of assuming responsibility for the salvation and progress of the colonized subject, stays concealed as a latent energy even after liberation from imperial rule

DOI: 10.4324/9781003167075-5

and, as Mignolo (2011, 46) argues, produces discontent and distrust among the formerly subjugated population. The discourses that today typically represent anti-Western, anti-Euro/American and anti–white hegemony movements can be traced, in large part, to the writings of Fanon (1967, 2002). According to Mignolo (2011), Fanon brought into focus the moral logic of coloniality that continues to pervade global societies: the path of modernity, upon which the former colonizers had ostensibly set their subjects.

Decolonization advocates for a delinking from the epistemological traditions of the West but takes on different forms in settler and non-settler colonies. In both North and South America, where imperial rules of European colonizers had ended, most nation-states continued to be governed by people of European descent, with laws that were not representative of Indigenous societies or their aspirations. Historically, the legal protections afforded to First Nations were unevenly implemented and often disregarded in actual practice. Decolonization movements in this region have, consequently, taken on the form of struggles for sovereignty and self-rule for the Indigenous communities. In African and Asian countries that are today ruled by members of the former subject peoples, decoloniality involves reclaiming local knowledge and collective memory displaced by colonial rule. Calls for decolonization have also inspired diaspora communities and ethnic minorities in Europe, who are pressing the states to acknowledge the colonial history of atrocities and dismantle colonial symbols and epistemologies.

This chapter will provide an overview of the intellectual traditions that have shaped the field of decoloniality and propose ways in which cultural expertise can build on the former's conceptual strengths. Through examples from both former colonies and Europe, I will illustrate how cultural experts can assist in dismantling colonial structures. The first example deals with legal interventions launched to bring about the repeal of Victorian laws on homosexuality in former colonies, while the second examines the potential of recent campaigns against colonial symbols in the West.

Theory and Concepts

Decoloniality emerged as a theoretical field in the 1980s, although, according to Mignolo (2011, 45–47), strands of decolonial thinking were also espoused by writers like Ottobah Cugoano and Wamán Poma de Ayala, from the 17th and 18th centuries respectively. These writers were not just anti-colonial thinkers, they also challenged colonialism's moral core, that is, European modernity and rational thought. In their attempts to prioritize experience and memory over a rational scientific approach, both disrupted the modernity narrative and offered alternative strategies to speak about the brutality of colonization and slavery (Mignolo 2011, 46–47). Mignolo calls this a form of epistemic disobedience; that is, a refusal to adopt the norms of discursive engagement enforced by the "modern" imperialists.

The Language of Colonialism

The 1980s saw a turn towards post-structuralism in the social sciences that French critical theorists such as Michel Foucault – especially with *The History of Sexuality* from the 1970s (Foucault 1990) – and Jacques Derrida – starting with his 1966 lecture, "Structure, Sign, and Play in the Discourse of the Human Sciences" (Derrida 1978) – had popularized. Foucault sought to reorient attention towards body politics and power – the idea that our bodies are moulded and instrumentalized by political and economic structures. Inspired by Derrida, the deconstruction of literary works – which could be described as a process that opens a foundational concept up for different interpretations – also became an influential lens through which to examine imperialism and the postcolonial state (for more background on post-structuralism, see Harcourt 2007; Harrison 2006, 126–130).

In former colonies, deconstructionist studies exposed how structures of colonial control determined and controlled modes of thought and expression in ostensibly liberated societies. In *Can the Subaltern Speak?*, Gayatri Spivak (2006) highlighted how our very ways of knowing and articulation are determined and restricted by the colonial experience. Spivak expressed scepticism as to whether precolonial epistemes could ever be recovered or reclaimed.

Ngũgĩ wa Thiong'o (1986), a Kenyan novelist, appeared to suggest that it was possible to reclaim knowledge when he argued that the African people should represent their stories and perceptions of the world beyond in the language that correlates to the local natural and social environment. According to Thiong'o, language is a tool of colonial alienation, that is, "an active (or passive) distancing of oneself from the reality around, and an active (or passive) identification with that which is most external to one's environment" (Thiong'o 1986, 28).

These ideas have now permeated discourses beyond critical literary studies where the emphasis is on the verb, decolonizing, rather than on the noun. Decolonizing is not reconfiguring; from the context of Australia, Blagg and Anthony (2019, 325–326) advocate for sovereignty, that is, for land and a place where Indigenous communities, unencumbered by white racism, can finally heal.

"We Have Never Been Modern"

In terms of theoretical models, decolonization can also benefit from an engagement with studies that examine western self-perceptions since works such as the one just quoted are premised on a rejection of western ideas. As Edward Said argued (2004), not only did the Orient learn to perceive self negatively through the lens of European colonists, but the Occident also evolved their identity and what are today perceived as origins of European modernity through colonial encounters.

Bruno Latour (1993b) has argued that the division between the natural versus the social world, with science pertaining to nature, formed the basis for distinguishing modern and pre-modern civilizations but was always a flawed concept. Nature and society do not exist in mutually exclusive worlds and, according to him, Europe was never really modern in the sense that has been understood so far (Latour 1993a).

In a 2018 *New York Times* interview, Latour explained that he and his colleagues were able to mount a confident critique on modernity and scientific reason because of a belief in the authority of science (Kofman 2018). "Even this notion of a common world we didn't have to articulate, because it was obvious. Now we have people who no longer share the idea that there is a common world. And that of course changes everything", he mused.

An important lesson from the writing and reception of scholarship on post-structural and post-modern thought has been this recurrent problem of what to do with the universal – the common world. Once we have rejected the presumed universality of European thought, the task of rebuilding the infrastructure still remains.

As Nigam (2020, 31) has pointed out, any application of the theory of decolonization must contend with the reality that new vocabularies, concepts, categories of thought and frameworks emerge as part of long, sustained processes. Decolonization efforts require decisions on whether it will produce something relevant to the common world and humanity or whether it will be expressed through smaller, localized processes, as proposed by Thiong'o (1986). The challenge with the former will be the imposition of a universal model for decolonization, while the challenge with the latter will be an inward-looking model that could easily lead to insular and potentially exclusionary spaces.

Decolonization in Praxis

Chakrabarti and Weber (2015, 217) propose a philosophy without borders where the western traditions will be only one of many sources from which conceptual frameworks are derived: "Borderless thinkers have to be slow travellers who keep leaving and coming back home, even if they have multiple cultural and disciplinary homes".

Beyond doing the necessary work of critiquing colonialism, the uphill task of building a new vocabulary must follow. Those invested in the rebuilding of new humanity recognize the improbability of recovering and reclaiming the precolonial world. The search for a pure Indigenous voice, one uncontaminated by colonial rule, is a *cul-de-sac*, according to Nigam (2020, 4). This search, he holds, has "inevitably been tied to emergent nationalist pride in the colonized world", since its colonized status is so closely tied to forms of knowledge associated with the colonizer (Nigam 2020, 3). The question of minority rights, quite understandably, accompanies invocations of nationalist and cultural pride. Instituting cultural rights for minorities, Nigam (2020, 170) warns, comes with the danger

that a direct relationship between the individual and the state may no longer be possible. Any defence of cultural rights must, he argues, find a way to hold groups accountable in order to protect individuals.

This challenge is illustrated in a vivid ethnographic picture by Todd Eisenstadt (2006) who describes Indigenous sovereignty politics in Oaxaca, Mexico, where mayors are selected through an assembly of resident men. Describing a political event where women activists disrupted such an assembly, Eisenstadt highlights how Indigenous sovereignty politics can, on occasion, become a bastion of masculinist leadership, one that is nurtured by broader undemocratic tendencies.

Decolonization in praxis faces a complex social situation with multiple, oppressive power centres but the agents may still try to locate blame in colonial epistemes. Eve Tuck and Wayne Yang (2012, 3) underline the need to not use decolonization as a metaphor, as an "approximation of other forms of oppression". According to them, decolonization has often been superimposed on other social justice projects, where civil and human rights are swapped for symbolic decolonization. As a metaphor, decolonization theory assumes responsibility only for reinventing epistemes – for example, through reforms in education policy – and not for the structural inequality that has been at the heart of the colonial problem. In settler colonies, Tuck and Yang (2012, 7) hold that decolonization should also involve repatriation and a share in settler-appropriated wealth.

In its current form, use of the words "decolonize" and "decolonization" comes easy, especially in academia. As Nayantara Sheoran Appleton has pointed out in a 2019 blog post, "Do Not 'Decolonize' … If You Are Not Decolonizing", the term has become a buzzword, an exercise in rebranding scholarly profiles as well as the site of knowledge production and praxis. Calls to decolonize do not automatically remove the structural inequalities within academia and its application outside the ivory towers displays similar problems. Decolonization should be hard work and its application "should implicate and unsettle everyone" (Tuck and Yang 2012, 7).

As the case studies will highlight, the cultural expert will be required to delineate scholarly and scientific evidence and address the decolonial theory to the needs of the present. It should, ideally, be concerned with rebuilding the infrastructure required to foster a new humanity, a common world without blinkers. Cultural expertise cannot afford to take sides – and I argue that it cannot even take the side of the formerly colonized since this group is diverse and interested parties are often pitted against each other. Experts must adopt what Holden (2020, 45–46) terms procedural neutrality when they grapple with certain conceptual and practical challenges which the next section will briefly outline.

Cultural Expertise as Applied Anthropology

As Holden (2019, 184) discusses, there has been a scholarly pushback against cultural determinism and the very idea that an objective account of culture is possible. Rosen (2020) and Bouayad (2019) have discussed how the efforts of experts

to present a given culture as cohesive can have a negative impact on cases involving First Nations' rights. With reference to the Mashpee Indians' legal claims on ancestral lands, Rosen problematizes the decision by experts who appeared for both sides to argue on the perpetuation of tribal ways and structures. His own approach to defining tribal identity, he claims, would have been the following (Rosen 2020, 139):

> Their momentary form is not what characterizes them as a type of socio-political entity, but rather reflects their capacity for shape-shifting, their ability to respond to changing conditions through processes that are distinctive to them. These processes include the constant division of powers so that too much power does not remain in too few hands for too long a period of time … the emphasis on the moral equivalence among members, the application of situational ethics, and the constant experimentation with others' customs through intermarriage, multilingualism, and maintaining a home base that is not territorially exclusive.

Bouayad, on the other hand, outlines how cultural experts have been collaborators who have assisted First Nations in preparing legal claims despite experiencing failures, at times, in their role as expert witnesses in the courtroom. Bouayad (2019, 19) points out that, where such expert evidence has been accepted, successive generations have had to deal with essentialist narratives created for these legal claims.

Cultural expertise as an instrument of decolonization must contend with an ethical dilemma of perceived or explicit bias, reductionist tendencies and the failure of lawsuits when an expert report is presented with nuance as proposed by Rosen (2020, 139). The two case studies reflect the challenge of balancing nuance with the demands of ethical engagement. They also hold potential lessons for the use of cultural expertise in future campaigns for decolonization.

CONCEPTUAL CHALLENGES FOR THE APPLICATION OF DECOLONIZATION THEORY

Any application of decolonization theory must contend with three conceptual challenges:

- Decolonizing moves must be as diverse as colonies and metropoles themselves were.
- Rejection of modernity which, through its flawed logic, oppressed colonized populations does not necessarily imply a rejection of the common world or the non-existence of science.
- There are multiple centres of power and sources of inequality. Colonization and the epistemology it imposed are but one of them.

Case Studies

Case Study 1: Sodomy Laws

Sodomy laws were instituted in British colonies with a view to punish sexual acts that were deemed against the so-called order of nature. According to Jyoti Puri (2016), the Sodomy Law or Section 377 Indian Criminal Code stigmatized sexuality and, consequently, the body of the colonized subject. She argues that this colonial law created racialized subjectivities through its control over sexual norms but only partially erased histories of eroticism and desire even as it simultaneously fostered bourgeois ideals of sexual normalcy and propriety. Sodomy laws are a striking example of how laws are closely informed by and, in turn, mould culture.

Removal of this debilitating stigma was at the heart of the 2018 judgement by the Supreme Court of India which decriminalized homosexuality through a "reading down" of the sodomy law. *Navtej Singh Johar & Others v. the Union of India* is a striking example of the conscientious use of cultural expertise. The judgement (pp. 70–73) deals specifically with the colonial history of the Indian Penal Code (IPC), but decolonization is not the main intent here. Rather, it provides a context to the law as well as its reading. It does not replace the framework of rights but runs parallel to it. An opportunity to meaningfully delink from colonial forms of oppression is afforded by the process itself.

The judgement largely concerns itself with two main questions: sexual autonomy and identity, on the one hand, and constitutional morality, on the other. On both questions, the judgement delves into expert evidence from previous legal proceedings in the United Kingdom and other countries with common law legal systems – Canada, the United States, South Africa, Trinidad and Tobago and Australia – to determine the feasibility of expanding Article 21, that is, the fundamental right to life and liberty as well as freedom from discrimination based on sex under Article 15. Evidence from European countries and agencies such as the United Nations and the European Court of Human Rights and the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity were considered, along with the expert opinion of the Indian Psychiatric Society.

The IPC itself had far-reaching influences on several nation-states that are still grappling with them. Penal codes similar to the IPC were introduced in Tanzania in 1867, Singapore, Malaysia and Brunei in 1871, Sri Lanka in 1885, Myanmar in 1886 and Kenya in 1897. The movements to secure LGBTQIA+ rights in former colonies have seen mixed results. Settler colonies like Canada and the United States have introduced changes without acknowledging the law's colonial past, while South Africa and Trinidad and Tobago have offered models that former colonies can adopt.

In 2019, the *Navtej Johar* judgement was enthusiastically used by petitioners in Kenya who argued that the sodomy laws in the two countries as well as their historical origins are similar. Although the petitioners in Kenya made a more direct case against the colonial origins of the law (see pp. 17, 21 of the judgement), the court ultimately ruled that the criminalization of homosexuality was in line with its "robust, patriotic and indigenous jurisprudence" (see p. 29).

Case Study 2: Colonial Symbols

In terms of epistemic disobedience, symbols are the most persuasive hooks for anti-colonial protests. In recent times, cultural artefacts such as statues have become a key site for mobilization in former and settler colonies. In the United States, there are petitions to remove statues of early colonizers such as Columbus as well as Confederate leaders who fought for the right of white men to own slaves.

The Black Lives Matter (BLM) protests started as a movement to address racial inequalities and persistent human rights violations in the United States but, as they spread to Europe, they took on some of the objectives of decolonial movements. These can be attributed to the existing challenges in European countries of securing the rights of ethnic minorities and the states' own reluctance in acknowledging their brutal colonial histories.

This has been particularly clear in the case of Cecil Rhodes's statues at Oriel College, Oxford University, and the University of Cape Town (UCT) (Figure 3.1). As Knudsen and Andersen (2019, 253) argue, the statues were not relics from the past but were added later as "political tools in a struggle over race, economy, socio-political formations and cultural affirmation". The campaign presented very different challenges in South Africa and the United Kingdom and highlighted many themes discussed in the previous sections. Knudsen and Andersen find that the campaign was a forum for debate at Oxford, while at UCT it was a space of political mobilization for practical actions. The language and aims of the Oxford campaign did not, the writers argue, "include themes such as policy brutality, university outsourcing and uneven access to

FIGURE 3.1 The Rhodes Statue on the University of Cape Town campus was removed on 9 April 2015. Credit: "#RMF Statue Removal 32" by Desmonkey is marked with CC BY-SA 2.0.

basic utilities" (Knudsen and Andersen 2019, 254). On the other hand, while the UCT campaign was successful in its goal of removing the statue, according to Knudsen and Anderson (2019), it exposed exclusionary tendencies in refusing to recognize transgender activists and in inadequately responding to complaints of sexual harassment within the campaign.

The South African example highlights the enduring need to address other sites of oppression that cannot be merged with the goals of decolonization. The Oxford example, in turn, illustrates Appleton's critique on decolonizing academia while remaining oblivious to the structures that support inequalities.

Oxford University closed its review in 2016, reportedly due to the influence of patrons and alumni who looked up to Rhodes as a symbol of British adventurism and enterprise. In 2020, after the BLM movement reached its campus, the Oriel College board took a decision to eventually remove the statue in a move that unsettles and implicates everyone – as Tuck and Yang (2012) argued decolonization should. This decision on the proposed removal was subsequently overturned.

Conclusion

The disruption caused by the BLM protests in Europe, during which statues of King Leopold II in Belgium and of Edward Colston in England were pulled down, is an opportunity to address structural inequalities engendered by colonialism and the societal inequalities that immigrants from former colonies and ethnic minorities face within European states as well as in settler colonies. Through the public discourse these spectacles generate, they can support and further legal and political battles that broadly fall under the label of decolonization.

Cultural experts are already assisting in making the claims of Indigenous groups legible to the state in settler colonies, but scholarly warnings against essentializing groups must be incorporated into the methodology. Cultural experts, including historians and anthropologists, can support efforts to strengthen sovereignty claims amongst First Nations; in the conversation around slavery and anti-Black racism; and in developing a case for repatriation. Academics are actively encouraging each other to move away from Eurocentric modes of knowledge production, but cultural experts still need to develop legal and political strategies that can push states towards acknowledging and apologizing for the history of colonial atrocities, including genocides, and facilitate the repatriation of stolen goods (see Cuno 2011). Finally, in the case of former colonies, colonial laws and the accompanying ideas of criminality need to be addressed without losing sight of postcolonial hierarchies and the protection individuals need within communities as well as in their relationship with the state.

Further Reading

Bouayad, Aurelien. 2019. "The Cactus and the Anthropologist: The Evolution of Cultural Expertise on the Entheogenic Use of Peyote in the United States." *Laws* 8, no. 2: 12.

Through the themes discussed in this paper, students will be able to identify how cultural expertise was used in different lawsuits for the protection of religious and cultural rights of Native Americans as well as the problems that decolonization efforts can pose in praxis.

Knudsen, Britta Timm, and Casper Andersen. 2019. "Affective Politics and Colonial Heritage, Rhodes Must Fall at UCT and Oxford." *International Journal of Heritage Studies: IJHS* 25, no. 3: 239–58.

Rhodes Must Fall is a movement that originated in South Africa and travelled to the United Kingdom as a protest against symbols of colonial oppression and excesses in both the colony and at home. This paper provides insights into the dialogue generated by such protests as vital ideological support to the processes and legal struggles initiated to decolonize academic institutions.

Q&A

1. In *Navtej Singh Johar & Others v. Union of India* and *EG v. Attorney General of Kenya*, which arguments did the petitioners use to highlight the colonial history of the sodomy law and the reforms in the UK and its former colonies?

Key: The petitioners discuss the historical background behind the institution of sodomy laws by British colonial governments as well as the developments in the UK, the US, Canada and other countries with common law rules in this regard.

2. How are the movements for sexual and land rights connected to those against symbols of colonial oppression such as the Rhodes Must Fall campaign? In what ways are they different? How can a cultural expert combine these in their applied work?

Key: All these movements trace the roots of contemporary inequalities in the colonial past. They challenge the hierarchies established through control over knowledge production and authority on subjects that relate to formerly colonized populations. Cultural experts who work towards decolonization must present how colonial oppression worked and continues to work through the power of both symbols and state law.

3. How can cultural expertise serve as an instrument of decolonization? Support your argument through a case study of your choice from a former colonizer (a European country), a settler colony or a postcolonial state.

Key: Decolonization implies dislodging the moral authority of European knowledge production and sourcing concepts from divergent sites and sources. Your example should reflect a utilization of alternative knowledge frameworks to address structural inequalities introduced by colonization.

References

Appleton, Nayantara Sheoran. 2019. "Do Not 'Decolonize'… If You Are Not Decolonizing: Progressive Language and Planning Beyond a Hollow Academic Rebranding." *Critical Ethnic Studies*, February 4.

Blagg, Harry, and Thalia Anthony. 2019. *Decolonising Criminology: Imagining Justice in a Postcolonial World*. London: Palgrave Macmillan.

Bouayad, Aurelien. 2019. "The Cactus and the Anthropologist: The Evolution of Cultural Expertise on the Entheogenic Use of Peyote in the United States." *Laws* 8, no. 2: 12.

Chakrabarti, Arindam, and Ralph Weber, eds. 2015. *Comparative Philosophy Without Borders*. London: Bloomsbury.

Cuno, James. 2011. *Who Owns Antiquity?: Museums and the Battle over Our Ancient Heritage*. Princeton, NJ: Princeton University Press.

Derrida, Jacques. 1978. *Writing and Difference*. Translated by Alan Bass. Chicago, IL: University of Chicago Press.

Eisenstadt, Todd A. 2006. "Elections by Customary Law in Oaxaca, Mexico: Expression of Cultural Rights or Violation of Democratic Electoral Norms?" *Center for Democracy and Election Management, Case Study* 1: 25.

Fanon, Frantz. 1967. *The Wretched of the Earth*. Harmondsworth: Penguin.

———. 2002. *Black Skin, White Masks*. London: Pluto.

Foucault, Michel. 1990. *The History of Sexuality*. Harmondsworth: Penguin.

Harcourt, Bernard E. 2007. "An Answer to the Question: 'What Is Poststructuralism?'" *University of Chicago Public Law Working Paper No. 156*: 1–31.

Harrison, Paul. 2006. "Poststructuralist Theories." In *Approaches to Human Geography: Philosophies, Theories, People and Practices*, edited by Stuart C. Aitken and Gill Valentine, 122–35. London: SAGE Publications Ltd.

Holden, Livia. 2019. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

———. 2020. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1: 29–46.

Knudsen, Britta Timm, and Casper Andersen. 2019. "Affective Politics and Colonial Heritage, Rhodes Must Fall at UCT and Oxford." *International Journal of Heritage Studies: IJHS* 25, no. 3: 239–58.

Kofman, Ava. 2018. "Bruno Latour, the Post-Truth Philosopher, Mounts a Defense of Science." *New York Times Magazine*, October 25.

Latour, Bruno. 1993a. *We Have Never Been Modern*. Translated by Catherine Porter. Cambridge, MA: Harvard University Press.

———. 1993b. *The Pasteurization of France*. Cambridge, MA: Harvard University Press.

Mignolo, Walter D. 2011. "Epistemic Disobedience and the Decolonial Option: A Manifesto." *Transmodernity* 1, no. 2: 44–66.

Nigam, Aditya. 2020. *Decolonization Theory: Thinking across Traditions*. New Delhi: Bloomsbury.

Puri, Jyoti. 2016. *Sexual States: Governance and the Struggle Over the Antisodomy Law in India*. Durham, NC: Duke University Press.

Rosen, Lawrence. 2020. "Expert Testimony in the Social Sciences: A Historical Overview of Contemporary Issues." *Law and History Review* 38, no. 1: 123–42.

Said, Edward W. 2004. *Orientalism*. New York: Vintage Books.

Spivak, Gayatri. 2006. "Can the Subaltern Speak?" In *The Post-colonial Studies Reader*, edited by Bill Ashcroft, Gareth Griffiths, and Helen Tiffin, 28–37. 2nd ed. London: Routledge.

Thiong'o, Ngũgĩ Wa. 1986. *Decolonising the Mind: The Politics of Language in African Literature*. London: James Currey.

Tuck, Eve, and K. Wayne Yang. 2012. "Decolonization is Not a Metaphor." *Decolonization: Indigeneity, Education & Society* 1, no. 1: 1–40.

Cases Cited

EG & 7 others v. Attorney General [2019], Petition No. 150 of 2016, High Court of Kenya at Nairobi.

Navtej Singh Johar v. Union of India [2018], Writ Petition (Criminal) No. 76 of 2016 (S Ct of India).

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

PART II

Debates and Boundaries of Cultural Expertise

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

4

CULTURAL EXPERTISE AND RACE

ChorSwang Ngin

LEARNING OBJECTIVES

After reading this chapter on race, you will be able to make a distinction between race, racism and racialization. You will understand how the taken-for-granted physical reality of race can be reconciled with a socially constructed idea of race. These concepts are explained through the application of the race concept in asylum courts in the United States; in community organizations confronted with conflicts in refugee and immigrant populations; and in racial profiling against African Americans in Southern California. The chapter proposes a collaboration between anthropology and law in asylum cases based on race. It also proposes community engagement in, and partnership with, civic organizations, churches and law enforcement to understand the impact of race-related issues. Cultural expertise on race and racism calls for an understanding of the history and experiences of people who are racialized through a new theoretical approach to racialization and higher education in ethnic studies.

Introduction

On 25 May 2020, George Floyd, a 46-year-old Black man, was killed in Minneapolis, Minnesota, during an arrest when police officer Derek Chauvin placed his knee on Floyd's neck. His murder triggered waves of activism in the US and elsewhere in the world in support of Black Lives Matter (BLM) and

DOI: 10.4324/9781003167075-7

against police brutality. The BLM movement called into question the legacy of slavery and the perpetuation of the slave trade. It spurred corporations to remove and rebrand racist images on their century-old products and brought to national attention a vocabulary that includes white supremacy, systemic racism and critical race theory.

At the same time as the protests against violence against African Americans, the US also saw a 145% increase in anti-Asian hate crimes in 16 of the country's largest cities (Center for the Study of Hate & Extremism CSUSB 2021), most shocking of which was the killing of eight Asians in a spa in Atlanta, Georgia, which led many to protest against anti-Asian hate and moved civic organizations to condemn the hatred.

These murderous incidents indicate that ideas of race and the deeply held view that there are differences between peoples across racialized categories continue to dominate life in the US. Anthropologists and other social scientists have long examined race as a social construct, noting that our visible phenotypic differences are only superficial. This constructivist view of no race versus the biological view of race presents a theoretical challenge. Does race matter? How can we understand race and racism in American society today? How is race/racism experienced differently by different individuals depending on the person's racialized and ethnicized position? What is the dynamic relationship between different understandings of the idea of race, and what are the implications for individuals whose everyday encounters with race are often complex, contradictory and elusive?

One way to address these questions is to look at the application of race in various legal and community settings. In the US, race is taken for granted as a given category. People in the United States are constantly asked to state their "race" or ethnicity in market surveys, on a visit to a doctor's office, when applying for a bank loan and for admission to a university. They are supposed to know what race they belong to.

Through the concept of cultural expertise in litigation (Holden 2011, 2019), I endeavour to explore this topic in my research as an anthropologist who works on asylum cases and in community organizations to help decision-making authorities who may not be familiar with cultural facts related to race and ethnicity.

Theories and Concepts of Race and Racism

Anthropology and the Biology of "Race"

There is a long history of the idea of "race". Humans vary biologically, but our visually observable features led early scientists to conclude that those who share similar phenotypical features must be closely related by common descent from a particular line of mankind. Slowly, race emerged to become a system of identification made famous by Caroli Linnaei's taxonomy *Systema Naturae* (1758) which extended his classification of plants and animals to include human populations

in four distinct human races. Each group is based on geography and physical features (skin colour) and linked with temperament, customs and habits (Buettner-Janusch 1966; Pfeiffer 1969).

In 1795, Johann Friedrich Blumenbach, a German professor of medicine and anthropology, expanded on the work of Caroli Linnaei and divided mankind into five races to reflect their physical appearance (Goodman, Moses, and Jones 2019, 30).

These ideas of "race" as the existence of biologically distinct groups, with a hierarchical ranking, are still relevant today. Although there are differences as to what groups exist around the world and how racism plays out, the legacy of these colonial constructs is evident in the cases I discuss in the following social interactions.

The Idea of Race Was Used to Justify Exploitation and Discrimination

In a book on racism, Ali Rattansi (2020) traced anti-Blackness from widespread white fears about "inter-racial" sexual liaisons to anxieties about economic competition which prompted "Black Codes" which prohibited Blacks from entry into certain industries. Laws enforced against African Americans included making them pay taxes but without the right to vote, serve on a jury or even appear as a witness in court. Some Southern states' "Jim Crow" systems segregated schools and provided for separate facilities in trains, buses, libraries, parks, swimming pools and other public amenities.

Recent scholarship taking a deeper look at slavery in the United States found that the concept of race played a direct role in the exploitation of enslaved people. Historian Robert Bernasconi contends that during the period of the Atlantic slave trade, the use of racial categories to frame human differences was already in circulation (Bernasconi 2009). With slavery providing a profit, it was easy for the slave traders to propagate an attitude that stigmatized some groups as inferior so that their exploitation could be justified. In other words, with economics being the real engine behind chattel slavery, a racialized hierarchy helped to justify the dehumanization and enslavement of Africans. After the abolition of slavery, the enactment of Jim Crow laws continued to benefit those who profited from the exploitation of African Americans (NMAAH&C 2020; Goodman, Moses, and Jones 2019; BBCFour 2009; Bernasconi 2009, 2017) and make race a category of exclusion, giving power to the meaning of race.

The explicit use of the idea of race to discriminate against African Americans continued after WWII in many ways, including the redlining of urban home ownership (California Newsreel 2003). After American soldiers returned home, the United States Housing Administration provided them with loans and easy credit for purchasing homes. However, racial considerations were built into the criteria for creditworthiness. White Americans were able to buy homes in the suburbs (designated as green zones) and the values of their homes

increased over time. The one million African American soldiers were denied the opportunities to purchase homes because housing and loan companies stigmatized them as not creditworthy, and there were fears that their presence would bring down home values. Without the opportunity of home ownership in the suburbs, as renters and living in redlined urban housing zones, most were unable to accumulate generational wealth. As evidenced by this pattern of dehumanization, discrimination against African Americans continues to the present.

As the first Asian group to come to the US, the Chinese were welcomed for their labour when thousands worked in the gold mines in California, built the transcontinental railroad and were pioneers in developing agriculture on the West Coast, but they soon bore the brunt of the nativist cry and racialized exclusions. Racialized characteristics formerly assigned to Blacks also became Chinese characteristics. Magazine cartoons referred to the Chinese as *nagurs*, and "a slight removal from the African race" (Takaki 1989, 101). Discrimination against the Chinese cumulated in the Chinese Exclusion Act of 1882. Not being "white", they too were denied the rights to vote, own property, file suit and testify in court. The designation and construction of people in the US were based on more than mere differences in "blood" and "pigmentation"; they were an attempt to maintain "racial" purity (Goldberg 1990, 239). When the "race" of a person did not fit, laws were changed. When a California lawmaker warned in 1878, "Were the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result would be a hybrid of the most despicable" (Takaki 1989, 101), it led to legislation prohibiting marriage between a white person and a "negro, mulatto, or Mongolian". Mongolian was the term used to designate Chinese immigrants. Other Asian immigrants coming to the US – the Japanese, Filipinos, Koreans, Asian Indians, Southeast Asians and Muslims – have all suffered in different ways in the long history of anti-Asian discrimination, including the shocking internment of 120,000 Japanese Americans during WWII.

It also provides the context for understanding the incitement by former President Trump who racialized Asians as birthing "anchor babies" in America to gain birthright citizenship and biologized them as the source of the "Chinese virus" during the COVID-19 pandemic to denigrate Asians and Asian-descent groups. It is not a coincidence that anti-Asian attacks occurred nationwide during such racist rhetoric by a demagogic political leader.

Scientific Responses

By the end of the 19th century, a growing body of scientific evidence began to undermine the idea of "races" as natural, discrete and fixed divisions of the human species. Modern biologists and genetic scientists argue that there may be much more diversity and genetic difference within any "racial" group than there is between people of different racial groups. Human variations in physical

characteristics are the result of adaptations to the environment and genetic drift – the random changes of genes across interbreeding populations (Goodman, Moses, and Jones 2019).

With the idea of "race" proven false by the weight of science, many anthropologists have tried to critique and deconstruct the idea of "race". They argued that the idea of "race" was unnecessary, just another "four-letter" word (Brace 2005), "man's most dangerous myth" (Montagu 1997) and "shamefully obsolete and potentially harmful" (Goodman 2001, 31).

In America's popular conceptions, race is a division of people that is visible, somehow biological and unchanging. Anthropologists and social scientists have worked to change this perception.

In an interview for the documentary *Race: The Power of an Illusion; the Difference between Us*, physical anthropologist Alan Goodman contended that "to understand why the idea of race is a biological myth requires an absolute paradigm shift in perspective … it is like seeing what it must have been like to understand that the world isn't flat" (California Newsreel 2003). In an interview for the same documentary, Pilar Ossorio, a legal scholar, microbiologist and bioethicist, argues that "the simple notion of race is wrong" (California Newsreel 2003). In 1989, the American Anthropological Association issued a statement on race after years of membership input. It organized a national public education project on *RACE: Are We So Different?* and produced an authoritative book with the same name (Goodman, Moses, and Jones 2019).

It Is Not Race or Race Relations, but Racialization and Racism

In order to understand the dynamics between groups and institutions, I examine their interactions in terms of the concept of racialization, a theoretical paradigm fully developed by Robert Miles (1982, 1989). Central to Miles's work is the notion of the generation and reproduction of the idea of race as a social and ideological construct. With the increase of European colonial expansion and colonization, contact with Others increased. This contact was structured by competition for land and demand for labour. Miles (1982, 1989) posited that European ideas of foreigners were based on the representations of Others generated in the context of a stronger European economic and military force.

Miles (1989, 75) defined racialization as a process of signification and magnification of physical features and, increasingly, of cultural features about inclusion and exclusion.

The concept of racialization allows us to understand the dynamics at play between different racialized groups. We can think in terms of how the enslaved Africans and the early Chinese workers were dehumanized, rather than a relationship between races that does not consider an extremely unequal relationship.

Therefore, the denigration of both African Americans and Asian Americans, among other racialized groups, can be understood in terms of a process of stigmatization based on their biological features and outsiders' cultural representation

and beliefs about them. Their characteristics are then magnified for the purpose of exploiting or excluding them. Racism is the exclusionary outcome at the end of the racialization process.

This theoretical formulation was particularly useful when I was asked to verify the race of an asylum seeker from Indonesia in the United States, and the claims that she was persecuted because of her race, in Case 1 (Ngin 2018a). It is also useful in understanding the management of diversity in the Vietnamese American community in Case 2 and understanding the differences in the experience of racialization between African Americans and Asian Americans in Orange County in Case 3.

Case 1 comes from my role as an anthropological expert witness working with attorneys and asylum adjudicators in federal courts. Cases 2 and 3 are drawn from my role as a board member participating in the Human Relations Commission and in the Sheriff's Community Coalition in Southern California.

Case Studies

Case 1: Cultural Expertise in Proving the Race, and Persecution Based on Race, of an Asylum Seeker from Indonesia

Dewi (a pseudonym), a woman in her late twenties, escaped to Los Angeles, California, after one of the worst anti-Chinese riots in Jakarta in recent Indonesian history. This was in May 1998 when more than 100,000 Chinese fled the country. Her asylum application had been rejected because the Immigration Officer noted she had failed to prove her claim of persecution based on her "Chinese race". The Immigration Officer suggested she contact an anthropologist. When Dewi contacted me, her case presented me with several challenges.

Under the 1951 UN Convention on Refugees, and its 1967 protocol, an individual may qualify for asylum if they can prove persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion (UNHCR 2011). Despite advances in our knowledge of race, US asylum adjudicators today are expected to verify the petitioners' racial identity and still use the protected categories developed more than 70 years ago. For Dewi to have a chance at gaining asylum protection, she had to provide evidence that she met this criterion. Given the rejection of the biological race concept by most social and biological scientists, the Chinese people are *not* a race and I could not declare the opposite.

Additionally, other cultural factors that could identify her as Chinese were not present. Due to Suharto's policy of forced assimilation in Indonesia during his dictatorship (1966–1998), Dewi grew up without a Chinese name and could not speak, read or write Chinese. As a result, I could not use common Chinese cultural characteristics to verify her identity based on culture. Moreover, under the prevailing official United States Census racial categories Dewi would fall

within the Asian race category. However, we cannot ascertain if she is from any Asian country, or from anywhere in the Chinese diaspora.

As with any nationality, there is a range of physical features among the Chinese people. Given the long tradition of Chinese migration from Southeast China to Indonesia, local Indonesians came to associate migrants from that region with Chinese. I was able to demonstrate to the court that the Indonesian government was targeting and persecuting those Indonesians of Chinese heritage, and not any other of the hundreds of tribes and groups in Indonesia. My report detailed how Indonesians of Chinese heritage owned businesses in certain areas and possessed certain cultural and linguistic characteristics, and they were racialized by other Indonesians as outsiders/foreigners despite their presence in the country since the Dutch colonial era.

I avoided the problematic concept of race in my report by applying the concept of the racialization of Chinese Indonesians (Ngin 2018b). The legal requirement to verify a person's race calls for greater theoretical precision in the forensic analysis of the asylum seeker persecuted because of "race". The fact that the immigration officer and other asylum adjudicators are required to use outdated categories that social scientists have shown are not discrete, fixed or rooted in biology is indicative of the futility of employing race to verify a person's identity.

Case 2: Cultural Expertise on Mediating Conflict in the Vietnamese American Community: Diversity and the Non-Alignment of Race and Culture

In 1999, Truong Van Tran, a video storeowner in Little Saigon, an ethnic enclave in the city of Westminster an hour south of Los Angeles, California, posted in his store window a portrait of Ho Chi Minh. The president of North Vietnam from 1945 to 1969 and an influential communist leader, Ho Chi Minh was also a controversial figure in the Vietnamese community. After the fall of Saigon in April 1975, large numbers of South Vietnamese refugees settled in Southern California, creating a new home with the largest number of Vietnamese outside Vietnam. Expressing their anger at the video storeowner, hundreds of former Vietnamese refugees, waving the red and yellow flag of South Vietnam, protested and clashed with the police who were trying to protect the storeowner.

A common practice among civic leaders working with new refugees and immigrants of different ethnic and cultural origins is to include knowledgeable individuals from within the communities. During the conflict, law enforcement in the county contacted the Orange County Human Relations Commission (OCHRC) for help with mediation in the community. The OCHRC was created in 1971 to address the county's increased diversity. The OCHRC sought to enlist my help, given my Asian origin, and that of another anthropologist, Vicky L of Vietnamese origin, to mediate the conflict, based on the common assumption that Asians must be familiar with Asian issues. However, Vicky and I both declined the request.

In reflecting on our decision not to help in the mediation, Vicky, whose parents came from North Vietnam and who speaks Vietnamese with a Northern accent, said that if the South Vietnamese in the community had known about her parental origin, given the fervent anti-Communist sentiment in the community at the time, they would probably have killed her. Because of my Malaysian Chinese origin, I would not have been acceptable to the Vietnamese community either. In 1979, in the Vietnamese government's dispute with China, it decided to take care of the "Chinese problem" by expelling the Chinese from Vietnam. Even though the Vietnamese Chinese had been in Vietnam for generations, they joined other Vietnamese to flee Vietnam after 1975. They became the Vietnamese "Boat People" refugees as they fled by boat to the neighbouring countries in Southeast Asia and finally resettled in the United States, France and other countries. Two non-Asian staff members of the Human Relations Commission – a Latino man and a white woman – perceived as culturally neutral, successfully mediated the conflicts between the two aggrieved parties because of their outsider status compared to the two Asian women anthropologists.

Despite all our social scientific knowledge, increasingly open public conversations about race and training on diversity, the United States Census Bureau continues to try to fit new ethnic and cultural immigrant groups into established categories based on race. With a larger paradigm and discourse based largely on a continuum between Black and white peoples/communities, we think in terms of categories. We assume that individuals from each race group from a geographical part of the world belong to one ethnic group and possess cultural knowledge of that group. In this common understanding, place, race, ethnicity and culture are aligned. In the example from Little Saigon, cultural expertise on claims and counterclaims must consider misconceptions that an Asian would necessarily be knowledgeable and accepted in the handling of Asian matters in the Asian community. An essential element in managing this community conflict was to recognize that despite being categorized as one "Asian American" community, their many histories and contexts needed to be considered.

Case 3: Cultural Expertise on Racialization, Racism and Community Partnership in the African American Community

Set along the coast of Southern California, Orange County is one of the wealthiest counties in the state, with a median household income about 35% higher than the national average.

Mike Carona, after becoming the Sheriff of Orange County, created the Sheriff's Community Coalition (1999–2009), an organization comprising members who represented some of the oldest and most eminent civil rights organizations in the United States – the ACLU, the NAACP, the Hundred Black Men of Orange County and various churches and civic organizations. I was invited to the board to represent the Orange County Human Relations Council mentioned earlier.

At one quarterly meeting, I asked the sheriff at a board meeting about his policy on racial profiling. Mr Carona immediately responded by saying that racial profiling was against the law. The question led to a lengthy discussion on what happens when a young Black man walks in Beverly Hills, or a young white male in a Black neighbourhood, and the importance of diversity. Later, another board member, Reverend Mark Whitlock, a pastor at Christ Our Redeemer, a Black Church in Irvine, said to me,

> I am glad you asked the question on racial profiling. If I, as a Black man, had asked the same question, the issue would have focused on the assumption that I had a chip on my shoulder. But when you asked the same question as an Asian woman, it became a discussion on the illegality of racial profiling, and the importance of diversity.
>
> *(Personal communication, 1999)*

I acknowledged his observation that Asian women are racialized differently from African American men. African American men are racialized as criminals and violent and thus represent the majority of the victims of police profiling, police shooting, police arrests and prison population (Sinyangwe 2020), whereas Asian Americans are perceived to be model minorities (Kao 1995).

Several months later, despite the sheriff's contention that racial profiling was illegal, sheriff deputies held Beverly Oden in custody for two hours near her home in Irvine, California, based on a police incident in a community nearby (Bihm 2007). Ms Oden was an Olympic volleyball player and a member of Reverend Whitlock's church. The mistaken detention by the police based on race prompted Reverend Whitlock and the OCHRC to set up a commission hearing on racism against African Americans. At the hearing, police officers from several police departments listened to African Americans from all walks of life – for example, teachers, accountants, city council members and homemakers – from throughout Southern California testify about the injustices, insults and racist incidents to which they had been subjected in everyday interactions (Ngin 2007). After the hearing, Reverend Whitlock credited the discussion we had at the Sheriff's Community Coalition meeting as his impetus for organizing the hearing.

Despite the hearing, a second example of racial profiling came to light in 2012 when an African American family in the city of Yorba Linda was targeted with hateful incidents. The OCHRC partnered again with Reverend Whitlock and two other Black churches to hold listening sessions for church members to share their stories of racism (Ngin 2013). The OCHRC produced a report gathered from hundreds of African Americans in Southern California showing the pervasiveness of racism in their everyday lives. Today the Commission, along with the non-profit arm of the Commission, continues with programs to promote diversity and provide mediation training programs and "Bridges" programs in schools throughout the county. It also holds an annual Human

Relations Awards event to honour individuals and organizations, including law enforcement, for good human relations work.

Cultural experts working with the police must recognize the insidious presence of racism even in the lives of African Americans in a relatively well-to-do county today. African Americans are racially profiled and continue to be targets of racism. Their voices are silenced by racist assumptions that they have "a chip on their shoulders" when they speak up. It is through the engagement between individuals racialized differently (an African American church elder and an Asian woman professor) and in partnership between law enforcement, community organizations and civic leaders that racist incidents against African Americans in Orange County came to light.

Conclusion: Cultural Expertise on Race and Racism

Despite Americans' greater attention during BLM to terms such as diversity, critical race theory, white supremacy, systemic racism and institutional racism, these terms do not have real meaning for most people, and social scientists continue to take up the challenge of educating the public. In moving forward, what lessons and strategies can help chart the journey ahead as communities engage in conversations about racism, diversity and inclusion?

The three cases represent a few of the many daily encounters with "race" as experienced by an asylum seeker from Indonesia, asylum adjudicators, community members, human relations experts, sheriffs and church elders as they unfold in Southern California. To provide cultural expertise in an adjudication in court or in mediation in the community, we must recognize that all individuals are conditioned to see race and racism from their individual lived experiences, regardless of their racialized background. They associate certain "races" with certain common-sense knowledge drawn from the past and its fragments have continued to percolate as representations of the Others today.

Working with asylum adjudicators, sheriffs and community groups necessitates an understanding that their experience and that of those they work with are a product of their interconnected world, their circumstances and their culture. In Case 1, race was a term used in the 70-year-old UN Refugee Convention to respond to the needs of another era. In Case 2, the preference of the Vietnamese in the community for a white woman and a Latino man in the mediation was based on the assumption of their supposed neutrality and the two Asian professionals' potential biases. Case 3 reveals the difficulties and necessity of engaging the subject of racial profiling.

Today, even in an era that may be labelled as post-racial (Hollinger 2011), many Americans still assume certain races possess certain innate abilities, cultural practices and norms. Despite decades of diversity education and anti-bias training, the general American public still assumes that we know about diversity.

To examine the workings of racism and the ways diversity is important in the dynamics within society, these three cases employed a fundamentally different approach based on the following ideas.

Racialization

While Case 1 on an asylum seeker from Southeast Asia may seem unconnected with the murder of George Floyd and anti-Asian hatred in the US, many asylum seekers, regardless of their countries of origin, are racialized based on their physical and cultural characteristics. In Indonesia, the Chinese minorities, as exemplified by Dewi, were stigmatized as not belonging to Indonesia and were targeted for attack during times of civil unrest in the country. With racialization, we avoid using and reinforcing the idea of race as a set of inherent qualities. With this approach, we can instead observe more clearly the workings and effects of racism.

Separating Race from Racism

Racism is the result of a racializing process where an individual is either included or excluded based on the person's biological features and/or cultural characteristics, such as names, accents or styles. Conversations about racism are a very uncomfortable and threatening topic. Racism may seem difficult to prove, but empirical evidence of racism is well documented where legal means are used to shape immigration and citizenship policies, for example, the 1882 Chinese Exclusion Act (Hing 1993; Gomez 2020); in anti-miscegenation laws prohibiting marriage across colour lines (Pascoe 2010); and in the redlining practices used to deny minorities the right to purchase homes in the United States. The impact of these and other practices particularly affected African Americans by limiting their access to opportunities and reducing their chances to build wealth (Rothstein 2017).

End Racism by Eradicating the Concept of Race

A number of scholars have argued for the abandonment of the idea of race (Montagu 1997; Rattansi 2020), most forcefully Pascoe, who suggested that the eradication of racism depends on the deliberate non-recognition of race (Pascoe 2010). Without a concerted effort by scholars to argue for the banishment of the idea of race, we may not have any tool to argue against the return of "race science" where new "research" on "race" seeks to advance the old ideas of the innate and hierarchical nature of race (Saini 2019; Comas 1961). Particularly significant is Angela Saini's book *Superior: The Return of Racial Science* on the survival and contemporary revival of racial science.

Student Activism and Ethnic Studies

The invention, elaboration and deployment of the idea of race to exploit others and to appropriate their resources began with the European colonial expansion and settler colonialism.

To decolonize this long history, scholars and activists have long demanded recognition of rights to learn and teach the experiences, history, struggles and resistance of its victims through ethnic studies courses (Tejeda, Espinoza, and Gutierrez 2003; Tuck and Yang 2012; Sandoval et al. 2016; Santos 2018).

In 1969, a coalition known as the Third World Liberation Front at the University of California, Berkeley, the Black Students Union and other student groups at San Francisco State University took the lead in a five-month strike on campus to demand a radical shift in admissions practices that mostly excluded non-white students and in the curriculum, which they regarded as irrelevant to the lives of the students of colour. Furthermore, the student and community members also demanded scholarly programmes that focused on the under-studied histories and situations of African Americans, Asian Americans, Chicanos and Native Americans. As a result, the Department of Ethnic Studies was founded at the University of California, Berkeley, and at San Francisco State University. Fifty years later, the College of Ethnic Studies at California State University, Los Angeles, was established.

The historic social movement of Black Lives Matter mentioned earlier is also marked by another historic moment: the California State Legislature passed Assembly Bill 1460 on 3 August 2020, making ethnic studies a graduation requirement in the largest public university system in the nation. In California, students are to learn about the history, persecution and contribution of Native Americans, African Americans, Asian Americans and Latinx Americans. The four groups combined account for about two-thirds of California's population.

These four groups represent a large part of American history. Understanding that they are a part of American history is critical, as it will provide a moral order to move beyond viewing them through race and to recognize that our long-held worldview on race was wrong.

Through the research and scholarship of ethnic studies, the new discipline provides a forum for the examination of matters related to claims of racism within its workings and contexts. When fully implemented in the American context, it could represent an intellectual space to discuss the chapters in American history that are often ignored or silenced.

Further Reading

BBCFour. 2009. "The History of Racism: Episode 1 – The Colour of Money: Colonialism and the Slave Trade." Video, 58:33. https://www.youtube.com/watch?v=GcrcflTCu4Q

Goodman, Alan H., Yolanda T. Moses, and Joseph L. Jones. 2019. *Race: Are We So Different?* 2nd ed. Wiley-Blackwell.

National Museum of African American History and Culture (NMAAH&C). 2020. "Talking About Race." Downloaded December 24, 2020. https://nmaahc.si.edu/learn/talking-about-race/topics/historical-foundations-race.

Q&A

1. Disarticulate race from ethnicity, culture and other related concepts.

Key: Are we able to determine a person's identity based on race or ethnicity, or predict the person's cultural practices? In this exercise, participants will first guess the identity of the individuals based solely on physical features, write down the answer and then interview the person. This exercise examines a person's assumptions of others based on appearance. It provides an opportunity to examine our assumptions.

2. What does "race" have to do with issues of equality, diversity, minority population and Indigenous people?

Key: In the construction of the "Others" – minority populations, Indigenous peoples, people of colour, immigrants and populations of certain religions – who were ranked as inferior to the dominant culture, with the result that they have been marginalized, made invisible, discriminated against and criminalized.

3. What does the chapter suggest as corrective measures to counter racism?

Key: A new approach to racialization to examine what lies beneath race and race relations.

4. If humans cannot be divided into four or five races as commonly understood, how should asylum adjudicators decide if the asylum seeker was persecuted on account of race?

Key: Asylum adjudicators should collaborate with social scientists who can provide expertise on the historical construction of the idea of race, the commonsense idea of race as understood by the adjudicators based on their culture and legal professional training, and the basis of persecution as understood by the asylum petitioners in their homeland.

References

BBCFour. 2009. "The History of Racism: Episode 1 – The Colour of Money: Colonialism and the Slave Trade." Video, 58:33. https://www.youtube.com/watch?v=GcrcflTCu4Q

Bernasconi, Robert. 2009. "Who Invented the Concept of Race?" In *Theories of Race and Racism: A Reader*, edited by John Solomos and Les Back, 83–103. 2nd ed. London: Routledge.

———. 2017. "Race, Slavery, and the Philosophers of the Enlightenment." Hannah Arendt Center for Politics and Humanities at Bard College, 7 August 2017. Video, 50:24. https://youtu.be/A0cfqBkM-e4

Bihm, Jennifer. 2007. "Orange County Police Called on Racial Profiling." *Los Angeles Sentinel*, November 8, 2007.

Brace, C. Loring. 2005. *"Race" Is a Four-Letter Word: The Genesis of the Concept*. New York; Oxford: Oxford University Press.

Buettner-Janusch, John. 1966. *Origins of Man: Physical Anthropology*. London: Wiley.

California Newsreel. 2003. "Race – The Power of an Illusion.". Available at: https://newsreel.org/guides/race/pressreleasecredit.htm

Center for the Study of Hate & Extremism (CSUSB). *Report to the Nation: Anti-Asian Prejudice & Hate Crime. New 2020-21 First Quarter Comparison Data*. San Bernardino: California State University. https://www.csusb.edu/sites/default/files/Report%20to%20the%20Nation%20-%20Anti-Asian%20Hate%202020%20Final%20Draft%20-%20As%20of%20Apr%2030%202021%206%20PM%20corrected.pdf

Comas, Juan. 1961. "'Scientific' Racism Again?" *Current Anthropology* 2, no. 4: 303–40.

Goldberg, David Theo. 1990. *Anatomy of Racism*. Minneapolis, MN: University of Minnesota Press.

Gómez, Laura E. 2020. *Inventing Latinos: A New Story of American Racism*. New York: The New Press.

Goodman, Alan H. 2001. "Biological Diversity and Cultural Diversity: From Race to Radical Bioculturalism." In *Cultural Diversity in the United States: A Critical Reader*, edited by Ida Susser and Thomas Patterson, 29–45. Oxford: Blackwell.

Goodman, Alan H., Yolanda T. Moses, and Joseph L. Jones. 2019. *Race: Are We So Different?* 2nd ed. John Wiley & Sons.

Hing, Bill Ong. 1993. *Making and Remaking Asian America Through Immigration Policy, 1850-1990*. Stanford: Stanford University Press.

Holden, Livia, ed. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.

———. 2019. *Cultural Expertise and Socio-legal Studies*. Bingley: Emerald.

Hollinger, David A. 2011. "The Concept of Post-Racial: How Its Easy Dismissal Obscures Important Questions." *Daedalus* 140, no. 1: 174–82.

Kao, Grace. 1995. "Asian Americans as Model Minorities? A Look at Their Academic Performance." *American Journal of Education* 103, no. 2: 121–59.

Linnaei, Caroli. 1758. *System Naturae*, 10th ed. Holmiae, Impensis Direct. Laurentii Salvii.

Miles, Robert. 1982. *Racism and Migrant Labor*. London; Boston, MA: Routledge & Kegan Paul.

———. 1989. *Racism*. London: Routledge.

Montagu, Ashley. 1997. *Man's Most Dangerous Myth: The Fallacy of Race*. 6th ed. Walnut Creek; London: AltaMira Press.

Ngin, ChorSwang. 2007. "A Racial Profiling Hearing and Healing." *Fullerton Observer*, 29: 10.

———. 2013. "African American History in California." In *Listening Sessions: African American Listening Session Report 2013*, edited by OC Human Relations Commission, 7. Santa Ana, CA: OC Human Relations.

———. 2018a. *Identities on Trial in the United States: Asylum Seekers from Asia*. Lanham, MD: Lexington Books.

———. 2018b. "Proving 'Race' Identity of Chinese Indonesian Asylum Seekers." *Special Issue: Cultural Expert Witnessing (Studies in Law, Politics, and Society)* 74: 133–64.

National Museum of African American History and Culture (NMAAH&C). 2020. "Talking About Race." Available at: https://nmaahc.si.edu/learn/talking-about-race/topics/historical-foundations-race

Pascoe, Peggy. 2010. *What Comes Naturally: Miscegenation Law and the Making of Race in America*. Oxford; New York: Oxford University Press.

Pfeiffer, John E. 1969. *The Emergence of Man*. New York: Harper & Row.

Rattansi, Ali. 2020. *Racism: A Very Short Introduction*. 2nd ed. Oxford: Oxford University Press.

Rothstein, Richard. 2017. *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: Liveright Publishing.

Saini, Angela. 2019. *Superior: The Return of Race Science*. Boston: Beacon Press.

Sandoval, Denise M., Anthony J. Ratcliff, Tracy Lachica Buenavista, and James R. Marín, eds. 2016. *"White" Washing American Education: The New Culture Wars in Ethnic Studies* [2 volumes]. Santa Barbara, CA: Praeger.

Santos, Boaventura de Sousa. 2018. *The End of the Cognitive Empire: The Coming of Age of Epistemologies of the South*. Durham, NC; London: Duke University Press.

Sinyangwe, Samuel. 2020. "Mapping Police Violence." *TED*, November 28, 2017. https://www.ted.com/talks/samuel_sinyangwe_mapping_police_violence

Takaki, Ronald T. 1989. *Strangers from a Different Shore: A History of Asian Americans*. Boston, MA; London: Little, Brown and Company.

Tejeda, Carlos, Manuel Espinoza, and Kris Gutierrez. 2003. "Toward a Decolonizing Pedagogy: Social Justice Reconsidered." In *Pedagogies of Difference: Rethinking Education for Social Justice*, edited by Peter Pericles Trifonas, 9–38. New York: Taylor & Francis.

Tuck, Eve, and K. Wayne Yang. 2012. "Decolonization Is Not a Metaphor." *Decolonization: Indigeneity, Education & Society* 1, no. 1: 1–40.

UNHCR – The UN Refugee Agency. 2011. *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*. Geneva: UNHCR. https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html

5

CULTURAL EXPERTISE AND LGBTQIA+

Victoria McCloud

LEARNING OBJECTIVES

After reading this chapter, you will understand the role of cultural expertise in LGBTQIA+ issues in the courts and judiciary. You will familiarise with cultural expertise in cases where LGBTQIA+ factors, mainly in the UK's legal system but also drawing on other systems. The discussion approaches cultural expertise from three directions: first, the use of specific LGBTQIA+ culture and life experience experts by courts; second, the incorporation of "vicarious" expertise via non-binding guidance to judges from other judges, as "best practice"; and third, the infusion of firsthand LGBTQIA+ expertise into the legal system through diversification of the judiciary.

Introduction

There is a lack of adequate theoretical framework in the literature as to how cultural expertise relating to LGBTQIA+ people can be incorporated into legal structures and processes. I present a novel three-factor model concentrating on avenues by which LGBTQIA+ expertise is incorporated into the judicial system in England and Wales. There are analogies with other jurisdictions recognising LGBTQIA+ people's rights and existence as a social group(s) (including, e.g., recognition of gender and sexuality as a "status" under Article 14 of the ECHR). The case studies are framed from the perspective of a facilitative approach to

DOI: 10.4324/9781003167075-8

protection and respect for LGBTQIA+ communities. This contrasts with legal regulation or restriction of rights from the perspective of jurisdictions which do not recognise (or actively restrict) LGBTQIA+ rights.

Theory and Concepts

There is variation in acceptance of sexual and gender identity concepts between jurisdictions and varied acceptance of LGBTQIA+ people as meriting recognition that they have "cultural" experience at all. Even then, where LGBTQIA+ people are recognised as a group, in jurisdictions such as the EU, one sees references to countervailing cultural concepts from other societal groups such as church organisations and political movements. This makes the theoretical framework of cultural expertise one which can carry both *positive* and *negative* connotations even within "tolerant" jurisdictions, depending on who is appointed as expert. A group opposed to LGBTQIA+ recognition in law may rely on its notions of cultural expertise in terms of LGBTQIA+ people "undermining morality" or causing "offence". For example, the Polish Education Minister (Reuters 2021) was quoted speaking critically of LGBTQIA+ people at "pride" marches and referencing notions of causing offence to people from the Roman Catholic church: "These people come out onto the street, offend Catholics in a vulgar way … behave obscenely, and that is supposed to be OK?"

Anti-LGBTQIA+ positions may be translated into law. In 2020–1, Hungary amended its constitution to incorporate a definition of the family interpreted as excluding transgender and other LGBTQIA+ individuals. It defines family as marriage and the parent–child relationship and states that the mother is a woman, and the father is a man. Hungary has enacted laws confining the adoption of children to married couples (whilst not recognising same-sex marriage) (see Parliament of Hungary: *Amendments to the Child Protection Act, the Family Protection Act, the Act on Business Advertising Activity, the Media Act and the Public Education Act*).

In the European context, this illustrates tensions between member states towards LGBTQIA+ people which have been described as a battle in cultural terms. For example, French President Macron reported at the conclusion of an EU summit in 2021, "To fight against these homophobic laws is to defend individual freedoms and human dignity, on our soil and for us all" (France TV Info 2021).

Positions about gender rights and sexuality may also be termed as cultural politics to refer to the ways culture shapes politics and people's attitudes: in terms of UK law, one notes the current medicalisation of transgendered people; an ambivalent approach in law towards non-binary people; and public/professional challenges to the validity of official but non-binding guidance given to judges.

These matters reflect disagreements in society about what we mean by gender or sex and whether gender identity ought to be a matter of self-definition, permanent and fixed at birth or conception or a matter of official determination such as by the UK's Gender Recognition Panel evaluating applications to obtain amended birth certificates (Gender Recognition Act 2004).

Sexuality

It is important in the context of the United Kingdom jurisdictions to be aware of this history of LGBTQIA+ recognition and civil rights. Sexual relations between men (but not between women) were a criminal offence in England and Wales until the Sexual Offences Act 1967. This set the age of consent for male homosexuality at 21, which was lowered to 18 in 1994 and then to 16 in 2001.

Whilst decriminalised, the status of gay men and lesbian women was nonetheless not fully aligned in terms of civil rights or acceptance of their place in society. In 1988, Section 28 of the Local Government Act 1988, in force until 2000, provided that branches of local government were prohibited from promoting, in specified categories of schools, the acceptance of homosexuality as a family relationship.

The introduction of same-sex civil partnerships (functionally equivalent to marriage) by the Civil Partnership Act 2004 and the legalisation of same-sex marriage in England and Wales in 2014 broadened the outlook and understanding of LGBTQIA+ people in the UK. Civil partnerships were extended to non-same sex partners in 2019 (*Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019*; *R (on the application of Steinfeld and Keidan) v. Secretary of State for International Development* (2018)).

Gender

Until 1999, the nearest relevant protection had been against discrimination based on anatomical sex and it was impossible for UK citizens to obtain legal recognition of their acquired gender. The Sex Discrimination (Gender Reassignment) Regulations 1999 for the first time made it illegal to discriminate against any person on the grounds of gender reassignment, but only in the areas of employment and vocational training. This was extended to cover harassment in 2000. Equality protections are now embodied in the Equality Act 2010 and are also covered by the Human Rights Act 1998.

In 2002 in *Goodwin & I v. United Kingdom*, the Court ruled that rights to privacy and family were infringed by the lack of recognition, in law, of the rights of those who had reassigned their gender. The UK passed the Gender Recognition Act 2004 permitting persons who identify themselves on a binary basis, i.e. male or female, as being of a gender different from the one they were assigned at birth to obtain an amended birth certificate subject to certain conditions. Prior to that date, there were arrangements for the straightforward amendment of other documents such as passports, which in UK law do not prove legal sex, but an amended birth certificate was legally essential for the purposes of marriage.

The Gender Recognition Act 2004 recognises "male" and "female" gender and the sexes of "man" and "woman" but makes no provision for non-binary persons. By that Act, a person aged over 18 may apply for a gender recognition certificate (triggering the right to amend the birth certificate, and a legal change of sex for "all purposes", under s.9(1) of the Act) on the basis of living in their

acquired gender. The effect, among other things, is to ensure that a person is recognised in their reassigned sex for the purposes of sex discrimination law under the Equality Act 2010: see judgment in *The Petition of For Women Scotland*. The process is quasi-judicially overseen by a body called the Gender Recognition Panel (Courts and Tribunals Judiciary of England and Wales, *Gender Recognition Panel*, November 1, 2019) which considers applications for amended birth certificates on grounds of gender reassignment. The Gender Recognition Act 2004 reflected the medical, political and social circumstances of its time which stressed the medical criteria. The Act requires medical evidence of any treatment which the applicant has received or has been prescribed for "gender dysphoria", defined in the Act as "the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism".

Issues have arisen as to the appropriateness of this medicalised approach, where, as happened in the 1970s in relation to homosexuality, the medical profession has moved on: the International Classification of Diseases (ICD-11) approved by the WHO no longer recognises gender identity disorder and instead refers to gender incongruence which is no longer defined as a mental disorder. Moves to amend the UK law to permit a non-medicalised approach to gender recognition and hence a change of legal sex stalled politically in the UK in 2023.

Case Studies

I approach the subject of LGBTQIA+ cultural expertise from a judge's-eye view. I will break the discussion of the law down into a triad of sources and illustrate those by reference to case studies. The illustration in Figure 5.1 sets out the tripartite set of key sources graphically, without any specific hierarchy.

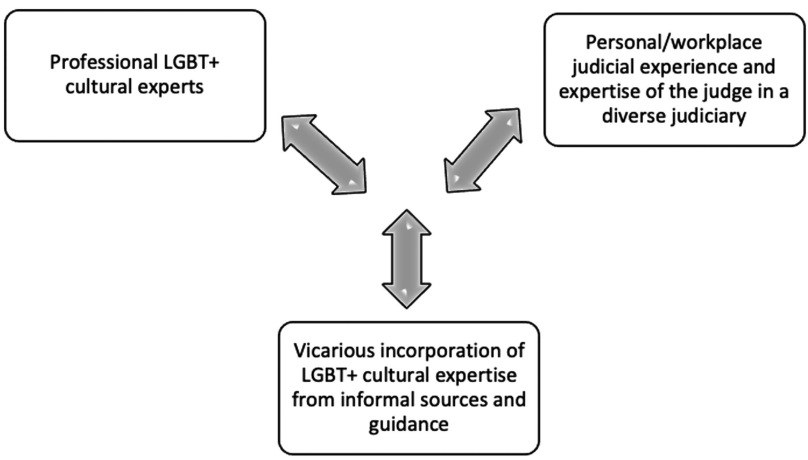


FIGURE 5.1 Three-factor model of sources of judicial knowledge in LGBTQIA+ cases.

I present three case studies that illustrate the willingness of the courts of England and Wales to make use of the three sources of cultural expertise which I suggested earlier in LGBTQIA+ cases. These examples were drawn from discussions with members of the judiciary (principally on the question of experts) and from the author's direct observation as a judge and from her own previous work within the collegiate process that produced the Equal Treatment Bench Book 2021 (Judicial College of England and Wales 2021).

Professional Cultural Expertise in LGBTQIA+ Cases

LGBTQIA+ issues arise in cases where applicants for asylum under the UK's immigration and asylum laws claim a well-founded fear of persecution based on sexuality. The legal sources are the Convention and Protocol relating to the Status of Refugees (1951); the UN Protocol relating to the Status of Refugees (1967); the 2012 UNHCR Guidelines on International Protection No. 9 (Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees); the Immigration, Asylum and Nationality Act 2006 and statutory instruments made under that Act; and the Nationality and Borders Act 2022.

In cases where the UK does not accept that the applicant is a member of the LGBTQIA+ community or does not accept that such people have a well-founded fear in the country of origin, the court can receive country expert evidence in relation to the legal position of LGBTQIA+ people in a given state and the practical realities of living there as an LGBTQIA+ person. It has been said by the court in relation to asylum cases that country experts should be given significant weight and if the decision-maker on refugee status reaches a contrary view, proper reasons must be given: see *SI (Expert Evidence – Kurd – SM Confirmed) Iraq v. Secretary of State for the Home Department*.

Here I consider one example where professional cultural expertise was applied by the court in such a case, namely *OO (gay men: risk) Algeria v. Secretary of State for the Home Department* (2013, 2016) which concerned the extent to which an applicant had a well-founded fear of persecution based on being a gay man if returned to Algeria (see also *BF (Tirana – gay men)* 2019).

The case is not chosen as being more significant than other cases where country risk is considered based on country cultural experts. However, this case also illustrates the use of medical professionals on the issue of the appellant's sexuality as an LGBTQIA+ man. In that respect, the mixed use of culture/country experts and both a psychiatrist and a psychologist in connection with the appellant's sexuality emphasises the ambiguity between the treatment of LGBTQIA+ people as being part of a community on the one hand and as being medicalised on the other.

Before assessing the credibility of the appellant's evidence, the court considered expert medical evidence from a psychiatrist that the appellant was primarily

homosexual, with some confusion as to his sexual identity (where the appellant himself was arguing that he was bisexual). The court considered the factual lack of evidence that the appellant had formed same-sex relationships. This raises the question of whether the appellant's cultural status as LGBTQIA+ was being viewed by the court in behavioural terms as opposed to simply a sense of sexual orientation. By contrast, one would not expect medical evidence to be thought relevant in a case which turned on issues of religious or ethnic cultural identity.

The court considered evidence from non-medical experts. The subject areas of specialism of the experts were described by the court as a well-respected academic country expert specialising in Algeria; an analyst and consultant specialising in political and security issues in North Africa and the Middle East; an author, founder and spokesman for French LGBTQIA+ Muslim people; and a gay man and LGBTQIA+ rights activist with experience in Algeria (who appeared under a pseudonym). It will be noted that the concept of relevant expertise here encompassed more than an "academic" discipline and was presented in terms of people having experience and expertise in the subject matter of gay rights in Algeria, including first-hand experience.

Incorporation of LGBTQIA+ Cultural Expertise from Informal Sources and Guidance

In a common-law system such as the UK courts, citations of previous cases, especially where those decisions are by a higher court, are frequent. In that sense, vicarious legal experience and expertise of previous judges, including examination of matters touching cultural issues, are shared in a formal way. However, the approach of the UK courts goes wider than notions of formal cultural expertise to consider more informal embodiments of expertise in the form of a document entitled the *Equal Treatment Bench Book* (ETBB).

The ETBB is guidance on a range of cultural issues relevant to cases in the courts of that jurisdiction, and it was prepared by a committee of judges. The ETBB is non-binding. This is important as it is unclear whether an appeal could be founded wholly upon failure to follow it. It adopts the position of providing a reference guide for judges, who may have no other reliable source to turn to amongst colleagues and may be hearing a case where there are no funds for an expert in a given cultural area. The ETBB aims to provide guidance on the process of doing justice fairly, considering broadly cultural factors.

The ETBB covers LGBTQIA+ issues in Chapter 10 ("Sexual Orientation") and Chapter 12 ("Trans People").

Forstater v. CGD Europe and Others (2019, 2021) made explicit use of the ETBB's LGBTQIA+ guidance with approval both in the initial tribunal decision and on an appeal. The case concerned a belief on the part of the appellant that biological sex is real, important, immutable and not to be conflated with gender identity and related to how she had been treated by her employer in the light of her statements to that effect. She argued that her belief was a philosophical belief

within the meaning of the Equality Act 2010 and that her role could not be terminated due to protections offered for such beliefs at work.

The Tribunal referred to the ETBB's guidance in relation to harassment experienced by transgender people at work and held that the claimant's belief,

> having regard to its "absolutist" nature, whereby she would "refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment", was one that was "not worthy of respect in a democratic society".
>
> *(*Forstater v. CGD Europe and Others *2019)*

On appeal, she succeeded on the narrow basis that such a belief was indeed a "philosophical belief":

> A philosophical belief would only be excluded … if it was the kind of belief the expression of which would be akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention [on] Human Rights (ECHR) by virtue of Article 17 thereof.
>
> *(*Forstater v. CGD Europe and Others *2021)*

The appeal court applied and reiterated the guidance of the ETBB in relation to the experiences of transgender persons and set out in very strong terms the narrow nature of the decision as to the "philosophical" nature of the beliefs and the distinction between that conclusion favourable to the appellant and the legal position which is in UK law, that transgender people are protected from the use of such beliefs so as to harass or discriminate. The *Forstater* case is a useful study of how the non-binding but strongly expressed guidance of the ETBB does not override the law even though the ETBB is based on judicial expertise from a diverse judiciary.

Robert Wintemute's analysis "Belief vs. Action in *Ladele*, *Ngole* and *Forstater*" (2021) contrasts the approaches of various "belief" cases towards LGBTQIA+ people: in *Ladele v. London Borough of Islington* the person held a belief but did not act on it. In *R. (on the application of Ngole) v. University of Sheffield* the person both held and acted on the belief. Wintemute argues that Ms Forstater was not dismissed because of her treatment of any transgender person, but because of her co-workers' "intolerance of her unfashionable (to them) belief that, in some situations, biological sex matters and trumps an individual's gender identity" (Wintemute 2021).

The fact of considering guidance in the ETBB, in an area of social debate such as gender identity, has been criticised on the basis that the document takes sides in a social debate by determining the validity of the notion of gender identity. Chacko (2021) argues that such guidance should be revised and discusses the issues arising from the *Forstater* litigation and the guidance in the ETBB in relation to transgender people.

Judicial Experience and Expertise of the Judge in a Diverse Judiciary

The final case study relates to the concept that, in a diverse judiciary, and therefore one which includes members of the LGBTQIA+ communities, the lived experience and expertise of judges and staff come into play. The desirability of a diverse judiciary has been expressed frequently (Judiciary Diversity and Inclusion Strategy 2020–2025). An effective bar on the recruitment of openly LGBTQIA+ people to the judiciary was abandoned in 1999 when a requirement to declare one's sexuality was withdrawn (Verkaik 1999).

W, F, C and D (Minors) (Name Changes Disclosing Gender Reassignment and Other Matters) is an example of a decision which relied upon the judge's and civil servants' own expertise from experience. In that case, the judge dealt with applications by parents to obtain Deed Poll enrolment. This is a court process for recording and approving changes of name in the UK and is usually optional. The position of children was considered, including where parents had made applications which explicitly or by implication disclosed a reassignment of a child's gender. The process is essentially an administrative one, with judicial oversight. No legal argument or court hearing takes place, subject only to the formalities of the paperwork being completed.

The judge observed of her own motion (i.e. of her own initiative but after receiving input from court staff and a judicial colleague) that the Deed Poll process is one which leads to the official publication of name changes, including on the internet, and that such publication conflicted with the protections given to adult transgender persons in the UK in relation to the publication of information disclosing that they have reassigned their gender. Thus, children in that position might discover that, as adults, their reassignment of gender had been, de facto, published. This negated their privacy protections with potentially negative consequences.

The judge observed that:

> staff here … assisted me by informing me of how the process works from their perspective and briefing me as to the problems they and court users have encountered and to the pressure this has placed on them as civil servants committed to promoting diversity and the interests of the public. Their input was helpful in writing this judgment. […] I was informed by staff that on at least one occasion an adult transperson whose name had been changed as a child, using the Deed Poll process, complained and was upset about the fact, which they had by then discovered too late, that they been "outed" by way of publication at the time their parents had changed the child's name. I understand staff have passed on such concerns as and when they have arisen.

What we see in this case is the use of internal, informal expertise within the court and civil service system responsible for making the decision. The importance of this is that it is arguably distinct from either a) formalised evidential expertise such

as we see in Case 1, or b) official guidance to judges which has been checked and published by the Judiciary itself. This illustrates the third of the three types of LGBTQIA+ cultural expertise in the model presented earlier in this chapter.

Conclusion

These case studies illustrate the UK's approach to LGBTQIA+ issues in immigration cases but are relevant to any cases where LGBTQIA+ issues arise. These cases relate – but in different ways – to cultural expertise deployed in courts. They relate to expertise either available from experts as expert evidence; advisory, non-evidential but reflecting consensual best practice and policy within the judiciary; or institutional, reflecting the corporate expertise available to judges as a community within a court system made up of civil servants and judiciary drawn from diverse communities, introducing informal institutional empathy in the form of appreciation of LGBTQIA+ issues.

Further Reading

Hooper, Louise, and Livio Zilli. 2016. *Refugee Status Claims Based on Sexual Orientation and Gender Identity: Practitioners' Guide No. 11*. Geneva: International Commission of Jurists. https://www.icj.org/wp-content/uploads/2016/10/Universal-PG-11-Asylum-Claims-SOGI-Publications-Practitioners-Guide-Series-2016-ENG.pdf

SOGICA – Sexual Orientation and Gender Identity Claims of Asylum: A European Human Rights Challenge. 2021. Accessed September 26, 2021. https://www.sogica.org/en/

UK Government. 2011. *Gender Identity Issues in the Asylum Claim*. Accessed August 15, 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257387/genderissueintheasylum.pdf

These three resources are of interest in relation to LGBTQIA+ issues in the evaluation of UK asylum claims but also generally in the approach to LGBTQIA+ people and issues.

Courts and Tribunals Judiciary of England and Wales. 2020. *Guide to Judicial Conduct*. Revised March 2018 (Updated September 2020). Accessed August 15, 2021. https://www.judiciary.uk/publications/guide-to-judicial-conduct/

Of interest when considering the ETBB because it provides further information on how judges are expected to conduct fair hearings.

Q&A

1. In what ways can cultural expertise in LGBTQIA+ issues be incorporated into judicial thinking?

Key: The analysis here proposes that there are three key routes to the incorporation of cultural LGBTQIA+ expertise, these being: the use of professional experts (sometimes very broadly defined); vicarious experience supplied to courts by way of non-legal guidance documents such as the ETBB; and direct judicial experience deriving from diversity in the judicial working environment.

2. Especially when considering cases where there is limited access to countries and limited availability of evidence from "on the ground" witnesses, and where LGBTQIA+ people may be oppressed or in danger, how can cultural expertise in relation to LGBTQIA+ people be obtained and incorporated in judicial thinking?

Key: In the UK legal system, experts may give evidence with the court's permission. The approach of courts and tribunals, especially in immigration cases, is to hear witnesses who have expertise (whether or not they have formal academic qualifications as experts, as in the case of journalists or those with first-hand experience) and to attach such weight to it as the court thinks appropriate, rather than to exclude it from consideration simply because it is technically not "expert" evidence from professionals.

References

Chacko, Thomas. 2021. *Prejudging the Transgender Controversy? Why the Equal Treatment Bench Book Needs Urgent Revision*. London: Policy Exchange.

Courts and Tribunals Judiciary of England and Wales. 2019. *Gender Recognition Panel*. November 1, 2019.

———. 2020. *Judicial Diversity and Inclusion Strategy 2020–2025*. London: Judicial Office, Royal Courts of Justice.

France TV Info. 2021. "Loi homophobe en Hongrie : Emmanuel Macron dénonce un texte 'totalement contraire à nos valeurs et à notre droit'." *Franceinfo*, June.

Judicial College of England and Wales. 2021. *Equal Treatment Bench Book*. February 2021.

Reuters. 2021. "Poland Should Copy Hungarian LGBT Law, Says Polish Minister." *Reuters*, June 28.

Verkaik, Robert. 1999. "Lord Irvine Intervenes to Encourage Gay Judges." *The Independent*, October 10.

Wintemute, Robert. 2021. "Belief vs. Action in Ladele, Ngole and Forstater." *Industrial Law Journal* 50, no. 1: 104–17.

Legislation and Treaties

Parliament of Hungary. 2021. *Amendments to the Child Protection Act, the Family Protection Act, the Act on Business Advertising Activity, the Media Act and the Public Education Act*. T/16365/15. Introduced June 10, 2021.

UK Parliament. 1967. *Sexual Offences Act 1967 (c. 60)*. https://www.legislation.gov.uk/ukpga/1967/60/pdfs/ukpga_19670060_en.pdf

UK Parliament. 1998. *Human Rights Act 1998 (c. 42)*. https://www.legislation.gov.uk/ukpga/1998/42/contents

UK Parliament. 1999. *The Sex Discrimination (Gender Reassignment) Regulations 1999(No. 1102)*. https://www.legislation.gov.uk/uksi/1999/1102/contents/made

UK Parliament. 2004a. *Civil Partnership Act 2004 (c. 33)*. https://www.legislation.gov.uk/ukpga/2004/33/contents

UK Parliament. 2004b. *Gender Recognition Act 2004 (c. 7)*. https://www.legislation.gov.uk/ukpga/2004/7/contents

UK Parliament. 2010. *Equality Act 2010 (c. 15)*. https://www.legislation.gov.uk/ukpga/2010/15/contents

UK Parliament. 2006. *Immigration, Asylum and Nationality Act 2006 (c. 13)*. https://www.legislation.gov.uk/ukpga/2006/13/contents

UK Parliament. 2019. *Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 (c. 12)*. https://www.legislation.gov.uk/ukpga/2019/12/contents/enacted

UK Parliament. *Nationality and Borders Act 2022 (c. 36)*. https://www.legislation.gov.uk/ukpga/2022/36/contents/enacted

UN – Human Rights Office of the High Commissioner. 1951. *Convention relating to the Status of Refugees*. Geneva, 28 July 1951. United Nations, *Treaty Series*, Vol. 189: 137.

UN – Human Rights Office of the High Commissioner. 1967. *Protocol relating to the Status of Refugees*. New York, 31 January 1967. United Nations, *Treaty Series*, Vol. 606: 267.

UNHCR – United Nations High Commissioner for Refugees. 2012. *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*. HCR/GIP/12/09, October 23, 2012. https://www.unhcr.org/509136ca9.pdf

Cases Cited

BF (Tirana – gay men) Algeria. [2019] UKUT 93 (Upper Tribunal 2019).

Forstater v. CGD Europe and Others Case Number: 2200909/2019. https://assets.publishing.service.gov.uk/media/5e15e7f8e5274a06b555b8b0/Maya_Forstater__vs_CGD_Europe__Centre_for_Global_Development_and_Masood_Ahmed_-_Judgment.pdf

Forstater v. CGD Europe and Others, Employment Appeal Tribunal 10/6/21. https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

Goodwin v. United Kingdom. Application No. 28957/95 (ECHR 2002).

Ladele v. London Borough of Islington, [2009] EWCA Civ 1357 (Ct. App. Of England and Wales 2009).

OO (gay men: risk) Algeria v. Secretary of State for the Home Department. [2013] UKUT 63 (Upper Tribunal, Immigration and Asylum Chamber 2013).

OO (gay men) Algeria CG v. Secretary of State for the Home Department. [2016] UKUT 65 (Upper Tribunal, Immigration and Asylum Chamber 2016).

R (on the application of Steinfeld and Keidan) v. Secretary of State for International Development. [2018] UKSC 32 (S. Ct. of the United Kingdom 2018).

R (on the application of Ngole) v University of Sheffield [2019] EWCA Civ 1127.

SI (Expert Evidence – Kurd – SM Confirmed) Iraq v. Secretary of State for the Home Department, CG. [2008] UKAIT 00094 (Asylum and Immigration Tribunal / Immigration Appellate Authority 2008).

The Petition of For Women Scotland, Court of Session [2022] CSOH 90. https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh90.pdf?sfvrsn=8eee302c_1

W, F, C and D (Minors) (Name Changes Disclosing Gender Reassignment and Other Matters). [2020] EWHC 279 (QB) (England and Wales High Court – Queen's Bench Division 2020).

6

CULTURAL EXPERTISE AND FEMALE GENITAL MUTILATION/CUTTING

Ruth M. Mestre i Mestre, Lotta Wendel and Sara Johnsdotter

LEARNING OBJECTIVES

After reading this chapter you will have familiarised yourself with cultural expertise in the legal handling of cases that involve female genital mutilation/cutting (FGM/C). You will have learnt: what FGM/C is and how it is framed in cultural terms in Europe; about FGM/C in relation to criminal law and child protection in Europe; and about FGM/C in relation to human rights protection and asylum seeking.

Introduction

In this chapter, we discuss how cultural expertise can be used to neutralize stereotyped images of minority cultures in court in female genital mutilation/cutting–related cases because, wisely employed, it may counteract possible negative effects of typification and judicial stereotyping.

Theory and Concepts

Female genital mutilation/cutting (FGM/C), or "female circumcision", covers a variety of cultural practices involving modifications of the female genitalia for non-medical reasons. The World Health Organization has sorted the practices

DOI: 10.4324/9781003167075-9

into four categories, which are used in legal, medical care and research contexts (WHO 2020):[1]

- *Type I.* Partial or total removal of the clitoral glans (the external and visible part of the clitoris, which is a sensitive part of the female genitals with the function of providing sexual pleasure to the woman) and/or the prepuce/clitoral hood (the fold of skin surrounding the clitoral glans).
- *Type II.* Partial or total removal of the clitoral glans and the labia minora (the inner folds of the vulva), with or without removal of the labia majora (the outer folds of skin of the vulva).
- *Type III.* Narrowing of the vaginal opening with the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora or labia majora. The covering of the vaginal opening is done with or without the removal of the clitoral prepuce/clitoral hood and glans (Type I FGM/C).
- *Type IV.* All other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization.

The WHO estimates that more than 200 million women and girls are affected (WHO 2020). The WHO uses only the acronym FGM, and most Western legislation follows suit, while many researchers prefer FGC or FGM/C (Johnsdotter and Johansen 2020).

FGM/C is defined as a social problem at a global level and has been addressed in international conventions, national legal systems and asylum regulations. Campaigns aimed at the eradication of the practices have been promoted since the 1980s. It is criminalized in all European states, either through specific or general criminal law provisions (Leye et al. 2007).

However, at the grassroots level, these practices widely differ depending on the cultural context. Whilst they all encompass a genital modification for non-medical reasons, the actual variation across the practices is enormous: an infibulation of a six-year-old girl in Somalia or an excision of a Gikuyu adolescent who opted for it has very little in common with an excision during the Bondo initiation rite in Sierra Leone or a pricking of an eight-month-old toddler in Thailand.

Typification and Judicial Stereotyping

In European multicultural societies, this cultural variation is underestimated whilst a standardized narrative of FGM/C guides public understanding (Leonard 2000; Rogers 2013). This "public" includes legal and social professionals. In theoretical discussions about the social construction of social problems, the cognitive process that ignores variation when we think about phenomena has been called "typification" (Best 2017; Loseke 2003). Typification describes our

tendency to categorize phenomena of which we lack personal experience. Being close to a stereotype, it lacks derogatory connotations. Stereotypes are broadly accepted beliefs about people – preconceived ideas about the attributes, roles or behaviour of an individual as a member of a social group. Stereotypes and typifications are indispensable in cognition and communication for us to navigate the world (Leyens, Yzerbyt, and Schadron 1994). In this text, "typification" refers exclusively to cognitive processes in social life.

Except for those concerned, very few people in Europe have personal experience of FGM/C or are familiar with the cultural contexts in which the practices are embedded. Yet typifications about FGM/C and stereotypes about African women may appear in legal contexts and influence a legal outcome. The most problematic typification, recurrently embraced by media reports, is the idea of the illegal circumcisions on kitchen tables of girls in Europe (Johnsdotter and Mestre i Mestre 2017). One of the most frequent stereotypes is that African women lack agency and are victims of violent African men (La Barbera 2009).

Typification in the form of judicial stereotyping compromises the impartiality and integrity of the judicial system (Clérico 2018). Instead of deciding cases based on facts or actual circumstances, court members who engage in stereotyping rely on preconceived beliefs about the parties as members of particular social groups (Cusack 2014). Stereotypes can distort the court's understanding of a case and influence the court's views on the responsibility or credibility of victims or witnesses. Consequently, judicial stereotyping may result in a violation of rights.

Judicial stereotyping occurs when court members use stereotypes in their reasoning, but also when they fail to challenge stereotypes activated by the parties or by lower courts. Challenging strategies include identifying and naming the stereotypes or identifying harmful consequences (Cusack 2014; Peroni and Timmer 2016; Timmer 2015). It would be helpful if courts clarified international state obligations regarding the elimination of stereotypes in the law and its enforcement (Brems and Timmer 2016).

Regarding FGM/C, the concept of culture has appeared in the past in criminal proceedings to exculpate the defendants or mitigate the sentence. This is known as the cultural defence, which raises concern as it may be understood as a justification for different forms of violence against women (Mestre i Mestre and Johnsdotter 2019). Whilst sharing those concerns, we believe that the presence of stereotyped images of minority cultures in court stands in the way of modifying patterns of violence against women (see, e.g., Macklin 2006). Introducing cultural expertise into criminal court cases could contextualize the criminal acts without reinforcing stereotypes, thus improving the fairness of the legal system. This chapter suggests that cultural expertise may be useful not only in criminal court cases but in other legal proceedings as well (Holden 2019a, 2019b).

Case Studies

B and G (Children): Challenging Stereotypes in Family Courts

***IN THE MATTER OF B AND G (CHILDREN) (NO 2)* [2015] EWFC 3**

This case generated extensive discussions because the President of the Family Division of the High Court, UK, Sir James Munby, made comparisons, *obiter dicta*, between FGM/C Type IV and non-therapeutic circumcision of boys and suggested that both practices constitute "significant harm". The case is exceptional as it challenges current stereotypes in the absence of cultural experts.

The case concerned care proceedings in relation to two children, B, a boy born in 2010, and G, a girl born in 2011, who were placed in foster care. Suspicions arose that G had been subjected to FGM/C after blood was found in her nappy when she was at nursery. A medical examination concluded that there was no sign of any circumcision. Nevertheless, in November 2013, the foster carer reported G's "irregular genitalia" (*B and G* 2015, para. 14). Both parents denied that G had been subjected to FGM/C.

Three medical professionals gave their opinions before the court. The judge found two of them inconsistent and unreliable. In contrast, the third expert's opinion, the only one with real experience of FGM/C in a paediatric context, was regarded as authoritative and convincing. The third expert found no evidence that FGM/C had been performed. The case could have been settled here, given that there was no evidence to establish that G either had been or was at risk of being subjected to FGM/C. Nevertheless, Munby P decided to elaborate on FGM/C regarding the concepts of "significant harm" and what it is "reasonable to expect" from a parent according to section 31 of the Children Act 1989 (*B and G* 2015, para. 65 ff).

As Timmer (2015) argues, it is difficult to develop a proper legal response to stereotyping, but as a minimum, courts should name stereotypes as well as carefully examine any harmful effects they may have. This is precisely what Munby P does in this case. The regulatory template regarding FGM/C and non-therapeutic circumcision of boys considers the first practice as inherently wrong, while the latter is an acceptable consequence of religious freedom and cultural traditions. The judge questioned the legal implications of such views.

In his judgment, Munby P states that "circumcision of the male involves the removal of a significant amount of tissue and creates an obvious alteration to the appearance of the genitals and leaves a more or less prominent scar around the circumference of the penis" (*B and G* 2015, para. 59). When compared with FGM/C, the judge concludes that it

> can readily be seen that although FGM of WHO Types I, II and III are all very much more invasive than male circumcision, [and that] at least some forms of Type IV, for example, pricking, piercing and incising, are on any view much less invasive than male circumcision.
>
> *(B and G 2015, para. 60)*

He concludes, "if FGM Type IV amounts to significant harm, as in my judgment it does, then the same must be so of male circumcision" (*B and G* 2015, para. 69). Munby P goes so far as to state that the type of FGM/C discussed in this case regarding G, would have been "much less invasive, no more traumatic (if, indeed, as traumatic) and with no greater long-term consequences, whether physical, emotional or psychological, than the process to which B has been or will be subjected" (*B and G* 2015, para. 63).

Regardless, as the current cultural perception regarding what is "reasonable to expect" from a parent includes permitting male circumcision, circumcision of B would not lead to any care proceedings. As Munby P writes: "Society and the law, including family law, are prepared to tolerate non-therapeutic male circumcision performed for religious or even for purely cultural or conventional reasons, while no longer being willing to tolerate FGM in any of its forms" (*B and G* 2015, para. 72). This view is considered legitimate since FGM/C is said to have no basis in any religion, while male circumcision is often performed for religious reasons. Further, part of the typification of FGM/C involves the assumption that the practices have no medical justification and confer no health benefits, while male circumcision is sometimes seen as providing hygienic or prophylactic benefits.

As the family were Muslim, Munby P speculated that B either had been or would in due course be circumcised. Still, parents are permitted to decide whether their sons should be circumcised without the threat of care proceedings regarding that child. Treating FGM/C as sufficient grounds for care proceedings would result in a lack of statutory basis concerning any male sibling(s). If girls at risk of FGM/C are to be removed from their parents, what is the appropriate outcome for her brother who may be circumcised? "Is her welfare best served by separating her permanently from her parents at the price of severing the sibling bond? Or is it best served by preserving the family unit?", Munby P asks (*B and G* 2015, para. 76).

This unequal result highlights how stereotypical and unreflective understanding of certain practices may have unwanted or even discriminatory results.

Munby P's opinions on FGM/C and male circumcision are *obiter dicta*. Thus, not essential to the determination of the issue, these comments do not set a precedent. Nevertheless, the case demonstrates that even firm and settled stereotypes can successfully be challenged in legal settings. To describe non-therapeutic circumcision of male children as significant harm has been described as groundbreaking (Earp 2015), but also as a "muddying the waters of male circumcision", which could "open the door for those opposed to such a practice" (McAlister 2016).

The Ali Case: Lack of Cultural Contextualization in Criminal Cases

CRIMINAL LAW, SWEDEN, B5015-06 IN DISTRICT COURT (RH 2007:7)

Culturally based typifications may play a role in the outcome in criminal court cases in which an illegal FGM/C procedure has been initiated. In the Ali case (Criminal Law, Sweden, B5015-06 in District Court, RH 2007:7 in Court of Appeal, NJA 2006 s 708 in Supreme Court), the FGM/C event was said to have taken place in Somalia with the girl's father as the initiator and perpetrator. Yet, it would not have been possible to convict Ali if the court members had had better insights into Somali family organization, Somali traditional gender relations and what typically happens when a girl is subjected to FGM/C in Somalia.

The first FGM/C criminal case in Sweden had an unexpected ingredient: the accused was a man, the father of the victim. Ali had four children with his ex-wife Safiya; the two oldest, a girl and a boy, had lived with him in Somalia after their divorce some years earlier; the two younger ones lived with their mother in Sweden.

An allegation against Ali about FGM/C regarding his oldest daughter emerged during a dispute over custody and confusion over Safiya's right to receive child benefits from the Swedish state for the children living with Ali in Somalia. When the state suddenly withheld the child benefits after several years, Safiya claimed that Ali had retained the oldest children in Somalia against her will and she applied for sole custody.

In March 2006, the dispute over custody was to be settled in a district court in Sweden. After the proceedings, Ali was immediately arrested for the suspected FGM/C of his oldest daughter and convicted of FGM/C and parental abduction of a child in the district court. In the Supreme Court, the charge of abduction was dismissed while the charge of FGM/C was referred to the Court of Appeal, where Ali received a two-year prison sentence for FGM/C.

A review of the criminal investigation, the court documents and the audios of the police interrogations and court sessions shows that Ali was perceived as unreliable not because his statements or accounts were contradictory or incoherent, but because he described a reality that was culturally unfamiliar to the court members. Specifically, it was different from their preconceptions of Somali, or Muslim, men and women. For instance, Ali produced a document signed by family representatives from both sides involved in the previous divorce negotiations. The document stated the terms of Ali and Safiya's divorce and child arrangements. Such negotiations between the affected clans are customary among

Somalis and are perceived as legally binding. The document was dismissed by the court, arguing that the result of the alleged negotiations was implausible: "That she [Safiya] willingly would refrain from being with her two children during several years of their childhood, they being of a sensitive age, does not seem very plausible" (*Verdict RH* 2007:7).

This conclusion is based on the ethnocentric current cultural construction of motherhood in Western countries – ideal mothers never leave their own children out of sight (Smart 1996). In contrast, among Somalis, a "good mother" sees to the best interests of her children and the family in other ways, including letting her children grow up in households other than her own. Somali children are "mobile" within their clan (Johnsdotter 2013) and often move between families, areas or countries. Most families have one or more children in foster care. In addition, the Somali clan system is patrilineal, which in practice means that all children "belong" to their father. If the Swedish court had made use of cultural expertise to understand what is "natural" and "reasonable" among Somalis regarding family organization, the situation would have been assessed differently.

In Somalia, fathers generally are not involved in the decision-making and arrangements of FGM/C (e.g., Sulaiman, Kipchumba, and Magan 2017). Culturally speaking, such events are strictly "women's business". Yet Ali was said to have been present during his daughter's circumcision. Although such a situation is unheard-of among Somalis, the scenario is imaginable to Swedish court members, influenced by media representations that depict FGM/C practices as the ultimate patriarchal oppression of women and girls. Had the court known how unlikely and inconceivable it is for a Somali father to be present during his daughter's circumcision, they might have concluded that the prosecutor's version was unsound.

When Ali was sentenced to prison there was no evidence of when or where the crime had taken place, the only evidence being the statement from his then 14-year-old daughter. The girl's contradictory (with often-changed details) version, conveyed during police interviews, may hint at the possibility that she was under pressure and actually wanted to stand out as unreliable. Yet, the court decided that her father was guilty beyond reasonable doubt.

This case appears to be imbued with typifications in the form of compound stereotypes: gender-based stereotypes about the cultural Other. Ali was treated in line with the stereotype of the "oppressive Muslim husband and father", while his ex-wife (even when it was obvious that her behaviour benefitted only herself) could motivate her actions by saying, "Ali forced me to do it". When Western courts deal with cases involving people from other cultural contexts, cultural expertise is crucial to ensure that trials are fair. In this case, lacking evidence, cultural expertise could have resulted in court members realizing how unreasonable it was to conclude that Ali was the perpetrator.

Collins & Akaziebie v. Sweden: Two Modes of Stereotyped Reasoning

EUROPEAN COURT OF HUMAN RIGHTS: APPLICATION NO. 23944/05

Judicial stereotyping may undermine the protection that the courts offer to women when claimants are not perceived as real victims. The use of cultural expertise can address harmful stereotypes by providing elements that bridge the gap between cultural prejudices or statistical stereotypes and a person's actual circumstances.

Few cases concerning FGM/C have reached the European Court of Human Rights (ECHR), despite the numerous denials of asylum claims at state levels (Ali, Querton, and Soulard 2012). One of them is *Collins & Akaziebie v. Sweden* (2007) in which the Court had to decide whether the deportation to Nigeria of Mrs Collins and her daughter was a violation of article 3 ECHR (prohibition of torture and ill-treatment) as they claimed that they would face a real risk of being subjected to FGM/C. Mrs Collins arrived in Sweden pregnant, seeking asylum, arguing the inability of her family to protect her and her baby from FGM/C, that there was no alternative secure relocation in Nigeria and that the father of her child had been harassed and forced to leave their village for letting her "escape" FGM/C.

The Court did not question FGM/C amounting to ill-treatment, but it doubted whether the applicants faced a real risk, declaring the application inadmissible. First, the Court accepted Nigerian Official Reports that estimate only 19% of women and girls undergo the practice, discarding competing information regarding the territories where prevalence is higher. Second, as neither institutions nor NGOs support the claim that women in the Delta state undergo FGM/C upon childbirth, Mrs Collins' credibility was in question. Third, the applicant's personal capacity to protect her daughter was scrutinized: she was schooled for 12 years; she expressed her opposition to FGM/C, receiving support from her husband and family; she "nevertheless decided to flee the country"; she "managed to obtain practical and financial means and succeeded in traveling to Sweden". The Court stated: "it is difficult to see why Mrs. Collins, having shown such a considerable amount of strength and independence, cannot protect her daughter from being subjected to FGM". Unable to substantiate a real risk, the Court declared the application manifestly ill-funded.

The case shows the ECHR's two modes of reasoning in gender-based asylum cases that result in unequal protection for women: a *thin* examination of gendered structures with a *thick* evaluation of private capacity to deal with the risk (Peroni 2018). The Court is content with formal protection and "increasing state

efforts" to protect women from FGM/C, regardless of any evidence concerning its ability to do so. At the same time, it overemphasizes the applicant's supposed capacity to face the risk and protect her daughter.

Besides satisfaction with mere formal protection, the *thin* examination of gendered structures is exemplified in the use of statistics for prevalence. Assessing real risk by applying general statistics is in itself a form of stereotyping: although 19% of women in Nigeria risk FGM/C, the individual risk for Mrs Collins could be 100%.

Because the Court relies on official data, it fails to ask whether FGM/C was more prevalent in some states than others and what the prevalence was in the Delta state, whether different cultural groups performed distinctive forms of FGM/C and whether or not the practice feared by the applicant was one of such forms. Although reports and studies about FGM/C prevalence may be problematic,[2] they do highlight questions that need to be asked. The participation of a cultural expert might have helped the Court in reaching the decision without relying on stereotypes, by bringing in knowledge for the assessment of the relevant facts. Arguably, the Court might still have reached the same conclusion, but it would have done so through a rational, non-stereotyped determination of risk.

The *thick* examination of her personal situation illustrates compound stereotypes (Cusack 2014) about non-Western women as being submissive victims of their own culture (Kapur 2002). The Court's findings regarding Ms Collins' resourcefulness to travel alone, combined with her strength and independence, run counter to assumptions about the weakness, passivity and helplessness African women are believed to possess. Instead of considering that her extraordinary diligence was a measure of her desperation, the Court held these traits against her and regarded Mrs Collins as being untrustworthy and unreliable (see Kelly 2010).

Due to the combination of both modes of stereotyped reasoning, the Court failed to provide refugee status protection and failed to challenge preconceptions about FGM/C and African women, thereby reinforcing inequality and discrimination. Such handling impacts asylum seekers' social standing and their access to justice. Cultural expertise could be of help in nuancing and strengthening the scrutiny of the discriminatory structures shaping the risk and in assessing how such structures affect the actual applicant.

Conclusions

Cultural expertise may help courts to ask the right questions by contextualizing the acts and highlighting the relevant facts in the light of the particular background of the people involved (Holden 2019a). Accessing cultural knowledge could enable courts to refrain from stereotyping and from relying on prejudice and typification in their reasoning.

Notes

1 The categories have subtypes which have not been included.
2 Refworld cites studies (Canada: Immigration and Refugee Board of Canada 2015) stating that Nigerian southern states with higher literacy rates (such as Delta) have higher FGM/C prevalence rates. Other studies suggest that some groups perform FGM/C during pregnancy.

Further Reading

Loseke, Donileen R. 2003. "Evaluating Constructionist Perspectives on Social Problems." In *Thinking about Social Problems: An Introduction to Constructionist Perspectives*, edited by Donileen Loseke, 3–24. 2nd ed. New York: Routledge.
On the impact of typifications on people's thinking.

Johnsdotter, Sara, and Ruth M. Mestre i Mestre. 2017. "'Female Genital Mutilation' in Europe: Public Discourse versus Empirical Evidence." *International Journal of Law, Crime and Justice* 51: 14–23.
An overview of criminal court cases in Europe.

ECHR FGM/C Case Law

Accepted cases

Sow v. Belgium (Application no. 27081/13); *R.B.A.B. and others v. The Netherlands* (Application no. 7211/06).

Cases declared inadmissible

Collins and Akaziebie v. Sweden (Application no. 23944/05); *Izevbekhai and Others v. Ireland* (Application no. 43408/08); *Omeredo v. Austria* (Application no. 8969/10); *Okon and Okon v. Ireland* (Application no. 22255/11); *R.W. and Others v. Sweden* (Application no. 35745/11); *Ameh and Others v. The United Kingdom* (Application no. 4539/11); *E.S. v. France* (Application no. 59345/11); *A.L. v. The United Kingdom* (Application no. 32207/16).

Cases struck out of the list

Agbotain and Osakpolor Omoregbee v. Sweden (Application no. 26834/05); *Bangura v. Belgium* (Application no. 52872/10); *Soumath v. The Netherlands* (Application no. 61452/15); *Barry v. The Netherlands* (Application no. 66238/16); *Magassouba v. The Netherlands* (Application no. 37153/17); *Kake and Camara v. The Netherlands* (Application no. 63913/17); *Touré v. The Netherlands* (Application no. 14778/18).

Q&A

1. When do you think cultural expertise could be best used in FGM/C court cases? Reply considering also criminal law, family law and administrative law.

Key: The chapter analysed cases where cultural expertise could be of use. However, for each area of the law, the role of cultural experts would be different, perhaps requiring a different timing and justification for its use.

2. Cultural expertise concerning FGM/C can impact the Court's decision and be crucial to guaranteeing impartiality in certain cases. Do you think its use should be left to the initiative of the parties or should it be introduced by law in procedural rules?

Key: Introducing cultural expertise into court cases may challenge the use of harmful stereotypes that undermine the impartiality of the judiciary and the rule of law in constitutional democracies. This question opens the discussion on whether the introduction should be made by the legislative power or by the justice system and be subject to democratic discussion and control.

3. What kinds of typifications among the court members were possibly activated in the cases presented? Are there other cultural practices defined as social problems in multicultural societies that may trigger similar processes?

Key: Although the chapter focuses on FGM/C cases, the discussion and arguments developed may be helpful for other cultural practices, (mainly) concerning women's rights, that mobilize stereotyping by public officials in different legal contexts.

References

Ali, Hana Cheikh, Christel Querdon, and Elodie Soulard. 2012. *Gender Related Asylum Claims in Europe*. European Union, Policy Department. https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf

Best, Joel. 2017. "Typification and Social Problems Construction." In *Images of Issues: Typifying Contemporary Social Problems*, edited by Joel Best, 3–10. New York: Routledge.

Brems, Eva, and Alexandra Timmer, eds. 2016. *Stereotypes and Human Rights Law*. Cambridge: Intersentia.

Canada: Immigration and Refugee Board of Canada. 2015. *Nigeria: Prevalence of Female Genital Mutilation (FGM) among the Urhobo, Including the Consequences for Refusing to Undergo this Procedure, Particularly Pregnant Women; State Protection Available (2014-March 2015)*. November 15, 2015. https://www.refworld.org/docid/56498d834.html

Clérico, Laura. 2018. "Hacia un análisis integral de estereotipos: Desafiando la garantía estándar de imparcialidad." *Revista Derecho del Estado* 41: 67–96.

Cusack, Simone. 2014. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases*. Final paper submitted to the United Nations Office of the High Commissioner for Human Rights, June 2014.

Earp, Brian D. 2015. "On the Supposed Distinction Between Culture and Religion: A Brief Comment on Sir James Munby's Decision in the Matter of B and G (Children)," University of Oxford website, February 8. http://blog.practicalethics.ox.ac.uk/2015/02/on-the-supposed-distinction-between-culture-and-religion-a-comment-on-sir-james-munbys-decision-in-the-matter-of-b-and-g-children/

Holden, Livia. 2019a. "Cultural Expertise and Socio-legal Studies: Introduction." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 1–9. Bingley: Emerald.

———. 2019b. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of cultural expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

Johnsdotter, Sara. 2013. "European Somali Children Dumped? On Families, Parents and Children in a Transnational Context." *European Journal of Social Work* 18, no. 1: 81–96.

Johnsdotter, Sara R., and Elise B. Johansen. 2020. "Introduction." In *Female Genital Cutting: The Global North and South*, edited by Sara Johnsdotter, 7–21. Malmö: Centre for Sexology and Sexuality Studies, Malmö University.

Johnsdotter, Sara, and Ruth M. Mestre i Mestre. 2017. "'Female Genital Mutilation' in Europe: Public Discourse versus Empirical Evidence." *International Journal of Law, Crime and Justice* 51: 14–23.

Kapur, Ratna. 2002. "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics." *Harvard Human Rights Journal* 15, no. 1: 1–38.

Kelly, Liz. 2010. "The (In)credible Words of Women: False Allegations in European Rape Research." *Violence Against Women* 16, no. 12: 1345–55.

La Barbera, Maria Caterina. 2009. "Revisiting the Anti-Female Genital Mutilation Discourse." *Diritto & Questioni Pubbliche* 9: 485–507.

Leonard, Lori. 2000. "'We Did It for Pleasure Only': Hearing Alternative Tales of Female Circumcision." *Qualitative Inquiry* 6, no. 2: 212–28.

Leye, Els, Jessika Deblonde, José García-Añón, Sara Johnsdotter, Adwoa Kwateng-Kluvitse, Linda Weil-Curiel, and Marleen Temmerman. 2007. "An Analysis of the Implementation of Laws with Regard to Female Genital Mutilation in Europe." *Crime, Law and Social Change* 47, no. 1: 1–31.

Leyens, Jacques-Phillipe, Vincent Yzerbyt, and Georges Schadron. 1994. *Stereotypes and Social Cognition*. London: Sage.

Loseke, Donilee R. 2003. *Thinking about Social Problems: An Introduction to Constructionist Perspectives*. New York: Aldine de Gruyter.

Macklin, Audrey. 2006. "The Double-edged Sword: Using the Criminal Law Against Female Genital Mutilation in Canada." In *Female Circumcision: Multicultural Perspectives*, edited by Rogaia Abusharaf, 207–23. Philadelphia, PA: University of Pennsylvania Press.

McAlister, Ruari D. 2016. "A Dangerous Muddying of the Waters? The 'Significant Harm' of Re B and G (Children) (Care Proceedings) [2015] EWFC 3." *Medical Law Review* 24, no. 2: 259–67.

Mestre i Mestre, Ruth M., and Sara Johnsdotter. 2019. "Court Cases, Cultural Expertise, and 'Female Genital Mutilation' in Europe." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 95–113. Bingley: Emerald.

Peroni, Lourdes. 2018. "The Protection of Women Asylum Seekers under the European Convention of Human Rights: Unearthing the Gendered Roots of Harm". *Human Rights Law Review* 18, no. 2: 347–70.

Peroni, Lourdes and Alexandra Timmer. 2016. "Gender Stereotyping in Domestic Violence Cases. An Analysis of the ECHR's Jurisprudence." In *Stereotypes and Human Rights Law*, edited by Eva Brems and Alexandra Timmer, 39–65. Cambridge: Intersentia.

Rogers, Juliet. 2013. *Law's Cut on the Body of Human Rights: Female Circumcision, Torture and Sacred Flesh*. Abingdon: Routledge.

Smart, Carol. 1996. "Deconstructing Motherhood." In *Good Enough Mothering? Feminist Perspectives on Lone Motherhood*, edited by Elizabeth Bortolaia Silva, 37–57. London: Routledge.

Sulaiman, Munchi, Elijah Kipchumba, and Mohammed Magan. 2017. *Changing Social Norms in Somalia: Baseline Report on Changes Project Addressing Women Empowerment, Female Circumcision and Early Marriage*. July 2017. Save the Children Somalia. https://resourcecentre.savethechildren.net/pdf/snap_chnages_baseline_final_0.pdf/

Timmer, Alexandra. 2015. "Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law." *The American Journal of Comparative Law* 63, no. 1: 239–84.

WHO – World Health Organization. 2020. *Female Genital Mutilation*. https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation

Cases Cited

Collins & Akaziebie v. Sweden, Application No. 23944/05 (European Court of Human Rights 2007).

In the matter of B and G (Children) (No 2). [2015] EWFC 3 (England and Wales Family Court 2015).

B5015-06 (Swedish District Court).

RH 2007:7 (Swedish Court of Appeal).

NJA 2006s 708 (Swedish Supreme Court).

7

CULTURAL EXPERTISE AND MULTICULTURALISM

Ralph Grillo

LEARNING OBJECTIVES

This chapter considers how anthropologists and other experts become involved with legal proceedings and what happens in their encounters with the law and with lawyers from the perspective of multiculturalism. After reading this chapter you will have learnt how cultural expertise is viewed by the courts in cases pertaining to diversity; to what extent it influences judges and juries in determining whether minority beliefs and practices should be taken into account when deciding a case; and eventually, whether cultural expertise should play a role in legal proceedings.

Introduction

Contemporary societies are to varying degrees multi-ethnic and multicultural with diversity stemming largely from the immigration and settlement of workers and refugees. Currently, however, there is widespread debate about the impact of diversification and the social, cultural and religious difference that accompanies it. While from the late 1960s to the 1990s, there was a broad consensus as to the principles underpinning the integration of minority ethnic populations, since the turn of the millennium, the public mood has shifted against this, with much alarm about "parallel lives", ghettoisation, unfair access to social resources and the radicalisation of young people (Vertovec and Wessendorf 2010). Indeed, almost everywhere, immigration, integration and multiculturalism have become

DOI: 10.4324/9781003167075-10

hotly contested ideas, as may be observed in the media and on the Internet, in parliamentary and political debates, in the preoccupations of professionals such as social workers and teachers and in everyday conversations.

Theory and Concepts

Often in response to the rise of populist movements that articulate and channel concerns about immigration and cultural differences, sometimes hysterically and in a xenophobic manner, there have been innumerable local, national and international policy initiatives. In this context, the relationship between cultural and religious differences, on the one hand, and the law on the other has become highly significant for the following reasons.

The plurality stemming from immigration has often brought individuals, families and sometimes whole communities within the purview of the law, especially if they try to live transnationally. The world of migrants, refugees and settled minorities often involves two or more legal jurisdictions (Shah 2010).

Some people seek to maintain practices potentially at odds with those of the societies in which they have settled and thus are perceived as problematic so far as law and public policy are concerned. I emphasise *some* and add that legal problems may arise from changing relations between men and women, and parents and children, *within* minority families, as much as from differences *between* minorities and majorities.

Across the globe, people are turning to religion (Evangelical forms of Christianity, Hinduism, Sikhism and not least Islam) to guide their conduct, seeking how to comport themselves in societies perhaps seen as individualistic and immoral. Despite the widely reported decline in belief and practice among adherents of the historic Christian churches, the world is increasingly post-secular (Habermas 2008), with a resurgence of religious belief and practice. At the same time, international conventions of human, cultural, religious and gender rights influence individual and collective claims.

Consequently, in all Western societies, there is now a multiplicity of culturally differentiated and often conflicting moral universes (conceptions of the good life and how to live it) which poses many challenges in the political sphere and in what Pierre Bourdieu (1987) called the "juridical field" or the "world of the law". The following account explores how and why cultural experts, principally anthropologists, become engaged in such matters, the nature of their relations with legal professionals and what, if anything, they accomplish when cases come to court.

In the United Kingdom and the United States, from the early 20th century onwards, a common response to the political and social problems posed by immigration and ethnicity has been to institute commissions of enquiry. Academics have frequently been called upon, or have taken it upon themselves, to contribute their expertise to such enquiries, including anthropologists for whom issues of

cultural difference touch on the core of their intellectual project. They have also appeared as experts in legal cases where they interact with lawyers, principally in the guise of cultural interpreters, mediators or "cultural brokers" (Holden 2011, 4). They are thus drawn into situations where the civil or criminal law and what to do about other cultures is at stake.

In such contexts, experts may be asked to comment on family law issues (marriage, divorce, custody of children, inheritance); unravel the complex arrangements of transnational migrant family businesses; act for defence or prosecution in criminal cases, often involving domestic violence and abuse; appear for claimants in asylum and immigration tribunals; or advise on cultural awareness training. These are highly politicised matters, posing questions about meaning and practice, rights and duties (who may or should do what, where and when) and the experts' authority to speak about cultural beliefs and practices.

On this terrain, anthropologists meet other professionals with their own mindsets, practices, rules, rituals and indeed cultures (Ballard 2010), and encounter serious disagreement on fundamental questions such as whether the law should recognise other cultural beliefs and practices, or whether there should be *One Law for All*, the title of a British campaign group opposed to any special legal provisions or exemptions on religious grounds. The following cases illustrate some of the difficulties this may entail for anthropologists. Nonetheless, in the United Kingdom, many lawyers are indeed open to seeking ways in which beliefs and practices can be adapted to the local context, and accept that justice must be able to meet the challenge of living in a multicultural society. As a former Lord Chief Justice puts it: "We live in a very diverse society and the justice system has got to be able to cope with that diverse society" (Woolf 2004).

Case Studies

Sikhs and the Definition of a "Racial Group" (*Mandla*)

According to the Sikh religion, there are five practices that adherents must follow, the five Ks, including not cutting one's hair. For men, the traditional turban, *daastar*, which covers the hair is a sacred symbol and regarded as compulsory. In the 1970s and 1980s, Sikhs in Britain claimed the right of men to wear the turban at work, or when riding a motorbike. Sikhs in Canada and France made similar claims. The right to wear a turban at school came up when a Sikh family, the Mandlas, approached the then Commission for Racial Equality (CRE). They sought the CRE's help in establishing that when a school refused to permit their son to attend wearing a turban, and also demanded he cut his hair, an offence had been committed under the 1976 Race Relations Act (Anon Lecturer in Law Liverpool University 1983; Banton 2000). The family argued that wearing a turban and not cutting head hair were practices required by their culture and religion. A county court, advised by experts, rejected this on the grounds that Sikhs were not a racial group as defined by the Act. An appeal court agreed, with

the most senior judge, Lord Denning, explaining that the law defined a racial group by reference to colour, race, nationality or ethnic or national origins, but it did not include religion or politics or culture. Consequently, while Sikhs are a "fine community upholding the highest standards, they are not a 'racial group'. So it is not unlawful to discriminate against them".

> You can discriminate for or against Roman Catholics as much as you like without being in breach of the law [...] But you must not discriminate against a man because of his colour or of his race or of his nationality, or of "his ethnic or national origins".
>
> *(for an outline of the case: Mandla v. Dowell Lee 1982)*

There followed a lengthy legal-cum-anthropological public debate in which Sikh activists lobbied members of parliament and organised demonstrations in London, not about the sacred value of the turban, but about whether Sikhs constituted a racial or ethnic group under the 1976 Act. In 1983, the case went on appeal to what was then the United Kingdom's highest court, the House of Lords, which held in favour of the Sikh claim. In brief, the court ruled that:

> The term "ethnic" [in the 1976] Act was to be construed relatively widely in a broad cultural and historic sense. For a group to constitute an "ethnic group" it had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics, two of which were essential. First it had to have a long shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it kept alive, and second it had to have a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.
>
> *(Mandla v. Dowell Lee 1982)*

Relevant criteria included common origin or ancestry, language, literature and religion. Thus the court extended the application of the discrimination legislation, beyond the somewhat narrow and increasingly outdated notion of race to encompass Sikhs who, in the leading judge's words, were "a distinctive and self-conscious community [and thus] a group defined by a reference to ethnic origins for the purpose of the 1976 Act" (*Mandla v. Dowell Lee* 1982)

Writing on the 25th anniversary of the judgement, Geoffrey Bindman QC, who represented the CRE and the family, observed that while it was clear that there was discrimination, "to persuade a court that Sikhs were a group with a common ethnic origin was going to be an uphill struggle" (Bindman 2008), but this is what they did. It meant convincing the court to interpret the law by broadening the definition of a racial group in such a way that Sikh practices could be accommodated within it. The role of the experts, who included Indarjit Singh (later Lord Singh of Wimbledon) and the anthropologist, Roger Ballard,

was to provide evidence about the nature of the Sikh community which would persuade the court that the definition of a racial group in the 1976 Act was inadequate to cover their situation.

While *Mandla* did not question the validity of Sikh beliefs and practices (i.e., about wearing a turban), later cases did appear to enter that territory. In 2008, a young female student claimed her right to wear a *kara*, a distinctive bracelet required by Sikh tradition, despite her school's regulation against jewellery. The court, taking cognisance of anthropological and other evidence, found in the girl's favour on the grounds that "there would be a particular disadvantage or detriment if a pupil were forbidden from wearing an item when that person *genuinely believed … that wearing was [exceptionally] important to her racial identity or religious belief*" (*On the application of Watkins-Singh v. Governing Body of Aberdare Girls' High School* 2008, 52 (emphasis added)).

Open-Air Cremation (*Ghai*)

The question of genuine belief was also central in another case. *Ghai v. Newcastle City Council* concerned an application by a Hindu, Davender Kumar Ghai, and members of the Sikh community, to allow open-air cremations. The *New Law Journal* summarised as follows:

> The claimant [Mr. Ghai] was an orthodox Hindu. He wished his body to be cremated on an open air pyre following his death, and he also wanted similar open air funerals for other Hindus. He approached the defendant local authority to facilitate those goals. The authority rejected his approach on the ground that such funerals were unlawful under [the Cremation Act of 1902].
>
> *(New Law Journal 2009)*

Mr Ghai's appeal against this decision was supported by charitable and activist organisations in the United Kingdom and in India and an online campaign. He contended that the Act "could not … override his fundamental right to undertake an open-air funeral pyre in accordance with his religious or cultural beliefs", under Article 9(1) of the European Convention on Human Rights (ECHR) (cited in *Ghai v. Newcastle City Council* 2009, 81).

The claims made by Mr Ghai and his supporters, before the courts and in public, are not as widely accepted by Hindus and Sikhs in Britain as they argued. Not all believe that open-air funeral pyres are necessary for a good death, and this provoked considerable discussion among the experts giving evidence on behalf of the various parties, who disagreed on whether cremation was a theological necessity (Ballard 2008; Schlensag 2012). Mr Justice Cranston, who heard the case, prepared a detailed report which drew on a variety of evidence, including that of anthropological witnesses; *inter alia* he consulted the standard anthropological work on Hindu cremations (Parry 1994). He asked whether the practice of open-air

cremation, which some Hindus and Sikhs were claiming as their right, should be permitted in a diverse society like the United Kingdom, taking into account the views of both majority and minority populations, and government legislation on health and safety, pollution and so forth (*Ghai v. Newcastle City Council* 2009).

Mr Justice Cranston concluded (*Ghai v. Newcastle City Council* 2009):

(a) The relevant Act and Regulations prohibit the burning of human remains, other than in a crematorium.
(b) Hindus and Sikhs dispute whether their religious beliefs necessitate an open-air pyre and associated ceremonial.
(c) Nonetheless, "the claimant's belief in open air funeral pyres is cogent and also central to his strand of orthodox Hinduism. It is beside the point that typically Hindus in this country do not share that belief";
(d) Consequently, the claimant did have a right to hold and "manifest his religious belief in open air funeral pyres" under ECHR Article 9(1);
(e) However, "the prohibition on open air funeral pyres [was] justified" on grounds including that "others in the community would be upset and offended by them and would find it abhorrent that human remains were being burned in this way".

Under Article 9(2) of the ECHR,

> Freedom to manifest one's religion is subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
>
> *(https://www.echr.coe.int/Documents/Convention_ENG.pdf)*

Mr Ghai appealed, and the higher court reversed the decision (*Ghai v. Newcastle City Council* 2010). The reasons given had little to do with whether or not Mr Ghai's beliefs were in accordance with the Hindu religion. Instead, the court sought ways in which Mr Ghai's wishes could be accommodated within the law. Mr Ghai conceded that his religious belief did not require him to be cremated, after his death, on a pyre in the open air, but that it would be satisfied if the process took place within a structure, provided that the cremation was by traditional fire, and sunlight could shine directly on his body while it was being cremated. An example of a suitable structure was found in Spanish Morocco, but the 1902 Act specified that a crematorium was a building, and the appeal judges had to determine whether the proposed structure satisfied the definition of a building under the Act. They agreed that it would and thus Mr Ghai won through what some described as a typically British compromise. Crucial in *Ghai* was the court's acceptance of the validity of *his* interpretation of Hinduism. In other cases, too, an individual's subjective understanding of their religion has been crucial.

Mr Amselem's *Succah*

Orthodox Jews living in a luxury Montréal apartment block had been asked by the management to remove a temporary *succah* erected on their balconies. A *succah* is a shelter used for eating and sleeping during the religious festival of Sukkot. Those concerned signed an agreement prohibiting such constructions for aesthetic and safety reasons, and the management allowed them to erect a communal *succah* in the apartment gardens. Mr Amselem, however, rejected this, arguing that his interpretation of Jewish law obliged him to erect an individual *succah* on his own balcony and that the prohibition infringed on his freedom of religion.

The first court found against him on the grounds that there was contradictory expert evidence for his belief in this religious obligation and that the compromise proposed by the management was reasonable. He appealed, and a majority judgment in the Supreme Court of Canada, adopting a subjective understanding of religion, held that on that basis Mr Amselem's freedom of religion had to prevail (*Syndicat Northcrest v. Amselem* 2004). The Court rejected the view that his subjective understanding could be ignored or overridden by evidence that what a believer deems a religious obligation is not in fact compulsory in his or her religious tradition. In doing so the Supreme Court of Canada followed a US Supreme Court decision, which advocated a minimally intrusive evaluation of an individual's beliefs; courts should only determine that a belief is not feigned and that claims are made in good faith: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect" (*Thomas v. Review Board of the Indiana Employment Security Division* 1981).

Various cases have therefore been determined by acknowledging individuals' subjective understanding of their religion, though this approach might imply the irrelevance of anthropological evidence. No matter what the experts said, Mr Amselem was entitled to his interpretation of his beliefs. A training manual for judges (Judicial Studies Board 2010) and the then President of the United Kingdom's Supreme Court in a lecture on "Religious Dress" said: "It is not for us to question the validity of a person's beliefs, provided that they are sincerely held" (Hale 2018, 11). This subjective, Pirandellian, interpretation of the doctrine – *Così è* (*se vi pare*) or *Right you are (if you think so)* – recognises the right of someone to believe what they like, though it does not necessarily follow that they may practice what they believe.

The foregoing discussion broaches the question of what, if anything, anthropological experts can contribute to a legal case, and whether their expertise can influence a court's decision, as the next case illustrates.

L and Her Mother

In 2011, a teenager (L), whose family had come to the United Kingdom from Zimbabwe, was charged with attempted murder. Her mother had woken one night to find L standing over her with a knife. The police were called, and L was

found to be in a trance-like state. When charged, L claimed that her dead grandmother had come to her in a dream and told her to attack her mother, whom the grandmother held responsible for L's father's sudden death in Zimbabwe some years previously. The implication was witchcraft or sorcery. Expert anthropologists and psychiatrists appearing for the defence and prosecution offered different accounts: an anthropologist outlined the cultural background of African beliefs in the supernatural, while a psychiatrist explained what he called L's psychological disorder of consciousness; another psychiatrist contested this, saying that L had made it all up. Indeed, this was the prosecutor's argument in which L was described as an accomplished liar.

This case shows the different mindsets of lawyers, judges, academic experts and other professionals engaged in a legal context. Anthropological experts often experience considerable difficulty in persuading lawyers to accept the validity and relevance of their evidence and the insights they might be able to give into the nature of cases such as L's. When anthropological reports are presented to a court their objectivity and scientific credentials may be routinely questioned. Indeed, in L's case, one of the two anthropologists who had been consulted was precluded from entering the witness box, on the grounds that he had nothing of substance to offer.

Undoubtedly L had attempted to attack her mother, but at issue was how to interpret the circumstances leading to the attack, what light they shed on L's motivation, *mens rea* and state of mind, and whether anything in the background could persuade the judge or jury to review the offence with which L was charged and the punishment she might face. None of the experts proposed a so-called cultural defence, which is the use of cultural arguments for the acquittal or mitigating circumstances (see Holden, Chapter 1 in this volume). In the event, the jury found her guilty, not of attempted murder, but of the lesser crime of malicious wounding. The judge then determined that, pending sentencing, she should be released on bail and allowed to stay in touch with her mother as long as another family member was present. After reports from the probation service and another psychologist, L received a suspended prison sentence and was discharged into the care of her mother. Joost Fontein, one of the anthropologists involved, and besides newspaper reports the principal published source for the trial, commented: "the sentencing was very sympathetic to [L] and her mother. She was allowed home … and she could begin to rebuild her life, her relationship with her family, and most of all with her mother" (2014, 98). Perhaps the anthropological intervention had more influence than initially seemed likely. Fontein (2014, 98) himself observed:

> Courtroom discussions did fall back on essentialized notions of culture that would make any anthropologist squirm. Yet the psychiatrists did engage, to some degree, with the anthropological evidence in their oral testimonies, which did seem to influence their courtroom discussions, if only in a small way. It also had an effect on the (ultimately flawed) defence

case. In the end the anthropological evidence presented to the court may also have had efficacy in the judge's deliberations, even if his statements did fudge something akin to the kind of cultural defence anthropologists are often at pains to avoid.

Freedom from, Freedom to

In reflecting on what emerges from these and other cases, it is useful to draw on Isaiah Berlin's discussion of freedom, and in particular his concepts of freedom from and freedom to (2002).

In the United Kingdom and elsewhere there has been much legislation relating to freedom from, e.g., discrimination, on the basis of gender and religious belief, and protection from hatred on such grounds, and *Mandla* hinged on extending the law to Sikhs. Evidence from Sikh activists and social scientific experts enabled the lawyers in *Mandla* to convince the courts that the 1976 Act's definition of a racial group needed to be updated in accordance with contemporary theory, for the benefit of the claimants.

Much effort on the part of academic experts has gone into protecting ethnic and religious minorities' freedom from discrimination. But what about freedom to? Sometimes freedom from and to are two sides of the same coin: banning Sikh turbans was a form of discrimination from which it was argued the 1976 Act protected them, thus enabling them to exercise their right. But claims for freedom to are central to much contemporary debate about diversity in multicultural societies. In respect of Muslims, for example, they include such matters as women's veiling (the wearing of a headscarf, niqab or burqa), building mosques or applying principles of religious law (Shari'a) in judging family matters. In some jurisdictions, however, e.g., France, Muslim women's freedom to follow religious beliefs and practices on face-veiling has been curtailed, indeed criminalised. This is the opposite of legislation enhancing freedom from discrimination.

Claims to allow the exercise of conscientious religious beliefs, as in *Ghai* and *Amselem*, may pose difficult questions for judges when they are confronted with disputed interpretations. One way of addressing such issues is to refuse to determine the validity of a religious belief and prioritise an individual's subjective interpretation, thus recognising the right of someone to believe, if not to practice, what they will, though this might imply that the specific knowledge and skills of experts are not needed. Cases like *Ghai*, however, also reveal a willingness to find ways of allowing freedom to, perhaps in a modified form, even if not strictly in accordance with the law.

Claims for freedom to (which sometimes come up against legislation protecting "freedom from", as with Muslim veiling), also entail questions of what might be tolerated in Western-style liberal democracies. In L's case, while the court could entertain a cultural explanation for her actions, it could not accept that her cultural background (as outlined by the anthropologists) provided grounds for her acquittal; nobody suggested it could justify attempted murder. Nonetheless,

although expert evidence was perhaps marginal to the defence, explaining the complex cultural background of the affair seemingly influenced the jury's verdict and induced the judge to take a more sympathetic view of what had occurred and adjust the sentence accordingly.

Conclusion

This chapter has reviewed a small sample of cases in which the intervention of cultural experts had mixed results. Other cases and contexts, for example, immigration tribunals (see Campbell, Chapter 12 in this volume) may tell a different story, but by and large, anthropologists acting as expert witnesses are often sceptical about whether courts will accept, or indeed understand, their culturally grounded interpretations, and at times perhaps give lawyers and judges less credit than they deserve when attempting to engage in dialogue.

That said, the encounter between anthropological experts and lawyers and judges may reveal significant problems of mutual understanding, between, for example, the widely accepted, common-sense view of culture as an identifiable, undifferentiated, collective attribute and that which sees it as a more individualistic, subjective, contested personal construct. Though some judges may be sympathetic to the latter, on the whole, the legal professions prefer to see culture as an established set of principles and practices, while anthropologists abjure such essentialism, and are uncomfortable when required to give a yes or no answer to a cultural question (Good 2008). Between lawyers and anthropologists, and sometimes among anthropologists themselves, there may thus emerge profound disagreements about culture's ontological status.

The governance of multicultural societies has historically involved much discussion of what to do about ethnic, cultural and religious diversity, with the limits of what is or is not to be tolerated under constant scrutiny. Encounters in court between the law and cultural experts play a small but not insignificant role in what is often a painful process of boundary negotiation.

Further Reading

Banton, Michael. 1998. "Judicial Training in Ethnic Minority Issues in England and Wales." *Journal of Ethnic and Migration Studies* 24, no. 3: 561–72.

Foblets, Marie-Claire, and Alison Dundes Renteln, eds. 2009. *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*. Oxford; Portland, Oregon: Hart Publishing.

Grillo, Ralph. 2017. "Anthropologists Engaged with the Law (and Lawyers)." *Antropologia Pubblica* 2, no. 2: 3–24.

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

Lawrence, Benjamin Nicholas, and Galya B. Ruffer, eds. 2015. *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony*. Cambridge: Cambridge University Press.

Renteln, Alison Dundes. 2004. *The Cultural Defense*. Oxford: Oxford University Press.
van Rossum, Wibo. 2007. "Dutch Judges Deciding Multicultural Legal Cases." In *Explorations in Legal Cultures*, edited by Fred Bruinsma and David Nelken, 57–74. Den Haag: Reed Business.
Volpp, Leti. 2000. "Blaming Culture for Bad Behavior." *Yale Journal of Law & Humanities* 12, no. 1: 89.

Q&A

1. How and why do cultural experts become involved in legal cases?

Key: Consider how diversity in contemporary Western societies has led to demands for freedom from discrimination on the part of minorities and the freedom to follow cultural practices.

2. To what extent should the law give minorities the freedom to express their beliefs and follow their cultural practices?

Key: Were the courts in the United Kingdom and Canada justified in allowing Mr Ghai and Mr Amselem the right to pursue their own subjective interpretation of beliefs and practices in Hinduism and Judaism? What use for cultural expertise in such cases?

3. What is the experience of cultural experts engaged in legal cases? What difficulties do they encounter?

Key: Compare the different ways in which cultural experts intervened in the Sikh turban case and L's trial for attempted murder.

References

Anon Lecturer in Law Liverpool University. 1983. "Turban or Not Turban – That Is the Question (Mandla V. Dowell Lee)." *Liverpool Law Review* 5, no. 1: 75–90.
Ballard, Roger. 2008. "The Logic of Cremation in Indic Contexts: An Anthropological Analysis." Centre for Applied South Asian Studies (CASAS) Online Papers: Ethnic Plurality and Law. https://fid4sa-repository.ub.uni-heidelberg.de/466/1/1_Logic_of_Cremation.pdf
———. 2010. "Applied Anthropology: A Viable Career Path in Contemporary Britain?" Paper for the Workshop *Public Anthropology for a World in Crisis* at the 2010 EASA Conference, Maynooth: 1–22.
Banton, Michael. 2000. "Strategic Vision in Combating Racial Discrimination." In *From Legislation to Integration? Twenty Years of the Race Relations*, edited by Muhammad Anwar, Patrick Roach, and Ranjit Sondhi, 158–177. London: Palgrave Macmillan.
Berlin, Isaiah. 2002. *Liberty*. Oxford: Oxford University Press.
Bindman, G. 2008. "The Right to Wear a Turban." *New Law Journal* 159, no. 7318: 594.
Bourdieu, Pierre. 1987. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38, no. 5: 805.
Fontein, Joost. 2014. "'She Appeared to Be in Some Kind of Trance': Anthropology and the Question of Unknowability in a Criminal Trial." *HAU Journal of Ethnographic Theory* 4, no. 1: 75–103.

Good, Anthony. 2008. "Cultural Evidence in Courts of Law." *The Journal of the Royal Anthropological Institute* 14, no. s1: S47–S60.

Habermas, Jürgen. 2008. "Notes on Post-Secular Society." *New Perspectives Quarterly* 25, no. 4: 17–29.

Hale, Brenda. (Lady). 2018. *Religious Dress*. Sultan Azlan Shah Lecture, Oxford, January 25, 2018. https://www.supremecourt.uk/docs/speech-180125.pdf

Holden, Livia. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.

Judicial Studies Board. 2010. *Equal Treatment Benchbook*. London: Judicial Studies Board.

New Law Journal. "Religion – Human Rights – Open Air Funerals. 2009. Ghai v. Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening) [2009] EWHC 978 (Admin), [2009] All ER (D) 68 (May)." *New Law Journal* 159, no. 7369, May 14.

Parry, Jonathan. 1994. *Death in Banaras*. Cambridge: Cambridge University Press.

Schlensag, Stefan. 2012. "Death Is Not the End, or Is It? Burial Rites and Funeral Ceremonies in Britain's Multi-Ethnic Society." In *Birth and Death in British Culture: Liminality, Power, and Performance*, edited by Anette Pankratz, Claus-Ulrich Viol, and Ariane de Waal, 163–77. Newcastle-upon-Tyne: Cambridge Scholars Publishing.

Shah, Prakash. 2010. "Inconvenient Marriages, or What Happens When Ethnic Minorities Marry Trans-Jurisdictionally." *Utrecht Law Review* 6, no. 2: 17–32.

Vertovec, Steven, and Susanne Wessendorf, eds. 2010. *The Multiculturalism Backlash: European Discourses, Policies and Practices*. London: Routledge.

Woolf, Harry. 2004. "African Britons and Equal Treatment Bench Book." *Ligali*, July 4.

Cases Cited

Ghai v. Newcastle City Council, [2009] EWHC 978, (Admin) (England and Wales High Court (Administrative Court) 2009).

Ghai v. Newcastle City Council, [2010] EWCA Civ 59 (England and Wales Court of Appeal (Civil Division) 2010).

Mandla and another v. Dowell Lee and another, [1982] 3 All ER 1108 (England and Wales Court of Appeals (Civil Division) 1982).

On the application of Watkins-Singh v. Governing Body of Aberdare Girls' High School, [2008] EWHC 1865 (England and Wales High Court (Administrative Court) 2008).

Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551, 2004 SCC 47 (S. Ct. of Canada 2004).

Thomas v. Review Board of the Indiana Employment Security Division, 450 US 707 (US S. Ct. 1981).

8

CULTURAL EXPERTISE AND LANGUAGE

Patrick Heinrich

LEARNING OBJECTIVES

This chapter focuses on the loss of Indigenous languages as a cause of poor mental and physical health and argues that Indigenous languages are crucial for the wellbeing of their speakers and society. After reading this chapter you will understand the extent to which the loss of Indigenous languages affects the wellbeing of Indigenous populations. In this context, cultural expertise on Indigenous languages helps towards a better understanding of the social, psychological and physical effects of fostering Indigenous languages, with far-reaching implications for the claims of Indigenous rights as well as for policy-making and law-making at a global level.

Introduction

Around the world, Indigenous language speakers are shifting from their ancestral language to a majority language. Abandoning ancestral languages for majority languages was once framed as progress and seen as an indicator of successful integration. We now see a reversal of this trend. Supra-national organizations like UNESCO (2020), national and local governments and Indigenous communities seek to revitalize Indigenous languages. Attention has shifted from facilitating the adoption of majority languages to stressing the benefits of speaking ancestral languages (Walsh 2018). Scholars have considered whether the loss of Indigenous languages is one of the causes of poverty, poor mental

DOI: 10.4324/9781003167075-11

and physical health or other social ills that are ubiquitous among Indigenous communities. Studies show that language affects personal and social wellbeing because different languages provide distinct access to knowledge and practices, but wellbeing is also influenced by the socio-political situations in which language loss occurs. Dorian (1981) observed that language endangerment always occurs in dominated communities. This makes language revitalization an attempt to undo domination and social inequalities (see Srinivasan, Chapter 3 in this volume).

In this chapter, I report on the specific nexus between language and wellbeing. I restrict the discussion to endangered Indigenous languages, but the principle that speaking ancestral languages benefits the speakers' wellbeing also holds true for immigrants (see Chrisman et al. 2017; Burdziej, Chapter 11 in this volume). I discuss three cases: Aborigines in Canada and Australia and Ryukyuans in Japan. They allow us to identify shared phenomena in polities that are different in terms of their history, demographic composition, multilingual and multicultural awareness and language and educational policies. Let me first briefly delineate some key concepts.

Theory and Concepts

Wellbeing is subjective but can be assessed with the help of indicators (Diener, Oishi, and Lucas 2003) and research across societies has helped to identify several variables that affect wellbeing, e.g., health, education, housing, job satisfaction and leisure time. The classical indicators of physical and mental wellbeing have been income, education, employment, living conditions, social support and health systems. Until very recently, language was not considered an indicator of wellbeing.

Research on the nexus between language and wellbeing draws on the sociology of language, which has shown that language has a performative role as a means of doing things and being someone (Bourdieu 1991). For example, bearing responsibility for others and exercising authority are roles that are constructed through discourse. It has also been demonstrated that Indigenous communities are negatively affected by sociocultural displacement: in contrast to the geographical displacement of migrants, Indigenous communities find themselves involuntarily placed in a new sociocultural and political setting (Fishman 1991). Indigenous peoples are often also displaced geographically, which adds another layer of difficulty to their lives: in contrast to migrants, Indigenous peoples have no place to return to if they seek to escape the effects of feeling displaced. Indigenous displacement is the result of domination by the majority to which Indigenous people have to adapt. Sociocultural displacement results in the interruption of Indigenous cultural and linguistic continuity. Urbanization amplifies the trend of displacement of Indigenous peoples (Kirmayer, Tait, and Simpson 2009).

BENEFITS OF INDIGENOUS LANGUAGES

How then do Indigenous people benefit from maintaining their language? Mühlhäusler (1996) states that different languages provide speakers with benefits pertaining to economy and knowledge and that every language provides an aesthetic resource. Ancestral languages allow Indigenous communities to place themselves in the world because every language serves as a unique repository of cultural knowledge and thus allows for distinct cultural practices.

Speaking an ancestral language also serves to claim linguistic, cultural and political rights; it makes it possible to maintain protective barriers against the dominant group (the majority) and helps to mitigate a relationship of domination. It helps to (re)produce values, institutions and practices that Indigenous people deem important. Indigenous languages provide their speakers with a range of choices that they do not otherwise have. These choices affect wellbeing.

Language loss plays a role in a number of social ills: Indigenous minorities are likely to suffer from prejudice, racism, poverty, unemployment, language loss, spiritual disconnectedness, family instability, etc. (Stephens et al. 2006). These issues are interconnected and aggravate one another. Racism, for example, undermines educational success. Hence, while educational success translates into social advancement for residents of Hokkaido in Japan, the same does not hold true for Hokkaido's Indigenous people, the Ainu (Onai 2011), as prejudice against the Ainu blocks their access to white-collar jobs. King, Smith and Gracey (2009, 78) write that "language revitalization can be seen […] as a health promotion strategy". Cultural and linguistic continuity is therefore seen as a predictor of an Indigenous community's wellbeing.

Language loss also causes a weakening of cultural autonomy. It becomes more difficult to support the community's self-image if majority languages are adopted. Language endangerment results in the loss of cultural knowledge, and this affects how people perceive their position in the world. Communities that have lost their language have difficulties steering their own course into the future. Language loss and cultural change restrict choices for education and governance. They limit access to ancestral land. Without Indigenous language, endangered language communities lose an important legal argument for asserting rights. Language loss also impedes the preservation of cultural artefacts. Therefore, maintaining Indigenous languages is not simply about language. Ghil'ad Zuckermann (2020, 187) argues that language revitalization "will become increasingly relevant as people seek to recover their cultural autonomy, empower their spiritual and intellectual sovereignty, and improve their wellbeing".

Case Studies

Sociolinguistic research studies socio-economic changes that cause language endangerment. Such research has shown that language endangerment is an effect of power inequality between the majority and minorities (Heinrich 2012). Studies of the effects of language loss on the relevant speech community are rare. In what follows, I report on such research, focusing on wellbeing. Physical wellbeing indicates the health status of an individual, which is mainly influenced by diet, exercise, fitness and stress exposure and management. Physical wellbeing contributes to mental and emotional stability. Mental wellbeing is essentially determined by subjective satisfaction with one's life, self-confidence and engagement with the world (Fletcher 2016).

Australian Aborigines

The proportion of Aborigines in Australia's total population of 25 million stands at 2.8% (650,000). Twelve per cent of Aborigines (52,000) are reported to speak an ancestral language (Australian Bureau of Statistics 2010). There were once 250 distinct Aboriginal languages, of which about 145 are still spoken today. One hundred and ten of these languages are either severely or critically endangered (Moseley 2009). Only 18 Aboriginal languages are spoken by all generations and are safe in the sense that their continued use is assured (Marmion, Obata, and Troy 2014). Eighty-one per cent of Australian Aborigines live in cities today. Their life expectancy is nine years shorter than that of non-Aboriginal Australians. It was 20 years shorter in 1973. Australian Aborigines fall significantly behind the non-Aboriginal population in the Human Development Index (Korff 2022a) which is calculated on the basis of life expectancy, education and the standard of living. The maximum score is 1.0. In 2000, the HDI index for non-Aboriginal Australians stood at 0.858. Cooke et al. (2007) calculated an HDI of 0.674 for Aboriginal Australians, a gap of 0.184.

The Australian Human Rights Commission (2009, 60–65) points out the positive effects of local languages on their communities, including the promotion of resilience, better health and better cognitive functioning. These improve employment options. The Standing Committee on Aboriginal and Torres Strait Islanders Affairs (2012) stresses that

> language work is close to the heart of many Indigenous Australians, the important role that Indigenous languages play in terms of a connection to culture, kinship, land and family was highlighted during the Commission's inquiry, as was the devastation to communities that results when language is lost.

A longitudinal survey into Aboriginal lifestyles found that traditional ways of life were the strongest predictor for better health outcomes (ANTaR Victoria

n.d.). Not paying attention to the benefits of Indigenous language deprives communities of the opportunity to tap into a range of resources including knowledge of concepts that structure everyday life and beliefs; means of connecting with the immediate cultural and geographic environment; tools for political self-empowerment; and aesthetic materials in the form of songs, stories and literature. However, diversity is poorly reflected in legal provisions, and knowledge about the benefits of speaking an Indigenous language is compartmentalized in academic circles, to the detriment of minorities, whose choices for language and wellbeing are thus further limited.

Language loss and sociocultural displacement correlate with lower educational achievements, lower incomes, shorter life expectancy and less satisfaction with one's own life (Walsh 2018; Zuckermann 2020). Higher rates of suicide have been found among Aborigines who have lost their ancestral language (Korff 2022b). Other than community cohesion and community-controlled healthcare delivery, more physical activity, a healthier diet and limited access to alcohol contribute to improved Aboriginal health and longevity in non-urban communities. These studies all point in the same direction: maintaining endangered languages improves wellbeing. Aborigines know this. In a survey focusing on why they engaged in language revival, 79% answered that they sought "to improve the wellbeing of Aboriginal and Torres Strait Islanders". This rate was higher than that for "to increase the use of the language" (Marmion, Obata, and Troy 2014, 21). Aborigine language activists want to use their language more frequently because doing so improves their lives. These findings have prompted Zuckermann and Walsh (2014) to call for more comprehensive studies. Such research is now underway in the Eyre Peninsula of southern Australia with the Barngarla community, where Zuckermann (2020, 267) observes "that language revival has an empowering effect on the community wellbeing and mental health of [the] people involved".

Aborigines in Canada

Canada has a population of 35 million inhabitants, 1.6 million (4.9%) of whom are Aboriginal or Indigenous peoples. They can be subdivided into three groups: First Nations, Inuit and Métis. The latter are descendants of First Nations women and French-speaking fur traders. The Métis have traditionally spoken Michif, a mixed contact language. Canadian Aborigines constitute about 600 recognized bands, and they speak 70 distinct languages; 210,000 people or 0.6% of the Canadian population report speaking an Aboriginal language (Statistics Canada 2020). Most of these languages are severely or critically endangered, and only three of them (Cree, Inuktitut and Ojibwe) are considered safe (Moseley 2009). Fifty-two per cent of the Aboriginal population lives in cities (Statistics Canada 2017). Aboriginal life expectancy is 17 years lower than that of the total population; suicide rates among the Inuit are 11 times higher than the national average; 60% of Aboriginal children grow up in poverty; school dropout is a persistent

problem; and depression and alcoholism are much higher than the national average (Assembly of First Nations 2007). The Human Development Index rating of Aboriginal peoples is lower than that of the general Canadian population (United Nations 2010). In 2000, the HDI for non-Aboriginal Canadians amounted to 0.900 while that of Aboriginal Canadians stood at 0.815, a gap of 0.085.

Research into the nexus of language and wellbeing reveals that youth suicide rates among First Nations people in British Columbia vary substantially from one community to another, but based on demographic data on Indigenous people, Hallett, Chandler and Lalonde (2007) compared data on language knowledge and youth suicide rates and showed that language use is an indicator of suicide rates (Hallett, Chandler, and Lalonde 2007; Chandler and Lalonde 2009). This quantitative study into wellbeing and language included altogether 150 Indigenous communities, comprising altogether 14,000 individuals. Since all Indigenous minority groups are rather small, bands were grouped into two cohorts: communities where more than 50% have Indigenous language knowledge (16 bands) and communities in which less than 50% have Indigenous language knowledge (136 bands).

According to Hallett, Chandler and Lalonde (2007) and Chandler and Lalonde (2009), youth suicide rates drop to zero in communities where a third of its members report a conversational knowledge of their ancestral language. In addition, Hallett, Chandler and Lalonde determined the predictive efficiency of language knowledge for the rate of youth suicide in comparison with six other factors (self-government, land claims, education, health care, cultural facilities and police and fire services). Correlating data on language knowledge and youth suicide rates shows that "high language knowledge bands averaged 13 suicides per 100,000 […], while those with lower language knowledge had six times the number of suicides (96.59 per 100,000)" (Hallett, Chandler, and Lalonde 2007, 396). The study concludes that "Indigenous language use, as a marker of cultural persistence, is a strong indicator of health and wellbeing in Canada's Aboriginal communities" (Hallett, Chandler, and Lalonde 2007, 398).

Language also has an impact on physical health. Oster et al. (2014) reveal that Indigenous language proficiency correlates with lower rates of diabetes. Cultural continuity emerges as a determinant to predict physical health. Wellbeing is compromised by policies of assimilation that leave no room for Indigenous languages. Oster et al. (2014) therefore conclude:

> We suggest that interventions aimed at reducing type 2 diabetes rates of First Nations people should work to break down the barriers to cultural continuity and continue the recent revitalization of First Nations cultural reclamation spurred by the Royal Commission on Aboriginal Peoples.

The role of language as a carrier of Indigenous knowledge and its ability to support communities where specific cultural values are reproduced plays a key role. Hence, cultural expertise can provide expert knowledge on how speaking

ancestral languages allows Indigenous people to feel culturally centred, connected and competent, which has positive effects on personal and social wellbeing.

Language Endangerment in the Ryukyu Archipelago (Japan)

Japan has a total population of 125 million inhabitants. Its only recognized minority are the Ainu, whose number is estimated to be somewhere between 30,000 and 200,000, but Japan has several Indigenous languages. Ainu aside, these languages are Hachijo and altogether six distinct Ryukyuan languages. The languages of the Ryukyu Islands and Hachijo are either definitely or severely endangered (Moseley 2009).

Language activists have stressed the necessity of maintaining and revitalizing the Ryukyuan languages by identifying their potential societal functions (Heinrich and Ishihara 2018). For example, during the meeting of the Ryukyuan Heritage Language Society in 2014, members held a round-table discussion which resulted in their listing 12 important functions that make Ryukyuan languages matter (Heinrich, field notes). Eleven of these arguments relate to wellbeing: (1) transmit and promote a deeper reflection of the Ryukyus in Ryukyuan; (2) restore Ryukyuan self-esteem and confidence; (3) promote, in education, Ryukyuan perspectives on language, history and culture; (4) restore cohesion between older and younger generations; (5) familiarize the younger generations with Ryukyuan heritage culture; (6) maintain, strengthen and apply Ryukyuan cultural heritage; (7) contemporize Ryukyuan languages and make them relevant for the future; (8) regain control over Ryukyuan self-image and education; (9) maintain choices for language, identity and culture; (10) stop conformism in Ryukyuan identities and behaviours with models from the Japanese mainland; (11) contribute to communal happiness and wellbeing; and (12) recognize Japan's cultural diversity and promote intercultural tolerance.

Only point 7 out of the 12 aforementioned points alludes directly to language. Otherwise, the potential of Ryukyuan languages and their edge over the Japanese language is seen to lie in the ability of Ryukyuan languages to contribute to community cohesion (4, 5, 9, 11). Ryukyuan languages are seen to be crucial for reconstituting the Ryukyu Islands as a cultural and linguistic centre in their own right (1, 2, 6), and they are significant in efforts to redistribute power between mainland Japanese and the Ryukyuan minority (3, 8, 10, 12). The last point (12) stresses the model character that the Ryukyus could have for the rest of Japan.

Language activists understand that language revitalization requires cultural renewal and societal healing. When I interviewed a 30-year-old Okinawan language learner about the effects of Okinawan language learning, she told me (interview, 16 March 2021):

> Studying Ryukyuan totally matches what I am looking for. It really makes me happy to follow my own goals. It has also liberated me. Maybe I studied

> English [before] to become American. The same principle applies to Japanese. One studies Japanese to become even more Japanese. Okinawan is different, though. I study it to be myself.

Another interviewee in her 50s who now teaches Okinawan at the university told me (interview, 10 March 2021) that

> speaking and teaching Uchinaaguchi [Okinawan] makes people happy. My grandparents, my students. Once I asked students to create a video in Uchinaaguchi for homework. They had a lot of fun. When we showed the videos, the grandparents came, and everybody was really excited. This does not happen in an English class. I received a lot of positive feedback. I felt that using Uchinaaguchi to create something and to communicate made everybody happy.

An Okinawan-as-a-second-language learner in her 40s stated (interview, 9 March 2021) that learning the language was very emotional for her, and that she sometimes needed breaks from it. She continued her language learning nonetheless, because "I am finding the meaning of life for myself. I think everyone should do it. Learning Okinawan was just a starting point. My real goal is life itself".

Wellbeing emerges as a central argument also among the Ryukyus. In 2006, I asked an Okinawan language teacher if she regretted not having raised her children in Okinawan. She gave me the following answer (interview, 19 July 2006):

> We live in a merit society, and all we care about is merit. Merit, merit, merit. And then language needs to adapt to this fixation. With my grandchildren I will not fall into this trap. I will provide them with Okinawan language skinship.

Skinship (*sukinshippu* in Japanese) is a word coined by linking the English word "skin" and the morpheme "-ship" which expresses relations. It refers to intimate, nonsexual relations such as that between parents and children, or between siblings. Hence, this Okinawan language teacher seeks to restore a more intimate tie between the young and the older generations through Okinawan language teaching. Social distance is not something abstract here. She refers to a concrete emotional and psychological intimacy that is fostered through communication in the ancestral language. Her idea of "language skinship" precisely denotes the nexus where language and wellbeing meet.

Conclusion

Endangered-language communities often have a history of "not being well" or "not doing well". Language revitalization contributes to improving wellbeing. Strengthening endangered languages is an activity that restores self-worth,

self-esteem, self-determination and self-confidence. Language revitalization is a way to regain control. Cultural expertise in language as a systematic understanding of the ways how language and wellbeing intersect requires more research. The results we have so far look promising. Focusing on language and wellbeing offers new insights for overcoming inequalities. Linguists can put their services and knowledge to work in the service of justice and assist in formulating policy guidelines and assisting Indigenous peoples in the assertion of rights. European and US sociolinguistics have made a start with anti-discriminatory engagement (Charity Hudley 2013) and, as Holden (2019) argues for anthropologists, there is no unified position in linguistics, but most linguists studying issues such as migration, indigeneity and language endangerment consider language for its performative role "to get things done and to be someone". Language loss results in the loss of options and possibilities in this regard. Ensuring that choices for diversity remain free and secure must therefore be given a high priority, and cultural expertise in Indigenous languages can contribute to the acceptance of this as a right in legal settings (Linguapax 2021).

Further Reading

Aboriginal Healing Foundation. 2008. *From Truth to Reconciliation: Transforming the Legacy to Reconciliation*. Ottawa: Aboriginal Healing Foundation.

A massive 400-pages-long volume which features emic approaches to language and wellbeing. Most of the chapters focus on resilience, reconciliation and social justice.

Taff, Alice, Melvatha Chee, Jaeci Hall, Millie Yei Dulitseen Hall, Kawenniyohstha Nicole Martin, and Anni Johnston. 2018. "Indigenous Language Use Impacts Wellness." In *The Oxford Handbook of Endangered Languages*, edited by Kenneth L. Rehg and Lyle Campbell, 862–83. Oxford: Oxford University Press.

Focusing mostly on cases in America, Taff and her associates report on qualitative evidence about the positive effects on health and society that accompany language revitalization. In the final part, this chapter suggests actions to be taken for successful language revitalization.

Zuckermann, Ghil'ad. 2020. *Revivalistics: From the Genesis of Israeli to Language Reclamation in Australia and Beyond*. New York: Oxford University Press.

The only monograph to date on the topic of language and wellbeing. Zuckermann recapitulates language revitalization in Israel in the first half of the book, and he then applies the lessons learned from the Israeli experience to Aborigines and their languages in Australia in the second part.

Q&A

1. What indications do we have that language choices affect wellbeing?

Key: There is a disparity in mental and physical health between Indigenous and non-Indigenous parts of society. Research shows that this is the effect of sociocultural displacement, i.e., of imposition of economic, cultural and political institutions and norms on Indigenous people. In this context, ancestral languages

are often abandoned. This has many negative repercussions on Indigenous communities. Language loss involves the loss of intellectual, economic, aesthetic and political resources. Language loss affects health, restricts choices for language, culture and norms, prevents the maintenance of community cohesion, limits opportunities to redistribute power more equally between the majority and the minority and renders attempts at self-empowerment more difficult. This negatively affects wellbeing. Seen the other way around, language revitalization can be a tool to improve wellbeing.

2. Why is speaking an ancestral language important, given the fact that nobody is left with "no language" if Indigenous people stop using their language?

Key: Language is not only a tool to transmit propositional content. It also has a performative role as a means of being someone and doing things. Being Indigenous (or any other kind of linguistic minority) and speaking one's own ancestral language affects speakers in terms of what can be said and how, who one can be and what one can do. Ancestral languages provide a cultural and linguistic centre and reproduce norms and values that are central to one's own community, as well as supporting claims for Indigenous rights.

3. What applications can you imagine for cultural expertise on language, education and the assertion of rights?

Key: Ancestral languages play a role in fostering intercultural tolerance and solidarity for society at large. This makes these languages a resource for the entire society, and they should accordingly be integrated within the education system to further the wellbeing of Indigenous groups. Cultural expertise on Indigenous languages can support dispute resolution and the assertion of rights, as well as lead to legal recognition of Indigenous languages at the legislative level.

References

ANTaR Victoria. n.d. "Self-Determination." Accessed February 19, 2023. https://antarvictoria.org.au/self-determination.

Assembly of First Nations. 2007. *First Nations Regional Longitudinal Health Survey (RHS) 2002/03: The People's Report*. Ottawa: RHS National Team. https://fnigc.ca/wp-content/uploads/2020/09/0bc75bb9e0f03ebc28116a605432f73b_rhs2002-03-the_peoples_report_afn.pdf

Australian Bureau of Statistics. 2010. "Population Characteristics: Aboriginal and Torres Strait Islander Australians." Australia Bureau of Statistics, May 4, 2010. https://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/526FE126443EBCC6CA257718001D547F/$File/47130_2006_reissue.pdf

Australian Human Rights Commission. 2009. *Chapter 3 – Introduction: Social Justice Report*. https://www.humanrights.gov.au/publications/chapter-3-introduction-social-justice-report-2009

Bourdieu, Pierre. 1991. *Language and Symbolic Power*. Cambridge: Polity Press.

Chandler, Michael J., and Christopher E. Lalonde. 2009. "Cultural Continuity as a Moderator of Suicide Risk among Canada's First Nations." In *Healing Traditions: The*

Mental Health of Aboriginal Peoples in Canada, edited by Laurence J. Kirmayer and Gail Guthrie Valaskakis, 221–48. Vancouver; Toronto: UBC Press.

Charity Hudley, Anne H. 2013. "Sociolinguistics and Social Activism." In *The Oxford Handbook of Sociolinguistics*, edited by Robert Bayley, Richard Cameron, and Ceil Lucas, 812–31. Oxford: Oxford University Press.

Chrisman, Matthew, Wong-Ho Chow, Carrie R. Daniel, Xifeng Wu, and Hua Zhao. 2017. "Associations Between Language Acculturation, Age of Immigration, and Obesity in the Mexican American Mano A Mano Cohort." *Obesity Research & Clinical Practice* 11, no 5: 544–57.

Cooke, Martin, Francis Mitrou, David Lawrence, Eric Guimond, and Dan Beavon. 2007. "Indigenous Well-being in Four Countries: An Application of the UNDP's Human Development Index to Indigenous Peoples in Australia, Canada, New Zealand, and the United States." *BMC International Health and Human Rights* 7, no. 1: 9.

Diener, Ed, Shigehiro Oishi, and Richard E. Lucas. 2003. "Personality, Culture and Subjective Well-being: Emotional and Cognitive Evaluations of Life." *Annual Review of Psychology* 54, no. 1: 403–25.

Dorian, Nancy. 1981. *Language Death: The Life Cycle of a Scottish Gaelic Dialect*. Philadelphia, PA: University of Pennsylvania Press.

Fishman, Joshua A. 1991. *Reversing Language Shift: Theoretical and Empirical Foundations of Assistance to Threatened*. Clevedon: Multilingual Matters.

Fletcher, Guy, ed. 2016. *The Routledge Handbook of Philosophy of Well-being*. London; New York: Routledge.

Hallett, Darcy, Michael J. Chandler, and Christopher E. Lalonde. 2007. "Aboriginal Language Knowledge and Youth Suicide." *Cognitive Development* 22, no. 3: 392–9.

Heinrich, Patrick. 2012. *The Making of Monolingual Japan: Language Ideology and Japanese Modernity*. Bristol: Multilingual Matters.

Heinrich, Patrick, and Masahide Ishihara. 2018. "Ryukyuan Languages in Japan." In *Heritage Languages around the World*, edited by Corinne A. Seals and Sheena Shah, 165–84. Abingdon; New York: Routledge.

Holden, Livia. 2019. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

King, Malcolm, Alexandra Smith, and Michael Gracey. 2009. "Indigenous Health Part 2: The Underlying Causes of the Health Gap." *The Lancet* 374, no. 9683: 76–85.

Kirmayer, Lawrence J., Caroline L. Tait, and Cori Simpson. 2009. "The Mental Health of Aboriginal Peoples in Canada: Transformations of Identity and Community." In *Healing Traditions: The Mental Health of Aboriginal Peoples in Canada*, edited by Lawrence J. Kirmayer and Gail G. Valaskakis, 3–35. Vancouver; Toronto: UBC Press.

Korff, Jens. 2022a. "Aboriginal Population in Australia." *Creative Spirits*, July 6, 2022. https://www.creativespirits.info/aboriginalculture/people/aboriginal-population-in-australia

———. 2022b. "Aboriginal Suicide Rates." *Creative Spirits*, May 16, 2022. https://www.creativespirits.info/aboriginalculture/people/aboriginal-suicide-rates#toc1

Linguapax. 2021. "Linguistic Diversity, What For?" (Massive Open Online Course). https://www.linguapax.org/en/mother-language-and-linguistic-diversity-mooc-linguistic-diversity-what-for/

Marmion, Doug, Kazuko Obata, and Jakelin Troy. 2014. *Community, Identity, Wellbeing: The Report of the Second National Indigenous Languages Survey*. Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). https://aiatsis.gov.au/sites/default/files/research_pub/2014-report-of-the-2nd-national-indigenous-languages-survey_2.pdf

Moseley, Christopher. 2009. *Atlas of the World's Languages in Danger*. Paris: United Nations Educational, Scientific and Cultural Organization (UNESCO).

Mühlhäusler, Peter. 1996. *Linguistic Ecology: Language Change and Linguistic Imperialism in the Pacific Region*. London: Routledge.

Onai, Toru. 2011. *Living Conditions and Consciousness of Present-day Ainu. Report on the 2008 Hokkaido Ainu Living Conditions Survey*. Sapporo: Centre for Indigenous Studies, Hokkaido University. https://www.cais.hokudai.ac.jp/english/pdf/2ainu_F-3.pdf.

Oster, Richard T., Angela Grier, Rick Lightning, Maria J. Mayan and Ellen L. Toth. 2014. "Cultural Continuity, Traditional Indigenous Language, and Diabetes in Alberta First Nations: A Mixed Methods Study." *International Journal for Equity in Health* 13, no. 1: 92.

Standing Committee on Aboriginal and Torre Strait Islanders Affairs. 2012. *Our Land Our Languages: Language Learning in Indigenous Communities*. Canberra: Parliament of the Commonwealth of Australia. https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/atsia/languages/report/index.htm

Statistics Canada. 2017. "Aboriginal Peoples of Canada: Key Results from the 2016 Census." *The Daily*, October 25, 2017. https://www150.statcan.gc.ca/n1/en/daily-quotidien/171025/dq171025a-eng.pdf?st=tJRUlsT1

Statistics Canada. 2020. "Language Highlight Tables, 2011 Census." Last modified August 4, 2020. https://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/lang/Pages/highlight.cfm?TabID=1&Lang=E&tableID=404&queryID=1&PRCode=01

Stephens, Carolyn, John Porter, Clive Nettleton, and Ruth Willis. 2006. "Indigenous Health 4: Disappearing, Displaced, and Undervalued: A Call for Action for Indigenous Health Worldwide." *Lancet* 367, no. 9527: 2019–28.

UNESCO. 2020. "Upcoming Decade of Indigenous Languages (2022–2023) to Focus on Indigenous Language Users' Human Rights.". Last update April 21, 2022. https://en.unesco.org/news/upcoming-decade-indigenous-languages-2022-2032-focus-indigenous-language-users-human-rights

United Nations. 2010. "State of the World's Indigenous Peoples, Volum eI." United Nations Department of Public Information, January 14, 2010. https://www.un.org/development/desa/indigenouspeoples/publications/state-of-the-worlds-indigenous-peoples.html

Walsh, Michael. 2018. "'Language Is Like Food…': Links between Language Revitalization and Health and Wellbeing." In *The Routledge Handbook of Language Revitalization*, edited by Leanne Hinton, Leena Huss, and Gerald Roche, 5–12. London: Routledge.

Zuckermann, Ghil'ad. 2020. *Revivalistics: From the Genesis of Israel to Language Reclamation in Australia and Beyond*. New York: Oxford University Press.

Zuckermann, Ghil'ad, and Michael Walsh. 2014. "'Our Ancestors are Happy!' Revivalistics in the Service of Indigenous Well-being." *Indigenous Languages: Value to the Community*. Proceedings of the 18th FEL Conference Okinawa International University, Ginowan City, Okinawa Japan, 17–20 September 2013, edited by Patrick Heinrich and Nicholas Ostler.

9

CULTURAL EXPERTISE AND THE MEDIA

Małgorzata Lisowska-Magdziarz

LEARNING OBJECTIVES

This chapter focuses on media literacy as a particular kind of cultural expertise, requiring conscious study and self-aware application in a legal environment. After reading this chapter, you will have learnt about the problems associated with offensive or potentially dangerous media content; the role of ever-changing technological tools in shaping the form and content of evidence in the courtroom; the indirect influence of media as opinion makers; and the potential consequences of the diversified types and levels of media and communication literacy of the parties involved in legal conflicts.

Introduction

The media are nowadays so powerful that organisations and individuals cannot simply choose to ignore them. The courts and the administration of justice are not exempt from the influence of mediatisation processes. This calls for a special skill set: cultural expertise (Holden 2020) in media and communication.

Theory and Concepts

One of the phenomena discussed amongst media and communication scholars today is mediatisation (Thompson 1995; Schulz 2004; Krotz 2007; Hjarvard

DOI: 10.4324/9781003167075-12

2008). It is an overarching process in which communication media (press, television, internet, but also private and public providers of space and content distributors), instead of being solely makers and disseminators of news and entertainment, emerge as independent institutions with goals and logic of their own. Therefore, not only are media being used as means of information, but they also influence societies.

DEFINING MEDIATISATION

Mediatisation (medialisation) is an overarching process wherein communication media, instead of being solely makers and disseminators of information and entertainment, emerge as independent institutions with goals and logic of their own.

Playing a crucial role in providing people with information and advice (Ball-Rokeach and Jung 2009) and representations of the world (Hall 1997; McCombs 2005), they influence citizens' attitudes and actions. They shape public agendas, dictating the hierarchy of social and political issues (McCombs and Reynolds 2002). They provide communication tools and content for political parties, businesses, schools and academia and religious institutions. At the same time, media outlets and production companies are also distinct political and market entities with their own political and commercial objectives that other social entities have to accommodate. Finally, media and communication devices constitute an integral part of people's everyday lives, and their ubiquity leads to the redefinition of the boundaries of privacy and public visibility.

Mass communication has always been an important component of the modern public sphere, but the mediatisation process has intensified as a result of the rise of interactive media (Cvetković 2019) that have led to the development of the so-called participatory culture (Jenkins et al. 2009) where people are not just consumers but also co-creators of media content. This opens a space for various forms of social activity and online engagement and leads to the rapid growth of knowledge thanks to the processes of collective intelligence (Surowiecki 2005), but also facilitates the spread of hate speech and disinformation. Media can be used by different political entities to shape our political and private choices, but they also provide a means of manipulation, and constantly expanding dissemination of fake news (Wardle and Derakhshan 2017). These processes are compounded by the phenomenon of convergence (Jenkins 2016) – the ongoing blurring of boundaries between communication technologies, types of content and users' roles and experiences, premised on their interconnectivity and interchangeability.

The Media and Mediatisation as a Source of Legal Problems

The existence of powerful and ever-present media with their own logic and objectives can both give rise to many legal issues and contribute to the solution of other ones. It can also affect the outcome of seemingly unrelated cases.

Media Content as a Source of Legal Issues

Media may give rise to legal problems when the matter of dispute is their content in itself, together with the results of its dissemination – for example, when it is deceptive, manipulative, offensive, compounding prejudices, damaging one's personal rights or provoking violence. Legal disputes may be then associated with (1) the offensive quality of the content itself, (2) its potential or actual repercussions and (3) the responsibility of its creators and distributors. In increasingly diverse societies, and in a situation of an overabundance of contradictory media information and opinions, the harmful quality of content can become increasingly difficult to prove. Media convergence makes it difficult to even identify its sources or to hold its creators or publishers accountable for the harm it may cause.

The Direct Influence of Media and Communication Technologies in the Courtroom

The direct influence of mediatisation on legal proceedings can be observed in the courtroom itself (Feigenson and Spiesel 2011; Hoffmeister 2014). The presence of journalists can affect the parties' communication and behaviour. Increasingly precise photographs, video and film footage, recordings and electronic correspondence provide access to relevant evidence, but can also lead to manipulation and deception in the courtroom.

The Impact of Media Coverage

Media and journalists become new entities playing a part in legal proceedings. Media coverage of legal cases has an increasing potential for swaying public opinion and pressuring the involved parties by, for example, publicising leaks or additional information via social platforms rather than before the court. The resulting "trial by media" can be a problem for the court and for the parties. The opportunity to comment on and discuss proceedings online can compound these issues even further.

The Indirect Influence of Media on the Proceedings and Outcomes of Legal Cases

The indirect influence of the media stems from their influence on people's minds and attitudes. They shape people's perceptions and understanding of social

processes and phenomena (politics, economy, religion, social agenda, migration, natural environment changes, conflicts and compromises) and institutions (courts, police, social care, healthcare, schools and universities, churches and denominations), together with expectations as to their roles and actions. While doing so, they also provide conflicted parties with media-derived representations of the social milieu as the basis for preconceptions, prejudices and stereotypes.

One should not overlook the role of media in pre-structuring the language that people use when describing themselves and other people's lives and communities. Mediatised communication has thus the potential to reinforce prejudices and stereotypes, by means of direct messages but also in more subtle, indirect ways. The participatory model of media use amplifies the influence of messages of hate on people's minds. The existence of so-called information bubbles, where media users encounter only opinions of similarly thinking people, makes the impact of hurtful stereotyping, hate speech and disinformation even more dangerous.

The Role of Media and Communication Skills

Communication competencies, being the function of multimodal (Kress 2009) and technological skills, affect parties' abilities to clearly state their interests and defend their positions. Mass media contribute to the existence within a population of a diversified range of such skills shaping people's ability to communicate via different means and devices. People come to court with various levels of understanding of the written word, different perceptions of the validity and importance of digital imagery and unequal ability to use the available media to educate themselves. Parties are also strongly influenced by their cultural backgrounds and their concepts of what modes of communication are legitimate, appropriate, valid and trustworthy in different cultural contexts and social situations. Therefore, an individual's communication literacy can influence their very understandability in the courtroom, the way they frame their issues and the outcome of the conflict. The issue of unequal and diversely structured communication and media skills of people is not one we can easily dismiss or overlook.

Media and Communication Literacy

Amidst mediatisation and growing cultural diversity, media and communication literacy and skills are, therefore, necessary to the legal professions; they require conscious study and self-aware application in a legal environment.

The idea of media literacy is usually conceptualised in terms of specific, interconnected groups of skills (Livingstone 2004; Buckingham 2007; Hobbs 2011, 2017), allowing individuals (1) access to media technologies and content, (2) analysis of messages, (3) their critical interpretation and evaluation (Kellner and

Share 2007, 62) and (4) individual creation – the last being part and parcel of communication in a participatory culture. It is then perceived as a democratising and empowering force, the crucial means to allow citizens to actively participate in the life of their society, instead of being passive consumers of political messages and recipients of advertising.

DEFINING MEDIA LITERACY

Media literacy is a set of interconnected groups of skills, allowing individuals the competent use of media technologies, access to media content, analysis of media messages, their critical interpretation and evaluation and individual creation.

However, in legal communication, certain media literacy skills are more relevant than others. Cultural expertise on media in the courtroom involves more analytical and evaluative aspects than creative ones. It also calls for more detailed technical knowledge about the workings of media systems and their co-existence with the world of economics, politics and social agendas. The ability to analyse media content and anticipate its impact; to separate out potentially harmful messages (such as hate speech or fake information); and to view them in the context of media influence constitute a particular skill set, crucial for conflict-solving.

Media Literacy Skills Useful in the Courtroom

The media literacy experts in the judicial system (lawyers, scholars, educators or practitioners) need to be equipped with an internally coherent and applicable set of skills enabling them:

- To receive, understand, interpret and critically assess media content.
- To understand the linguistic, semiotic and rhetorical processes leading to the construction of particular meanings.
- To assess and understand the persuasive and manipulative aspects of media messages.
- To foresee and assess the effects of media messages on individuals and communities, particularly when widely disseminated via technological tools.
- To know and understand the institutional processes of the creation and dissemination of media content, including the responsibility of the individuals and organisations involved.
- To understand the systemic co-conditioning between the media and other parts of the social, economic and political system.
- To understand the processes of creation of user-generated messages together with their mechanisms of distribution and dissemination.

- To understand the technological "affordances" and limitations of various media and communication tools.
- To be aware of the differences in the communication, technology and media skills of people from different cultural, ethnic and class backgrounds.
- To be able to transcend the differences and limitations of the communicating parties with the means of transmodal translation and fair communication.

Sources and Tools for Media Literacy

Media and communication competence as a form of cultural expertise is therefore useful and indeed necessary for judges, attorneys, police and social workers, in the courtroom and in various conflict-solving situations. It will prove indispensable whenever the mass media are directly involved, indirectly affect the conflict or influence the ability of the involved parties to communicate their interests and opinions. The academic discipline of media and communications studies is multifaceted and methodologically eclectic. Apart from its own findings, it draws from political science, sociology, economy, anthropology, linguistics and rhetoric, semiology and other social sciences and humanities. It is therefore difficult to point to a uniform set of resources designed for the specific needs of the legal profession. Most emphasis in education systems is currently put on literacy programmes aimed at children and youngsters, the elderly and economically or socially marginalised groups. Their application in other areas is less thoroughly described and conceptualised. This calls for creativity and open-mindedness while searching for the experts and sources of media expertise applicable to the situation of legal conflict.

The Need to Not Take Media for Granted

The seemingly straightforward nature of media (doesn't everybody know how to turn a TV on or use a computer? Isn't the media content easy to understand?) often lead to people taking media messages and technologies for granted. Yet it is important to be aware of the complexity of today's media systems and technologies and the far-reaching consequences of mediatised communication. Media and communication literacy involves a special kind of knowledge and skill that are useful in the courtroom but requires careful honing and constant adjustment to the ever-changing conditions of life in a multicultural, mediatised society.

Case Studies

Media and Hate Speech, Fearmongering and Racial Stereotyping

A relevant case concerns the action taken by the Commune of City Gdańsk against Polish Television – TVP Info 26 December 2016, concerning the

portrayal of the Council of Immigrants in Gdańsk, alleging that its depiction by the TV station (aired on television, placed on the stations' website and on associated social media platforms) represented the actions of the Commune and the Council in a manipulated way, from a racist and xenophobic standpoint, leading to the vilification of the Community's good name and contributing to an unjustified collective sense of fear and danger. The complainant demanded the removal of all content in question, a public apology and a fine paid to the Centrum Wsparcia Imigrantów i Imigrantek (Centre for the Support of Men and Women Immigrants) in Gdańsk. The court, besides hearing the founders and contributors of the Centre and the representatives of the immigrant communities in Gdańsk as to the practical results and emotional consequences of the implicated media content for those communities, also called for professional opinions of a journalist and media studies and social psychology experts. Their analyses covered the ethics of professional journalism, allegedly breached in the relevant material, and the verbal and visual indicators of hate speech and racism in the media information and reporting. The experts also pointed to possible indirect calls to violence conveyed by the incriminated content, the reach of the hate speech messages given their diffusion on television and social media and the general mechanisms of social influence of the media in such situations. It pertained in particular to the spread of misinformation, stereotyping and labelling, racial and religious defamation and the infringement of people's personal rights. The court also ordered the analysis of the content of 16 other websites covering the same topics. The experts pronounced the material in question to be damaging to the image of the Commune of Gdańsk and the good name of the Council and to indeed amount to hate speech, possibly contributing to fear of immigrants or inciting violence against them. It was deemed harmful to the general image of the immigrants' community and the institutions supporting them, but also potentially detrimental to the emotional wellbeing of individuals. Its presence on the station's interactive platforms gave it more prominence and extended its visibility as compared to a one-time TV broadcast, providing material for hate speech on other social media platforms.

As a result, in January 2020 the Regional Court in Warsaw ordered the TV station to apologise to the Commune of Gdańsk on its main TV information service and the associated social media and to pay 50,000 zl in damages to the Centre for the Support of Men and Women Immigrants in Gdańsk (JK 2020).

Who Is a "Public Figure" in the Participatory Media Culture, and What Is the Extent of Their Freedom of Speech?

A judgment of the Polish Supreme Court from 22 January 2014 (*Wyrok Sądu Najwyższego z dnia 22 stycznia* 2014) concerned a four-year-long legal dispute between three teenage college students and a prominent conservative politician, a member of the European Council (also a university professor). It had started in 2010 when the students submitted a petition to their college headmaster. On the

basis of the judgment of the European Court of Human Rights in the *Case of Lautsi and others v. Italy* (2011), the petitioners complained that the presence of the crucifix in the classrooms in their school and its placement above the state emblem constituted a breach of the right to freedom of thought, conscience and religion guaranteed by the European Convention on Human Rights, undermining the rule of ideological neutrality of the state, cultural and religious pluralism and freedom of thought, conscience and religion. The students used their social media profiles to publicly explain their points of view and report developments of the situation. The politician commented on it in two interviews given to the local newspaper, further redistributed by national media. He called for punishment for the students, describing them in an extremely blunt, derogatory manner, alluding to their youth, upbringing, social and financial status, the parenting incompetence of their families and the alleged support of their actions by liberal European politicians. As a result of these interviews, the students filed a lawsuit against the politician before the local court, demanding a public apology as well as exemplary damages to be paid to charities. The case had larger public ramifications, as it concerned not only citizens' personal rights but also freedom of expression as a whole, and the way in which it is given effect. Therefore, it fell within the Strategic Litigation Programme of the Helsinki Foundation for Human Rights, which provided the students with legal assistance. The students obtained a favourable judgment. The local court decided that their and their families' personal rights had indeed been breached. Then, the defendant appealed to the Appeal Court on the ground of the students being – because of their interactive media presence and resulting public visibility – "public figures", and therefore less entitled to the protection of their personal rights. The Appeal Court found in favour of the students. Its decree called for the reconciling of two important values – the protection of dignity, honour and good name (Art. 30 and 47 of the Polish Constitution) and freedom of expression (Art. 54), stating that neither is unconditional and that the latter must be balanced against the necessity to respect people's personal rights. This decision highlighted the difference in protection that people can rely on, depending on the private or public nature of their persona. It was necessary to delimit the private and public presence of the complainants, and their associated rights, in the situation of the ever-growing public presence of private individuals using mass communication tools for public purposes. The experts stated that expressing opinions via publicly accessible social media platforms is nowadays the received form of participation in public discourse. Therefore, one cannot assume that one becomes a public figure and thus not entitled to the full protection of one's privacy rights just because one voices one's opinions on public matters in media. Internet users do not automatically become public figures when their media content gains wider visibility. That would be detrimental to democracy, as it would discourage people from participating in public debate. Becoming a public persona as a result of one's media activities would require regular conducting of such activities, for example as a part of one's professional duties or continuous political campaigning. Moreover, the vocabulary and rhetoric used by the politician in his interviews were disproportionately hateful and inappropriate

for public debate. It did not concern only the students' actions, but also their families and private lives.

The politician applied to the Supreme Court for the judgment to be overturned. The Supreme Court fully upheld the judgment of the Appeal Court.

Responsibility of Interactive Media Platforms for Hate Speech

On 10 October 2013 and 16 June 2015, the European Court of Human Rights gave judgments relating to the amenability of internet providers for offensive messages posted by its users. Delfi AS, the owner of a major internet portal in Estonia, allowed the publication of anti-semitic hate speech on its forum, concerning a transportation company and its owner. As a result of the complaint by the company against the portal, the Estonian courts recognised the portal's responsibility for hate speech and ordered it to pay damages. Delfi AS appealed to the ECHR (*Case of Delfi AS v. Estonia* 2013). The judgment confirmed the responsibility of the content provider for the hate speech published online in the space intended for the users' discussion and commentary. The court ordered an assessment on whether, and how, the portal encouraged the users to comment; how great the impact of their posts might be and how far-reaching their consequences; whether the portal profited financially based on the frequency of the comments; whether it was able to prevent or block hateful content; and whether the user-generated content of the portal's forum did indeed contain hate speech. The judgment was based on the fact that the portal, although fully aware of the hateful posts on its forum, encouraged users to comment and only automatically blocked vulgarisms, without any actual effort to moderate content and block offensive posts. To date, the judgment seems to have had no practical systemic results. In 2016 the Tribunal itself took a more lenient approach with a Hungarian portal accused of similar breaches (*Case of Magyar Tartalomszolgáltatók Egyesülete v. Hungary* 2016). In fact, many content providers allow hateful content and only block some of it, based on the alleged impossibility of active monitoring of all posts and the threat of censorship. Still, the *Delfi AS v. Estonia* case is an important step towards a more comprehensive position in international law concerning hate speech in interactive media. It is important, as hate speech in the media, next to fake news and the spread of conspiracy theories, is currently one of the most disturbing and dangerous phenomena in interactive communication. Media content is consumed amongst many distractions. Media users are rushed and inattentive and look for strong emotional stimuli rather than intellectual analysis. They may be unable or unwilling to verify the truthfulness of media content or reflect upon the stereotyping and fearmongering that may be present (Wardle and Derakhshan 2017). Therefore, media may sway people's private and political decisions based on incorrect information and questionable premises and contribute to the reinforcing of social conflicts and divisions. This places more responsibility on journalists and media institutions. The broader context for a possible solution is the existence of a diversified set of internet business and media entities. They can assume positions of content providers, network providers, access providers or service providers as the so-called responsible parties, accountable not only for the technical and formal quality

of their services but also for their content. They also may be deemed non-responsible providers of the mere conduit, i.e. caching and hosting services. Therefore, decisions as to their responsibility must be based on the analysis of the position of the publisher, as a space provider rather than a content creator, paired with an evaluation of the content, context, reach and scope of actual actions blocking offensive material.

Further Reading

McCombs, Maxwell, and Amy Reynolds. 2002. "News Influence on Our Pictures of the World." In *Media Effects: Advances in Theory and Research*, edited by Jennings Bryant and Dolf Zillmann, 1–18. Mahwah, NJ: Lawrence Erlbaum Associates Publisher.

This article gives a concise and well-documented overview of the effects of the media on social agendas and values.

Kellner, Douglas, and Jeff Share. 2005. "Toward Critical Media Literacy: Core Concepts, Debates, Organizations, and Policy." *Discourse: Studies in the Cultural Politics of Education* 26, no. 3: 369–86.

This article explains the concept of critical media and communication literacy and its practical ramifications.

Kress, Gunther. 2009. "The Social Environment of Contemporary Communication." In *Multimodality: A Social Semiotic Approach to Contemporary Communication*, edited by Gunther Kress, 18–31. London: Routledge.

This chapter outlines the social conditions for contemporary communication from a social semiotics point of view, including the issues of access to knowledge and power, social ramifications of the multimodal character of communication and practical and ethical consequences.

Q&A

1. In the case of *Commune of Gdańsk v. TVP Info*, the court called for an expert opinion as to whether the TV station used hate speech and breached journalism ethics. How can expert opinions on media and communication assist the court? Why were the experts called, instead of the court using its general intuitive understanding of hate speech or the personal perceptions of the parties?

Key: Students should reflect on the necessity of anchoring the concept of hate speech with clear, understandable criteria pertaining to semantics, pragmatics and the uses of communicated content. Could the concept of hate speech vary depending on the cultural background of the communicating parties? Could the pragmatic objective (intention of harm) be deemed the universal indicator of hate speech? They should consider the issue of actual, empirically researched mechanisms by which the media influence people's behaviour versus the intuitive sense of their probable or possible impact, and the importance of this knowledge to the rational assessment of the consequences of hate speech in the media. They should ask themselves to what extent the professional and ethical codes of journalism can help the court in such cases, and in what situations they may not

be enough. They should reflect on the importance of expert opinion concerning the media and ask themselves why courts should use media and communication experts instead of making an intuitive, seemingly straightforward assessment of media and their functions, rooted in their regular, everyday reception.

2. Given the ever-growing participation of users in the creation of media content, almost everybody can be considered a public figure. Why would the court accept the private status of the teenagers mentioned earlier, and thus protect their personal rights?

Key: Students should be able to reflect on the private/public status of media users based both on their own experiences as content creators and possibly activists in the public sphere and on their awareness of the changing concept of privacy in the media-saturated world.

They should reflect on the possibility and applicability of systemic solutions delineating the precise criteria by which individuals visible in media should be considered public figures. Would the existence of such criteria lead to more responsible strategies of content creation and posting, or to the limiting of free expression? Also, should the young age of the parties be factored in when their private/public status is assessed?

3. In your opinion, since it is technically impossible to control user-generated content posted on internet forums and platforms, and the attempts at control can lead to censorship, should those attempts be abandoned entirely, or should the courts strive to mitigate and control the content no matter what?

Key: Students should reflect on the possible consequences of giving free rein to hate speech, fake news and misinformation in the interactive media versus the hypothetical possibility of using legal solutions to restrain and limit freedom of expression. They should be able to contextualise it in respect of different concepts of freedom of expression in different cultures and various media systems. They could also discuss possible legal and practical repercussions of the creation of a systemic solution (even if it is not fully enforceable) concerning the responsibility of the space and service providers for the content placed within their remit. They may analyse the distribution of accountability between various responsible and non-responsible providers. Could each type be treated as media or as mere business entities?

References

Ball-Rokeach, Sandra J., and Joo-Yung Jung. 2009. "The Evolution of Media System Dependency Theory." In *The Sage Handbook of Media Processes and Effects*, edited by Robin L. Nabi and Mary Beth Oliver, 531–44. Thousand Oaks, CA: SAGE Publications.

Buckingham, David. 2007. *Media Education: Literacy, Learning and Contemporary Culture*. Cambridge: Polity.

Cvetković, Dragan. 2019. "Introductory Chapter: Multimedia and Interaction." In *Interactive Multimedia – Multimedia Production and Digital Storytelling*, edited by Dragan Cvetković, 1–7. London: IntechOpen.

Feigenson, Neal, and Christina Speisel. 2011. *Law on Display: The Digital Transformation of Legal Persuasion and Judgment*. New York: New York University Press.

Hall, Stuart, ed. 1997. *Representation: Cultural Representations and Signifying Practices*. Thousand Oaks, CA: SAGE in association with Open University.

Hjarvard, Stig. 2008. "The Mediatization of Society: A Theory of the Media as Agents of Social and Cultural Change." *Nordicom Review* 29, no. 2: 105–34.

Hobbs, Renee. 2011. *Digital and Media Literacy: Connecting Culture and Classroom*. Thousand Oaks, CA: Corwin; London: Sage.

———. 2017. *Create to Learn: Introduction to Digital Literacy*. Hoboken, NJ: Wiley.

Holden, Livia, ed. 2020. *Cultural Expertise: An Emergent Concept and Evolving Practices*. Basel: MDPI – Multidisciplinary Digital Publishing Institute.

Hoffmeister, Thaddeus A. 2014. *Social Media in the Courtroom: A New Era for Criminal Justice?* Westport, CT: Praeger.

Jenkins, Henry. 2016. *Convergence Culture: Where Old and New Media Collide*. New York: New York University Press.

Jenkins, Henry, Ravi Purushotma, Margaret Weigel, Katie Clinton, and Alice J. Robison. 2009. *Confronting the Challenges of Participatory Culture. Media Education for the 21st Century*. Cambridge, MA: MIT Press.

JK. 2020. "Telewizja Polska ma przeprosić Gdańsk za antyimigrancki materiał w TVP Info." *Wirtualnemedia.pl*, January 13. https://www.wirtualnemedia.pl/artykul/tvp-info-minela-20-przeprosiny-gdansk-za-antyimigrancki-material-wyrok-sadu

Kellner, Douglas, and Jeff Share. 2007. "Critical Media Literacy Is Not an Option". *Learning Inquiry* 1: 59–69.

Kress, Gunther. 2009. *Multimodality: A Social Semiotic Approach to Contemporary Communication*. London: Routledge.

Krotz, F. 2007. *Mediatisierung: Fallstudien zum Wandel von Kommunikation. Wiesbaden: VS, Verlag für Sozialwissenschaften*. Wiesbaden: VS Verlag für Sozialwissenschaften.

Livingstone, Sonia. 2004. "Media Literacy and the Challenge of New Information and Communication Technologies." *The Communication Review* 7, no. 1: 3–14.

McCombs, Maxwell. 2005. "A Look at Agenda-setting: Past, Present and Future." *Journalism Studies* 6, no. 4: 543–57.

McCombs, Maxwell, and Amy Reynolds. 2002. "News Influence on Our Pictures of the World." In *Media Effects: Advances in Theory and Research*, edited by Jennings Bryant and Dolf Zillmann, 1–18. Mahwah, NJ: Lawrence Erlbaum Associates Publisher.

Schulz, Winfried. 2004. "Reconstructing Mediatization as an Analytical Concept." *European Journal of Communication* 19, no. 1: 87–101.

Surowiecki, James. 2005. *The Wisdom of Crowds: Why the Many Are Smarter Than the Few*. London: Abacus.

Thompson, John B. 1995. *The Media and Modernity: A Social Theory of the Media*. Cambridge: Polity.

Wardle, Claire, and Hossein Derakhshan. 2017. *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*. Council of Europe Report, September 27, 2017. Strasbourg: Council of Europe.

Cases Cited

Delfi AS v. Estonia. 2013. Application no. 64569/09 (European Court of Human Rights 2013).

Lautsi and Others v. Italy. Application no. 30814/06 (European Court of Human Rights 2011).

Magyar Tartalomszolgáltatók Egyesülete v. Hungary. Application no. 22947/13 (European Court of Human Rights 2016).

Wyrok Sądu Najwyższego z dnia 22 stycznia 2014, III CSK 123/13 (Polish Supreme Court 2014).

10

CULTURAL EXPERTISE AND INVESTIGATIVE JOURNALISM

Ticky Monekosso

LEARNING OBJECTIVES

This chapter considers how investigative journalists provide cultural expertise by examining criminal trials that involved allegations of witchcraft and sorcery in the Central African Republic, Cameroon and Tanzania. You will learn how evidence is collected and produced for courts, how legal professionals handle evidence about traditional beliefs and accommodate it within the framework of modern national legislation in a context of legal pluralism and the basis on which judges rule on the admissibility of such evidence and determine guilt or innocence.

Introduction

This chapter reformulates investigative journalism in connection with cultural expertise, as defined by Holden (2011, 2). Investigative journalists are well placed to report on events and issues which are relevant to legal cases. Well-researched and timely reports can complement other types of information which are available to the court. Hence, this chapter refers to a set of methodologies which may take years of reporting experience for reaching the higher professional and ethical standards of expertise at court.

DOI: 10.4324/9781003167075-13

Theory and Concepts

Story-Based Inquiry, an investigative journalism handbook published by UNESCO, proposes the following definition for investigative journalism:

> Investigative journalism involves exposing to the public matters that are concealed – either deliberately by someone in a position of power, or accidentally, behind a chaotic mass of facts and circumstances that obscure understanding. It requires using both secret and open sources and documents.
>
> *(Hunter 2011)*

David E. Kaplan (2013) notes that the best investigative journalism employs a careful methodology, with heavy reliance on primary sources, forming and testing a hypothesis and rigorous fact-checking. Its practice often involves the use of public records and data and a focus on unearthed secrets.

This chapter draws on primary and secondary sources – i.e. videos, TV reports, documentaries, newspapers, photographs, posters and so on – to explore the potential of high-quality journalism in cases involving accusations of, and actions informed by beliefs about, witchcraft and sorcery. According to Moro (2018) the term 'witch' identifies someone alleged to practice socially prohibited forms of magic, while 'sorcerer' refers to someone who intentionally takes on the role of magical practitioner, often with the intent to harm.

To understand the case studies discussed herein, it would be helpful to view the videos referenced in each section, which can be found in the references list.

Case Studies

Central African Republic – Witchcraft Trials

In this case study, we look at a 2009 documentary for *Al-Jazeera* English by the well-known Sierra Leonean investigative journalist who attended trials and interviewed those involved (Insight TWI 2009). Sorious Samura applied investigation journalism methods, a systematic and thorough attempt to learn the facts about complex and hidden matters of witchcraft in the Central African Republic (CAR) to ascertain the facts and examine the issues at stake in cases of witchcraft in the CAR judiciary. Samoura carried out investigative interviews with a range of sources and local experts including a state prosecutor, witch doctors, police, prison guards, people accused of witchcraft, villagers, medical professionals, the Minister of Justice and the head of the president's cabinet to ensure that his report was evidence-based. He used investigative interviews, collected and checked information, and analysed the context and significance of every fact and any substantive issues to make his own assessments including his personal knowledge and experience of the country.

The prosecutor interviewed made a case to abolish the criminalisation of witchcraft from the penal code. He argued that no country today should include measures against witchcraft in their legal code and that people should believe

what they want. Failure to do this poses a fundamental problem if they result in sending innocent people to prison based on other beliefs or affirmations. Yet he was almost alone in making this argument in the CAR.

The alternative argument was put forward by an appeal court prosecutor that almost everyone, including the elites, believes in witchcraft. For this reason, it is better if the legal system recognises this reality; if we remove the articles in the penal code related to witchcraft many people will feel that the state is failing to regulate or punish what they believe to be a reality, which would fuel the risk of vigilantism against supposed witches.

Although the CAR's legal system has long treated witchcraft as a criminal offence, this principle was questioned by a committee of legal experts appointed to advise the government as to whether witchcraft should continue to be a criminal offence (Insight TWI 2009). Somewhat surprisingly, the committee recommended that witchcraft should continue to be a criminal offence.

The CAR's approach to this offence has generated a massive number of cases and witchcraft is the most prosecuted crime. The legal system is clogged with cases alleging the practice of sorcery and witchcraft allegations take various forms. But is it fair to ask whether these cases are investigated and fairly tried given that most of the accused are vulnerable persons?

An examination of criminal law reveals that elders and children who keep to themselves are frequently accused of witchcraft; villagers beat people accused of witchcraft to force them to confess, following which they are reported to the police; detectives specialise in rooting out sorcery; the police work with witch doctors to determine if the accused is a witch; the police question individuals accused of witchcraft to collect evidence; at court witch doctors are called to give their opinion of the suspect's ties to sorcery and local herbs are used to make a suspect "confess"; various forms of evidence are relied upon to prove an individual's guilt (e.g. the plaintiff's dreams can be admitted as evidence or strange behaviour can implicate the accused). In such circumstances, it is unsurprising that many defendants find it hard to prove their innocence in part because the judge uses his or her discretion to determine if the defendant behaves like a witch and, under Article 149 and Article 150 of the CAR's penal code, the judge has the power to decide if the defendant is a witch.

Severe punishment is administered to those who are convicted and a prison term of five to ten years involving hard labour and a fine ranging from 100,000 CFA francs to 1,000,000 CFA francs ($167 to $1,676) can be imposed where witchcraft is believed to have resulted in the death of a victim.

Tanzania – Albinism

In *Africa Investigated*, Anas Aremeyaw Anas (an investigative journalist) and Isaack Timothy (a representative from the albino community) discover what lies behind attacks against people with albinism (*Al Jazeera* English 2011). Anas visits several victims, talks to doctors and the police and approaches a witch doctor pretending

to be a businessman who wants to become rich by selling a body part of an albino. Both employ a careful methodological approach to gathering facts including reliance on primary sources and interviews, forming and testing hypotheses and rigorous fact-checking which requires patience, good contacts and time.

In Tanzania, belief in witchcraft is widespread. In particular, people affected by albinism are often discriminated against and they are regarded as possessing mystical qualities. Some believe that they are cursed or bring bad luck, while others believe that parts of their bodies can be used to bestow magical powers. For example, in some mining areas, there is a belief that obtaining the body parts of an albino can increase the chance of striking it rich. Albinos are sometimes attacked or murdered to harvest their body parts.

Violence against albinos is regarded as a crime and those convicted of this offence may be prosecuted and punished. However, in Tanzania, such attacks are seen as an act of violence and are judged by the same criteria as all forms of assault or murder regardless of the motivation behind an attack. All such actions are punished with a similar degree of severity. Unlike the courts in the CAR, the Tanzanian judiciary is not concerned with assessing whether beliefs or mystical practices are "real"; the court does not regard witchcraft as an aggravating factor or as a reason for a crime. Individuals convicted of assaulting or murdering an albino person may be sentenced from 20 years to life imprisonment depending on the issues raised by the case. State prosecutors have collected evidence of the following type of crimes against albinos: a witch doctor was found with human intestines whose DNA matched that of a dead teenager; a defendant was found in possession of four fingers and ten bones which DNA tests proved were those of the victim; four men were found guilty of intent to sell a human arm to a witch doctor (the killers had planned to sell the victim's organs for use in witchcraft); several convicts had raided the house of a person with albinism to kill him but they ended up chopping off his arm which they took to a witch doctor to sell for six million Tanzanian shillings (about $2,600); a witch doctor paid $75,000 for a full set of albino body parts; finally, between 2006 and 2015, 133 people were arrested and charged with killing people with albinism.

Cameroon

In Cameroon, where many people believe in witchcraft, families believe that their LGBTQIA+ children are witches and try to "cure" them through torture, rape and murder. An article published by Reuters described how lesbian women are perceived as "witches or as having been cursed" and that their family members torture, rape and murder them (Reuters 2018). "Viviane" had been chained to a wall and a pastor raped her – a crime for which he could never be prosecuted. "A pastor in Cameroon is like a god. God can't rape. And if you accuse him of rape, you're the devil", said Viviane, who fled the country and now lives in France.

Cameroon's plural legal culture deals with allegations of witchcraft in different ways, based on its two distinct traditions: English common law in the two anglophone regions of Cameroon and French codified ("Napoleonic") law in the eight francophone regions. At the same time, customary law is also a source of law, and

traditional courts exercise jurisdiction over a range of matters including criminal and civil law.

Under common law in the anglophone regions, a prosecutor must produce empirical evidence to prove that an individual has practised witchcraft (and not merely been accused of being a witch). Unless the defendant confesses, prosecutors and judges rely on "solid" evidence at the investigatory stage and the prosecutor should drop the prosecution before the case reaches the court if there are any biases.

If the accused was slandered, as accusations by neighbours, acquaintances or jealous family members are often motivated by spite or personal grudges, Cameroon penal code Section 305(1) – (Defamation) punishes with imprisonment for from 6 days to 6 months and with a fine of from 5,000 CFA francs to 2,000,000 CFA francs ($8.5 to $3350), or with only one of the penalties.

In francophone Cameroon, the accused is required to prove their innocence. This makes it easier for cases to reach the court. However, once a case reaches court, the presumption of innocence still applies and accusers are under pressure to provide a wide range of empirical evidence to support their accusations including witness statements, testimonies from witch doctors regarding the defendant's behaviour or physical "magic" objects which can be used as definitive evidence about the actions of a defendant. But assembling all these forms of evidence into a credible proof of guilt can be quite difficult, not least because the standard of proof under Cameroonian Criminal Law varies between courts, and because many cases are prosecuted in traditional courts before local chiefs.

Cameroonian legislation does not clearly define the term "witchcraft". The code refers to three distinct concepts – witchcraft, magic and divination – but it groups all these concepts as a single criminal offence. This complicates the work of judges who are ultimately responsible for distinguishing between "true" and "false" allegations of witchcraft and rely on evidence to reach a decision.

In Cameroon, witchcraft is an offence under section 251 of the penal code and can also be considered an aggravating factor for dishonest acts. It is punished with imprisonment from two to ten years, or with a fine of from 5,000 CFA francs to 100,000 CFA francs ($8.5 to $167), but prison terms can be up to ten years.

Conclusion

This chapter argues that cultural expertise is also provided by journalists. I argue that investigative journalism is a source of cultural expertise as investigative reports require time to undertake case-specific research into issues such as witchcraft beliefs and practices. Investigative journalism is a research method similar to that undertaken by academic researchers such as anthropologists, socio-legal sciences and other social sciences because it is based on direct enquiry, and it is produced in a timely manner and in a format that is accessible and relevant to judicial enquiries. This is a distinct field of journalism which mirrors the forms of research found in the arts and humanities.

We have learned that legal decisions are informed by a police investigation and witness statements and the justice system in some African countries makes

use of the knowledge and beliefs of the local chiefs, witch hunters, family members, members of the police and of the judiciary. Testimony about attitudes, speech, rumour, empirical evidence from family members, neighbours and so on is admitted in witchcraft trials. Judges may rely on some types of evidence including "forced" confessions. In such circumstances, it can be difficult to secure independent evidence that is relevant to the case, and perhaps the key problem with cases involving accusations of witchcraft is that they involve allegations which cannot be proved independently from common beliefs.

However, legal procedure varies immensely by country and sometimes by court, and, worryingly, criminal sentences are not standardised.

In the CAR and in Cameroon, witchcraft accusations go forward because there are specific legal provisions which recognise that witchcraft is a criminal offence. In Tanzania, killing people with albinism – which is believed by some to be a form of witchcraft – is a criminal offence no different from murder or assault.

Further Reading

Kiye, Mikano Emmanuel. 2018. "Combating Witchcraft in the State Courts of Anglophone Cameroon: The Insufficiency of Criminal Law." *African Study Monographs* 39, no. 3: 121–40.

Belief in witchcraft is widespread in Cameroonian society and has met with a variety of responses from traditional courts and state courts in anglophone Cameroon where contradictory developments in the fight against witchcraft in the state courts have emerged.

Schühle, Judith. 2013. *Medicine Murder of People with Albinism in Tanzania–How Casino Capitalism Creates Rumorscapes and Occult Economies*. CAS Working Paper Series No. 2/2013, Center for Area Studies, Freie Universität Berlin.

In 2007, a spate of killings of people with albinism in northwest Tanzania occurred due to rumours that the bones of people with albinism were a necessary ingredient to generate wealth. This paper examines the context in which these murders took place.

Hund, John. 2004. "African Witchcraft and Western Law: Psychological and Cultural Issues." *Journal of Contemporary Religion* 19, no. 1: 67–84.

This paper discusses the South African Suppression of Witchcraft Act of 1957 which outlawed tribal mediation by chiefs and sangomas (African priest-diviners) in witchcraft accusation trials and which has resulted, in part, in Africans turning to mob justice and violence to protect themselves against witches.

Q&A

1. Can persons accused of witchcraft get a fair trial if the laws and the judiciary believe that witchcraft exists?

Key: In the legal system of the CAR and Cameroon there are legal provisions that state that witchcraft is a crime and the judiciary believes that witchcraft exists. But assembling empirical evidence into a credible proof of guilt can be

quite difficult, not least because the standard of proof under criminal laws varies between courts and criminal sentences are not standardised.

2. Can state prosecutions of individuals accused of harming or killing albinos be effective?

Key: In Tanzania, the legal system dismisses such beliefs and judges their actions as ordinary crimes and unlawful killing.

3. Compare and contrast the nature of the "evidence" used to try witches in the CAR and in Cameroon. How can such evidence be justified? Can allegations be carefully and rationally examined by legal professionals? How can this kind of evidence be independently verified?

Key: In the CAR and in Cameroon, legal decisions are informed by a police investigation and witness statements. The evidence used to assess accusations of witchcraft can include suspicion, speech, rumour, the testimony of family and neighbours, police reports and testimony from witch doctors. However, allegations cannot be proved independently from common beliefs.

References

Al Jazeera English. 2011. "Africa Investigates: The Spell of the Albino." *YouTube* video, December 14, 2011, 24:59. https://www.youtube.com/watch?v=BVAyFlVw_e8

Holden, Livia. 2011. "Introduction: Reflexivity, Culture and Ethics." In *Cultural Expertise and Litigation: Patterns, Conflicts and Narratives*, edited by Livia Holden, 1–10. London: Routledge.

Hunter, Mark Lee. 2011. *Story-based Inquiry: A Manual for Investigative Journalists*. Paris: UNESCO Publishing.

Insight TWI – The World Investigates. 2009. "Central African Republic: Witch Trials.". *YouTube* video, December 14, 2013, 24:08. https://www.youtube.com/watch?v=3fut6NfOyZg

Kaplan, David E. 2013. *Global Investigative Journalism: Strategies for Support*. A Report to the Center for International Media Assistance (CIMA). 2nd ed. Washington: CIMA. https://www.cima.ned.org/wp-content/uploads/2015/01/CIMA-Investigative-Journalism-Dave-Kaplan.pdf

Moro, Pamela A. 2018. "Witchcraft, Sorcery, and Magic." In *The International Encyclopedia of Anthropology*, edited by Hilary Callan, 1–9. Hoboken, NJ: John Wiley & Sons.

Reuters. 2018. "Lesbian 'Witches' Chained and Raped by Families in Cameroon." *Thomson Reuters Foundation*, October 2, 2018. https://www.reuters.com/article/us-cameroon-lgbt-rape-idUSKCN1MC001

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

PART III

Cultural Expertise in the Fields of Law

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

11

CULTURAL EXPERTISE AND PROCEDURAL JUSTICE

Stanisław Burdziej

LEARNING OBJECTIVES

This chapter explains how cultural expertise can promote litigants' voices and understanding of what goes on in court, as well as ensure their respectful treatment, which is conducive to trust in the courts and legal system. After reading this chapter, you will understand the difference between distributive and procedural justice and between the perceived fairness of a decision and the perceived quality of the decision-making process.

Introduction

Four decades of socio-psychological research on perceptions of justice have demonstrated that in various decision-making contexts, recipients of decisions universally appreciate fair treatment (Lind and Tyler 1988; Tyler and Huo 2002). Four elements, in particular, have been found to shape the subjective experience of fairness: (1) the opportunity to present one's case (*voice*); (2) the perceived impartiality of the decision-maker (*neutrality*); (3) the respectful treatment by the decision-maker (*respect*); and (4) whether the recipients of the decision understand the decision-making process and the meaning of the decision for themselves (*understanding*) (Blader and Tyler 2009; Wolfe et al. 2016). In some cases, it turns out, people value fair treatment (i.e., procedural justice) even *more* than a favourable outcome (i.e., distributive or substantive justice, that is – the "content" of the decision). While fair decisions and objectively fair

DOI: 10.4324/9781003167075-15

decision-making procedures remain of utmost importance, it is now widely recognized that authorities need also to pay attention to subjective perceptions of fairness. Across the world, authorities are using these findings to increase trust in judiciaries, reform police and prisons and improve tax collection by fostering voluntary compliance and cooperation (Jackson et al. 2010; Murphy 2005; Tyler and Jackson 2014).

Theory and Concepts

Minority Status and the Experience of (In)justice

Trust and legitimacy of the justice system are particular challenges in minority contexts. Indigenous peoples and ethnic, national and other minorities are often found to be more vulnerable as litigants due to language barriers, a lack of familiarity with the legal system and adherence to norms that may stand at odds with those of the wider society.

Members of ethnic minorities generally display a distrust towards the legal system. Conversely, assumptions about race, especially, shape attitudes towards the police (Johnson et al. 2017). In the US, "minority concerns with the justice system are fuelled by racial profiling, the excessive use of force, and the disproportionate impact of drug laws on minority communities" (Tyler 2001, 217; Schilliger 2020). As a consequence, representatives of minority communities are subject to increased surveillance and experience higher arrest and incarceration rates.

Research on trust in the police and the courts shows that the experience of fairness is a key factor in predicting compliance with these authorities. Members of ethnic minorities are more likely to hold negative opinions of formal authorities and institutions (Cochran and Warren 2012) and show more distrust and less confidence in the police, the law and the justice system as a whole. All of this results in their "lower involvement in testifying as witnesses, lower commitment as jurors, and lower likelihood to report crimes" (Estévez, Rachitskiy, and Rodríguez 2013, 156).

How Cultural Expertise May Enhance the Subjective Experience of Justice

The four-element model of procedural fairness proposed by Blader and Tyler (2009) suggests paying attention to voice, neutrality, respect and understanding. Each of these elements of procedural fairness can be enhanced by the provision of cultural expertise. In this framework, cultural expertise will boost perceived fairness by bridging the parties' and the court's expectations of what constitutes fair treatment.

Voice. The ability to present one's own account of the issue at hand is commonly identified as the key factor shaping people's perceived fairness of treatment.

In the court setting, this involves the opportunity to make a statement, ask and answer questions or explain any doubts. Time constraints invariably limit litigants' opportunities to speak, leading to a conflict between expediency and fairness. Also, judges (and other decision-makers) often try to limit the voice of those participants whom they expect unable to provide any "relevant" facts or whom they expect to win anyway. In any case, deprivation of voice is often conducive to decreased trust, even when winning the case.

Understanding. The key contribution of cultural expertise to the subjective experience of justice may well be the translation function. This may include not only language differences but also cross-cultural differences in the meaning of court norms, processes and decisions, adding new challenges and creating new dilemmas for interpreters. Some courts rely on elders or community members to explain the meaning of a sentence to those minority litigants who have particular difficulty understanding the law.

Neutrality. Fair treatment involves the impartiality of the decision-maker, that is, equal treatment of all parties to a dispute. In practice, this may mean ensuring each party had a chance to speak and avoiding preferential treatment of any of the parties, either verbally or through body language. Nevertheless, it remains valid to question what exactly constitutes equal treatment in those situations where there are significant cultural differences between the litigants. When a criminal defendant attempts to get away with the murder of their spouse because of their culture's focus on honour or traditional gender roles, does neutrality allow taking these cultural circumstances into account? Proponents of cultural defence argue precisely that the failure to account for defendants' cultural background can lead to inequality and an undue preference of the legal system and the normative framework toward the dominant society.

Respect. Respect is a crucial element of fair treatment. Research shows that it matters particularly to those whose social standing is being questioned, e.g., litigants. Now classical studies in courtroom ethnography have highlighted how trials can become "status degradation ceremonies" (Garfinkel 1956). The growing significance of respectful treatment in modern times is most comprehensively explained by Axel Honneth through his concept of the "struggle for recognition" (Honneth 1996).

Justice: Universal or Culturally Specific?

Existing empirical evidence demonstrates that procedural justice matters across socio-demographic variables, including gender, education and financial status (Tyler 2004). However, most of these studies come from common-law countries. Over the past decade, interest in possible cultural differences in the significance of procedural justice has increased steadily. We now have evidence from countries as diverse as Brazil, China, Ghana, Hong Kong, Mexico, the Netherlands, Nigeria, Pakistan, Poland, Slovenia, South Africa, Trinidad and Tobago and others (see e.g., Burdziej, Guzik, and Pilitowski 2019; Tankebe et al. 2016). Most

authors conclude that procedural justice matters greatly and that people across cultures are sensitive to fair treatment. The political and cultural context is not insignificant, though. Some studies show that the efficiency of authority (especially the police) comes to the fore in those countries where crime is particularly high and corruption is rampant (see Bradford et al. 2014). Recently, Sun et al. (2017) challenged the applicability of "Western wisdom" (e.g., Tyler's model of procedural justice) in a study on the legitimacy of police in China, suggesting that the concept has limited applicability beyond Western individualistic cultures.

Case Studies

Next, we briefly discuss how cultural expertise may in practice contribute to greater procedural fairness in dispute resolution. The three examples illustrate how cultural brokerage – whether in the form of courtroom interpretation, elderly mediation or the provision of amicus curiae briefs by NGOs – helps enhance the voice of and respect for minority litigants. At the same time, these examples outline some of the challenges to the subjective perception of fairness in litigants created by the provision of cultural expertise.

Court Interpreters as Cultural Experts

A substantial amount of literature exists on court interpretation (Berk-Seligson 2017; Biernacka 2019; Stern 2011) wherein scholars are often sceptical of interpreters assuming expert roles. González, Vásquez, and Mikkelson (2012, 582) recommend judges "be cautious about seeking expert cultural advice from interpreters". The reality is often different, though, as interpreters can provide cultural expertise beyond mere translation. Sometimes they do so at their own initiative, while other times they are solicited by judges or lawyers. Some authors advocate a broader understanding of interpretation as a form of cultural brokerage or cultural mediation, while others prefer the model of "literal" translation. Empirical research (Hale 2014) demonstrates that court interpreters lack specific guidelines on how to address these divergent expectations, and pursue diverse strategies, while most avoid the two extremes.

Elders as Cultural Brokers for Minority Communities

Over the past decade, Indigenous community elders have been increasingly involved in criminal justice in several jurisdictions, including Australia, Canada, New Zealand and the US (Marchetti 2014, 343; see Higgins, Chapter 18 in this volume). This process is motivated both by the desire to reverse some of the negative effects of the colonial imposition of a foreign legal system upon the Indigenous communities and also by the understanding that informal social control is often more effective in reducing crime than formal control. Thus, the involvement of elders'

Indigenous communities in criminal justice can be viewed as part of a broader trend towards "problem-solving" and "therapeutic justice" which address deeper causes of crime and social disorder (see Winick and Wexler 2003), often incorporating various restorative mechanisms. One such mechanism is Aboriginal Sentencing Conferences (ASC) in several Australian jurisdictions, which involve offenders, victims and their family members, as well as support agency representatives, the prosecutor, a facilitator and the Aboriginal Justice Officer (Marchetti 2014, 347). With a caveat regarding power dynamics within minority groups, there is a growing understanding that involving traditional authority figures in dispute resolution may often boost the voice of Indigenous litigants and their perceived fairness of the courts and the legal system in general. Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of Indigenous peoples, has recently encouraged "the further participation of indigenous elders and traditional cultural authorities as experts" (Tauli-Corpuz 2016).

Cultural Expertise and Advocacy

A common form of cultural expertise across many jurisdictions is *amicus curiae* briefs. *Amicus curiae* (or "friend of the court") is an entity – a person or an organization – who is not a party to a case but wishes to assist the court by providing information or expertise deemed useful in reaching a decision. Often, these briefs are provided to the court by non-governmental organizations with diverse social, political and ideological agendas; some may even specialize in this form of advocacy. Others may be professional or scholarly societies, which have different priorities, but, under particular circumstances, may feel obliged to provide the court with their relevant expert knowledge.

Amicus curiae briefs, in principle, can be viewed as enhancing the voice of litigants by enlisting respected people and institutions to provide evidence to the court. Many NGOs step in to restore balance between parties of a dispute, assisting particularly vulnerable litigants, such as minority members. They also typically focus on strategic litigation, paying particular attention to cases that provoke social controversy. Even though *amicus curiae* briefs typically support one set of arguments in hotly debated issues, they contribute to the overall amount of culturally relevant information that reaches the court.

However, the practice of *amicus curiae* also creates particular challenges vis-à-vis the role of experts. Cultural expertise significantly differs from cultural defence. While cultural defence also "has the scope to provide the judge with supposedly neutral information" (Holden 2019, 2–3), it involves the use of cultural arguments by the defence only. Cultural expertise, on the other hand, ought to be neutral, with the expert being loyal to the court. In practice, the difference between both forms of expertise is often blurred: NGOs with specific ideological and political agendas provide *amicus curiae* briefs in a variety of cases. Thus, NGOs may put increasing public pressure on courts to deliver specific decisions.

Conclusion

This chapter highlighted the multiple links between cultural expertise and procedural fairness. From the perspective of procedural fairness, cultural expertise constitutes a systematic effort to enhance the subjective experience of justice. This is especially true in relation to those litigants whose voices are silenced – due to cultural differences – or who may benefit from a better understanding of court procedures. Cultural expertise can also help to navigate the divergent expectations of what actually constitutes fair treatment across different cultures. These differences may regard body language, eye contact, gender roles, forms of addressing the judge and the parties and power distance. Finally, procedural fairness can also be viewed as a professional principle guiding the provision of cultural expertise, requiring experts to remain unbiased, use accessible language and show respect towards both parties.

Further Reading

Honneth, Axel. 1996. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge, MA; London: The MIT Press.

Axel Honneth's now-classic sociological essay helps to understand why modern people become increasingly sensitive to fair and respectful treatment.

Lind, E. Allan, and Christopher P. Earley. 1992. "Procedural Justice and Culture." *International Journal of Psychology* 27, no. 2: 227–42.

Lind and Earley's 1992 paper offers a relevant section on "Theoretical Issues in Cultural Differences", where they discuss procedural fairness in individualistic versus group-oriented cultures.

Tyler, Tom R. 2000. "Social Justice: Outcome and Procedure." *International Journal of Psychology* 35, no. 2: 117–25.

Tyler's paper is a useful brief introduction to the concept of procedural justice by the leading scholar in the field. Tyler discusses how the subjective experience of justice relates to the culture of the recipients of authorities' decisions.

Q&A

1. How do subjective perceptions of authorities' fairness shape compliance with legal authorities?

Key: Over three decades of empirical research demonstrate that perceived fairness of decision-making and respectful treatment are key factors promoting trust in authorities, as well as citizens' willingness to comply and collaborate with authorities' decisions. Procedural fairness is important regardless of the perceived favourability of received outcomes (e.g., court decisions). Thus, when treated fairly, defendants tend to view the court system as legitimate even when they receive outcomes perceived as unfavourable.

2. Is the expectation of fair treatment culturally universal?

Key: Studies from several dozen countries demonstrate that people universally appreciate fair treatment. Also, people value it irrespective of gender, education and class. Evidence from countries with high levels of crime and little rule of law suggests, however, that authorities' efficiency is also important for predicting perceived legitimacy. The exact meaning of what constitutes adequate voice or what treatment is respectful, though, may differ across cultures. One important factor influencing expected voice, neutrality, understanding and respect is the society's power distance.

3. Under what circumstances could preferential treatment of minority members be viewed as undermining the neutrality of the law and the courts?

Key: In practice, court parties often differ in language skills, legal knowledge and social capital. In trying to secure a voice and understanding for the underprivileged defendants (e.g., by instructing cultural experts), judges and lawyers need to carefully navigate both parties' expectations of neutrality and fair treatment.

References

Berk-Seligson, Susan. 2017. *The Bilingual Courtroom: Court Interpreters in the Judicial Process*. Chicago, IL; London: University of Chicago Press.

Biernacka, Agnieszka. 2019. *Interpreter-Mediated Interactions of the Courtroom: A Naturally Occurring Data Based Study*. Bern: Peter Lang AB.

Blader, Steven L., and Tom R. Tyler. 2009. "Testing and Extending the Group Engagement Model: Linkages between Social Identity, Procedural Justice, Economic Outcomes, and Extrarole Behavior." *Journal of Applied Psychology* 94, no. 2: 445–64.

Bradford, Ben, Aziz Huq, Jonathan Jackson, and Benjamin Roberts. 2014. "What Price Fairness When Security Is at Stake? Police Legitimacy in South Africa." *Regulation & Governance* 8, no. 2: 246–68.

Burdziej, Stanislaw, Keith Guzik, and Bartosz Pilitowski. 2019. "Fairness at Trial: The Impact of Procedural Justice and Other Experiential Factors on Criminal Defendants' Perceptions of Court Legitimacy in Poland." *Law & Social Inquiry* 44, no. 2: 359–90.

Cochran, Joshua C., and Patricia Y. Warren. 2012. "Racial, Ethnic, and Gender Differences in Perceptions of the Police: The Salience of Officer Race Within the Context of Racial Profiling." *Journal of Contemporary Criminal Justice* 28: 206–27.

Estévez, Estefanía, Marina Rachitskiy, and Carla Rodríguez. 2013. "Is Perception of the Mainstream Legal System Homogeneous Across Ethnic Groups?" *The European Journal of Psychology Applied to Legal Context* 5, no. 2: 155–61.

Garfinkel, Harold. 1956. "Conditions of Successful Degradation Ceremonies." *The American Journal of Sociology* 61, no. 5: 420–24.

González, Roseann Dueñas, Victoria F. Vásquez, and Holly Mikkelson. 2012. *Fundamentals of Court Interpretation: Theory, Policy and Practice*. Durham, NC: Carolina Academic Press.

Hale, Sandra. 2014. "Interpreting Culture: Dealing with Cross-cultural Issues in Court Interpreting." *Perspectives, Studies in Translatology* 22, no. 3: 321–31.

Holden, Livia. 2019. "Cultural Expertise and Socio-legal Studies: Introduction." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 1–9. Bingley: Emerald.

Honneth, Axel. 1996. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge, MA; London: The MIT Press.

Jackson, Jonathan, Tom R. Tyler, Ben Bradford, Dominic Taylor, and Mike Shiner. 2010. "Legitimacy and Procedural Justice in Prisons." *Prison Service Journal* 191: 4–10.

Johnson, Devon, David B. Wilson, Edward R. Maguire, and Belén V. Lowrey-Kinberg. 2017. "Race and Perceptions of Police: Experimental Results on the Impact of Procedural (In) Justice." *Justice Quarterly* 34, no. 7: 1184–212.

Lind, E. Allan, and Tom R. Tyler. 1988. *The Social Psychology of Procedural Justice*. New York: Plenum Press.

Marchetti, Elena. 2014. "Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers." *Law & Policy* 36, no. 4: 341–69.

Murphy, Kristina. 2005. "Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-Compliance." *Journal of Law and Society* 32, no. 4: 562–89.

Schilliger, Sarah. 2020. "Challenging Who Counts as a Citizen: The Infrastructure of Solidarity Contesting Racial Profiling in Switzerland." *Citizenship Studies* 24, no. 4: 530–47.

Stern, Ludmila. 2011. "Courtroom Interpreting." In *The Oxford Handbook of Translation Studies*, edited by Kirsten Malmkjær and Kevin Windle, 325–42. Oxford: Oxford University Press.

Sun, Ivan Y., Yuning Wu, Rong Hu, Ashley K. Farmer, Jessica C. M. Li, and Lin Liu. 2017. "Procedural Justice, Legitimacy, and Public Cooperation with Police: Does Western Wisdom Hold in China?" *The Journal of Research in Crime and Delinquency* 54, no. 4: 454–78.

Tankebe, Justice, Michael D. Reisig, Xia Wang, and Margaret Bull Kovera. 2016. "A Multidimensional Model of Police Legitimacy: A Cross-Cultural Assessment." *Law and Human Behavior* 40, no. 1: 11–22.

Tyler, Tom R. 2001. "Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?" *Behavioral Sciences & the Law* 19, no. 2: 215–35.

———. 2004. "Enhancing Police Legitimacy." *The Annals of the American Academy of Political and Social Science* 593, no. 1: 84–99.

Tyler, Tom R., and Yuen J. Huo. 2002. *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*. New York: Russell Sage Foundation.

Tyler, Tom R., and Jonathan Jackson. 2014. "Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement." *Psychology, Public Policy, and Law* 20, no. 1: 78–95.

Tauli-Corpuz, Victoria. 2016. "Human Rights, Indigenous Jurisdiction and Access to Justice: Towards Intercultural Dialogue and Respect." *unsr.vtaulicorpuz.org*, February 24.

Winick, Bruce J., and David B. Wexler, eds. 2003. *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*. Durham, NC: Carolina Academic Press.

Wolfe, Scott E., Justin Nix, Robert Kaminski, and Jeff Rojek. 2016. "Is the Effect of Procedural Justice on Police Legitimacy Invariant? Testing the Generality of Procedural Justice and Competing Antecedents of Legitimacy." *Journal of Quantitative Criminology* 32, no. 2: 253–82.

12

CULTURAL EXPERTISE AND ASYLUM AND REFUGEE LAWS

John R. Campbell

LEARNING OBJECTIVES

This chapter focuses on the work of different legal actors, the importance of key legal terms and the work of country experts who need to critically engage with the legal process of cultural expertise to assist asylum applicants to secure protection. After reading this chapter you will understand the importance of cultural expertise – in the form of written reports – which are submitted to law courts in the United Kingdom, Canada and the USA where immigration judges decide the claims of individuals seeking asylum. These legal proceedings are adversarial in nature and pit independent legal counsel for asylum applicants against legal counsel for the government.

Introduction

As signatories to the 1951 Refugee Convention the United Kingdom, Canada and the USA are required to create a Refugee Determination System (RDS) that conforms with the Refugee Convention and international law (Hamlin 2014). An RDS involves state institutions, an independent judiciary and refugee lawyers in a process that fairly assesses an asylum applicant's claim for protection: the process is lengthy and legalistic and most asylum applicants are refused protection.

DOI: 10.4324/9781003167075-16

Theory and Concepts

Social anthropology – which employs participant observation, ethnographic interviews and the analysis of a wide range of documents – is well placed to analyse law and legal institutions. Anthropologists can describe social interactions (for example, interaction in courtrooms or between lawyers and their clients), analyse legal cases and analyse the wider social field in which law and legal institutions operate (Moore 1973; Campbell 2017). This chapter is written from the point of view of an anthropologist who has undertaken extensive fieldwork in the socio-legal field of asylum and immigration law and who has 30 years of experience as a country expert.

The asylum procedure begins when an applicant lodges an application with the administrative authority responsible for deciding initial asylum claims. The bureaucrats who make these decisions have no legal training and, in most cases, they refuse the claim. However, an applicant usually has a right to appeal their case to a judge who hears legal arguments by both parties and assesses expert evidence on the issues raised by the appeal.

Lawyers representing asylum applicants often can ask country experts (usually social scientists specialising in a particular country or geographic area) to provide a written report that addresses key elements of an asylum seeker's account of persecution in their country of origin. In the US, asylum applicants may pay for legal advice, though in some cases this may be provided through a *pro bono* scheme, and expert reports are usually provided free/*pro bono*; in the UK and Canada, legal advice is paid for from a government "legal aid" fund. Experts should be chosen who possess expertise and in-depth knowledge of the issues raised by a specific claim – i.e., regarding the applicant's country of origin, their language, culture, a country's institutions and laws, etc. – and whether they can provide a report that will persuade a judge to grant asylum. Refugee lawyers set out specific instructions which an expert is asked to address: normally the lawyer seeks evidence that will confirm/support the credibility of specific aspects of their client's account which is not available in published Country of Origin Information sources (Gibb and Good 2013; Campbell 2020). Country experts may be anthropologists, historians, linguists, journalists or lawyers; their reports together with the legal arguments by both parties are submitted to a court in advance of the hearing.

Immigration Judges (IJs) make use of the court's procedural rules and practice directions to decide how much weight, if any, to attach to an expert's evidence and to legal argument. Procedural rules set out how IJs deal with every issue that may arise during a hearing from the overriding objective of the appeal process – which is to enable the court to deal with cases fairly and justly – to managing hearings, giving decisions, dealing with the parties and interpreters and assessing the burden of proof. Practice directions deal with appeal procedures, evidence, case management issues, expert evidence and case law and bail applications. During an appeal, the IJ presides over and manages the hearing by regulating a

system of turn-taking between the two parties as they argue the case and provide evidence. At the end of the hearing – which can last from two to four-plus hours – the IJ concludes the proceedings and reserves to themselves the right to decide the case. Decisions are announced later.

Procedural rules give IJs the power to regulate asylum proceedings and control the work of the legal counsel and experts. An IJ's use of this power reflects their professional vision, i.e., their habitus, and reinforces their power to identify relevant law, assess the evidence and decide a case. IJs exercise a wide level of discretion in their use of the procedural rules and directions. Limited training for IJs, inadequate time allocated to hear cases and government policies limiting the right of appeal often give rise to procedural irregularities which result in unequal treatment of appellants and unlawful judicial decisions (Gill et al. 2018; Schoenholtz, Ramji-Nogales, and Schrag 2007).

Legal procedure and case law vary between countries. Nevertheless, expert evidence can assist individuals to secure protection if it successfully combines four factors. First, the evidence must be based on sound research, it must clearly identify the sources of information it relies upon and it must address the issues raised by the appeal. Second, an expert must comply with the Civil Procedure Rules by providing an objective, unbiased opinion on matters within their expertise without becoming an advocate for the appellant. In short, an expert's obligation is to assist the court to reach a decision; an expert's obligation is not to the appellant or their lawyer (Good and Kelly 2013). Third, experts must comply with the ethical code of their profession (see Cole, Chapter 2 in this volume). Among anthropologists, this means protecting the well-being of those they work with, anticipating potential harm to one's informants, acquiring and using the information they cite via a process of informed consent, and working and writing in a manner that respects the right to the privacy and confidentiality of their informants. Finally, a good expert should challenge official and judicial stereotypes about refugees, i.e., that they are economic migrants or that they have in some way acted unreasonably, to help ensure that asylum applicants have their cases carefully dealt with and fairly and justly decided by a judge. Holden (2020) proposes to rearticulate the procedural requisite of experts' independence in connection with an expert's legal obligation to assist the court and an expert's professional obligation to assist members of vulnerable groups such as asylum seekers to secure a fair hearing (see also Holden, Chapter 1 in this volume). Inevitably, lawyers, judges and experts come to different conclusions regarding the facts being decided in these appeals.

Experts find that IJs sceptically view their evidence/testimony, while IJs often reject, re-interpret or instrumentalise our findings in ways which we did not intend (Riles 2006). This problem arises because an expert's legal standing in asylum and migration law is limited to providing "hearsay" or "opinion" evidence. Legislation has established "standards" that IJs should use to assess the testimonial evidence of asylum applicants (Thomas 2007). However, in the absence of adequate training and clear guidelines, IJs refuse a large percentage of appeals

on the basis that an applicant's testimony – which is often the only evidence they are in a position to provide – lacks "credibility", even when other evidence is seen to be credible/admissible (Byrne 2007).

Case Studies

The cases discussed here arose in the aftermath of the Eritrea–Ethiopia border war (1998–2000) which resulted in the death of 100,000 persons and the displacement of over a million individuals who fled violence, persecution and war (Human Rights Watch 2003). The cases required evidence from experts with a good grasp of local culture and society, regional history and knowledge about war/conflict and migration in the Horn of Africa. The first case was chosen because it raises important issues about state repression and the absence of human rights. It is also a well-documented case that was in the US courts for 12 years. The latter two cases concern the deprivation of citizenship and the risk of refouling individuals back to a country where they would be at risk of persecution. These cases illustrate different challenges for country experts and the applicant. In *Negusie* the case concerned a legal and evidential issue: did US legislation prevent him from applying for asylum, and in Eritrea did he act under duress while a prison guard? The central question in *ST* was whether Ethiopian-born ethnic Eritreans were stripped of their Ethiopian nationality. The appeal of *AM & AM* hinged on answers to two factual questions: did officials in Saudi Arabia allow the appellants' parents to enter and reside in Saudi Arabia using a Convention Travel Document (were the family Eritrean nationals) and would the applicants be at risk if they were returned to Eritrea?

The Case of Daniel Negusie

Negusie was an Eritrean national who was forcibly conscripted into the armed forces. In 1998, a border war with Ethiopia erupted and when he refused to fight he was imprisoned and tortured for two years before being released and forced to work as a prison guard for four years after which he fled to the US where he applied for asylum. *Negusie v. Holder* was first heard in the US in 2008 by the US Citizenship and Immigration Services which set aside expert country evidence. The court decided that Negusie did not qualify for asylum because under the "Prosecutor's Bar" he had "assisted in the persecution of prisoners by working as an armed guard" and was therefore excluded from protection under Art. 1F of the Refugee Convention. However, the IJ decided that Negusie could not be returned/deported to Eritrea because he was likely to be tortured there.

Negusie's lawyer appealed against the decision to the Board of Immigration Appeals which upheld the decision. His lawyer then appealed the USCIS decision to the Fifth Circuit Court of Appeal which also upheld the lower court's decision. However, in 2009 the Supreme Court found that the decision was wrong in law because it depended on the wrong case law:

> As there is substance both to petitioner's contention that involuntary acts cannot implicate the persecutor bar because "persecution" presumes moral blameworthiness, and to the Government's argument that the question at issue is answered by the statute's failure to provide an exception for coerced conduct, it must be concluded that the INA has an ambiguity that the BIA should address in the first instance.

The case was sent back to the Board for a new decision. The Supreme Court decided that the key issue was whether Negusie had acted voluntarily as a prison guard or whether he had acted under duress and, if the latter was true, then he could not be held responsible for his actions and thus could not be barred from asylum. In 2018, the Board reconsidered its decision and adopted a narrow duress exception which required the applicant to provide a preponderance of evidence as to whether a duress defence applies (different US courts have adopted very different views of this type of defence). In effect, the Board once again refused to grant asylum to Negusie. However, in 2020 the US Attorney General overturned the Board's decision. He found that the Board had erred in law:

> The Department of Homeland Security does not have an evidentiary burden to show that an applicant is ineligible for asylum and withholding of removal based on the persecution of others. If evidence in the record indicates the persecutor bar may apply, the applicant bears the burden of proving by a preponderance of the evidence that it does not.

The case has once again been returned to the Board for a fresh decision. In effect, and after repeated failures by different courts to understand the legal issues, the case still requires a final decision by the Board.

The Case of "ST"

This case was one of a long line of decisions made by the Upper Tribunal of the United Kingdom Asylum and Immigration Tribunal which addressed questions about the nationality of Ethiopian-born ethnic Eritreans who had been arrested and deported by Ethiopia during the border war with Eritrea. The acronym "CG" indicates that it is a country guidance case; such decisions arise in relation to asylum applicants whose initial asylum appeal has been refused and whom the British Home Office intends to forcibly return to their country of origin. ST's initial appeal was heard in 2008 and was dismissed on the basis that case law had established that Ethiopia, his country of origin, would accept him back as a national and because he had not identified himself as a national claiming instead to be an Ethiopian-born ethnic Eritrean. A reconsideration of his case was heard later in 2008, but the IJs found no material error of law in the initial decision. ST's lawyer appealed the case to the Court of Appeal in 2009 which found that

the judges had erred in law in applying a presumption that ST was not at risk in the context of his accepted ill-treatment (by Ethiopia) in the past.

In the months preceding the hearing, counsel for the appellant reviewed his client's case and worked with ST's solicitor to instruct two country experts to write reports and attend the hearing to give oral testimony. The experts were instructed to address the background to the border war in which ethnic Eritreans were arrested and expelled from Ethiopia, the present situation of ethnic Eritreans in Ethiopia and Ethiopian nationality law and practice, and to assess what would happen to ST if he were to be returned to Ethiopia.

At roughly the same time, legal counsel for the SSHD was preparing his case by calling together officials from different divisions of the Home Office to review the evidence he would be relying upon and to find new material which might undermine the appellant's arguments and evidence. Both parties submitted their skeleton arguments to the court prior to the hearing.

The appeal was heard over three days during which legal arguments were heard and written and oral evidence was considered by a panel of senior IJs. The Tribunal's decision begins by providing an overview of Ethiopian nationality law and a review of relevant case law. The SIJs briefly reviewed events in Ethiopia following the outbreak of war with Eritrea in 1998 before looking at whether ST had been arbitrarily deprived of Ethiopian nationality.

The decision reflected a method of legal analysis which, on the one hand, sets out and formally acknowledges respect for key international legal frameworks of protection for refugees and people in need of protection but, on the other hand, demolishes expert and legal evidence in a manner that fails to significantly extend the scope of protection to those in need of protection. Thus, the decision cites Art. 9 of the European Qualification Directive and Art. 1(A)1 of the Refugee Convention as relevant law and proceeds to heavily qualify how these frameworks should be used to interpret ST's right to return to Ethiopia by critically reviewing the expert evidence submitted to it. However, in the face of a preponderance of consistent expert evidence, the panel decided that if ST were to be returned to Ethiopia that he would be a non-national who would not be allowed to work or own property, would be required to obtain a work permit, would not be able to use health and educational facilities and would not have the right to vote. While the Upper Tribunal stopped short of recognising that ST would become a stateless person, it did grant him protection and it overturned five previous country guidance decisions on this issue.

The Case of *AM & AM*

The case of *AM & AM* concerns two brothers who applied for asylum in Canada in 2017 and whose initial applications were refused. Their legal counsel instructed me to write a report addressing four issues: (1) were they entitled to Eritrean nationality on the basis that their parents were of Eritrean origin? (2) Do they have an entitlement to Ethiopian nationality? (3) Is there objective evidence regarding the practice of the Saudi authorities putting "Eritrea" as their nationality on official Saudi

documents? And (4) is there objective evidence which might corroborate whether the claimants' father obtained an Ethiopian passport (e.g., through bribery)?

The central issues for the Immigration and Refugee Board were to determine the nationality of the two brothers *and* whether they could be returned to Ethiopia or to Eritrea without violating the Refugee Convention's prohibition against refoulement, i.e., the forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution. I provided evidence that: (a) the claimants were entitled to Eritrean nationality (but not Ethiopian nationality); (b) between the early 1960s and early 1990s, the Saudi authorities had accepted UN Convention Travel Documents issued in Sudan to supporters of the Eritrean Liberation Front and had allowed individuals to enter and work in Saudi Arabia; and (c) following Eritrean independence in 1994, that Eritreans resident in the Middle East had acquired Ethiopian documents by bribery.

The Refugee Appeal Division (RAD) which heard the appeal began by citing the decision of Canada's Federal Court of Appeal in the case of *Huruglica* which found that RAD had the authority to overturn decisions by the Immigration and Refugee Board when credibility was not an issue in the initial appeal. This allowed RAD to substitute its decision for the initial decision. The IJ accepted affidavits by the appellants and my expert report and found that the appellants' were entitled to Eritrean nationality but that they could not be returned to Eritrea because this would breach the prohibition on nonrefoulement. The court decided that the appellants' parents had fled to Saudi Arabia where the brothers were born and raised. On this basis, it granted both brothers asylum.

Conclusion

The cases reviewed in this chapter highlight common features of asylum and immigration law and practice which reflect the adversarial nature of legal proceedings. The US case, which benefitted from expert evidence in the initial appeal, subsequently hinged entirely on issues of law in subsequent appeals. The outcome of the other two cases reflected a close collaboration between the applicant's lawyers and an expert: ST required expert knowledge of how the Ethiopian authorities arrested, detained and deported Ethiopian-born individuals of Eritrean ethnicity during the Eritrea–Ethiopia border war. The case of *AM & AM* required expert knowledge of the Eritrean diaspora in the Middle East and how they are perceived and treated by host countries such as Saudi Arabia.

The RDS systems in the UK, USA and Canada involve unequal legal contests between the state and asylum applicants, with the latter supported by independent legal counsel in contests which are heavily weighted in favour of the state (see Nader's (2002) discussion on the direction of the law). As the case studies show, nation-states have introduced legislation in an attempt to prevent asylum seekers from securing protection. Country experts are in a unique position to provide cultural expertise in the form of detailed and in-depth information which directly addresses the claims raised by refugees for protection which neither

lawyers nor judges are aware of. Without this information, and in a context in which states are failing to adequately fund the institutions tasked with assessing and deciding asylum claims, it is important for lawyers and experts to work together to help asylum seekers secure protection and to circumvent wrongful decisions which can result in lengthy periods of detention and forcible return to an individual's country of origin where they may face persecution.

Further Reading

Berger, Iris, Tricia Redeker Hepner, Benjamin N. Lawrence, Joanna T. Tague and Meredith Terretta. 2015. *African Asylum at a Crossroads: Activism, Expert Testimony, and Refugee Rights*. Athens, OH: Ohio University Press.
This book examines a wide range of issues concerned with asylum seekers from Africa.

Government of Canada. 2021. "Claiming Asylum in Canada – What Happens?" https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming_asylum_incanadawhathappens.html for an overview of the asylum procedure in Canada.

Human Rights First. n.d. "If You Are Seeking Asylum We Can Help." https://www.humanrightsfirst.org/asylum/asylum-law-and-procedure for an overview of the asylum procedure in the US.

Tribunal Procedure Committee. 2012. "Regulation: Immigration and Asylum Chamber Tribunal Procedure Rules. Rules on How cases are handled in the Immigration and Asylum Chamber." January 6, 2012. https://www.gov.uk/government/publications/immigration-and-asylum-chamber-tribunal-procedure-rules (accessed on 8 June 2020) for an overview of the asylum procedure in the UK.

Campbell, John R. 2020. "Examining Procedural Unfairness and Credibility Findings in the UK Asylum System." *Refugee Survey Quarterly* 39, no. 1: 56–75.
This paper sets out the procedural hurdles with asylum applicants face in the UK and elsewhere.

Gill, Nick, and Anthony Good. 2019. *Asylum Determination in Europe: Ethnographic Perspectives*. Basingstoke: Springer Nature.
This open-access book analyses different aspects of the asylum process across the EU.

Good, Anthony. 2004. "'Undoubtedly an Expert'? Anthropologists in British Asylum Courts." *The Journal of the Royal Anthropological Institute* 10, no. 1: 113–33.
This paper provides an early discussion of the role of country experts.

Q&A

1. What is cultural expertise and what role can it play in the Refugee Determination System?

Key: Cultural expertise has been described as "a special knowledge that enables socio-legal scholars, experts in laws and cultures, and cultural mediators …

to locate and describe relevant facts, in light of the particularly background of the claimants/litigants/accused" to enable judges/decisionmakers to take more informed decisions. The evidence normally takes the form of written reports – but experts may also provide oral evidence – submitted to the court by the claimant's lawyer. Such reports address key elements in the claimant's case which can include aspects of culture, family life, gender, marriage and kinship and history; the reports can also address key issues in foreign law such as nationality law, adoption, marriage and so on. In asylum proceedings, IJs are required to understand an applicant's fear of persecution as defined by the Refugee Convention; this task requires more than a simple translation of the appellant's statement and evidence and often includes evidence from an expert regarding the entirety of the socio-political circumstances which led an individual to flee their country of origin. A well-researched expert report which addresses all the issues can assist an asylum applicant to secure protection.

2. Who can provide cultural expertise to the asylum process and how is their work regulated?

Key: A wide range of experts can be called upon to provide cultural expertise including anthropologists, historians, linguists, sociologists, journalists and others who possess an in-depth knowledge of an asylum applicant's country of origin. However, only experts who can provide a persuasive case, based on well-documented research, are normally asked to submit a report. All national legal systems are governed by statute provisions which set out the rules regulating the provision of expert evidence to the courts; in addition, the courts possess specific procedural rules and directions that IJs make use of to manage and regulate hearings. Experts need to understand and clearly communicate knowledge about an appellant's country of origin, family, kinship and marriage, religion and ethnicity and other related aspects concerning politics and law and will need to be able to clearly illustrate how and under what circumstances the state fails to protect its nationals and to uphold the law.

3. What roles do immigration judges and lawyers play in the asylum process?

Key: The RDS system is adversarial in nature. This means that two advocates represent their parties' cases or positions before an impartial judge who attempts to determine the truth and pass judgment. However, the dispute between parties is not an equal contest because the state has access to significantly more resources than are available to independent counsel. For example, states attempt to block appeals by passing legislation, such as the prosecutor's bar, or by arguing that claimants from certain countries do not qualify for asylum or they may pass legislation to criminalise asylum seekers. Immigration lawyers need to understand the law and be able to formulate a valid defence based on their knowledge of case law. IJs, on the other hand, exercise substantial powers to oversee and manage hearings – which take the form of turn-taking by each party – and they possess the authority to curtail legal arguments and decide the claim.

References

Byrne, Rosemary. 2007. "Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals." *International Journal of Refugee Law* 19, no. 4: 609–38.

Campbell, John R. 2017. *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System*. Abingdon; New York: Routledge.

———. 2020. "The Role of Lawyers, Judges, Country Experts and Officials in British Asylum and Immigration Law." *International Journal of Law in Context* 16, no. 1: 1–16.

Gibb, Robert, and Anthony Good. 2013. "Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures." *International Journal of Refugee Law* 25, no. 2: 291–322.

Gill, Nick, Rebecca Rotter, Andrew Burridge, and Jennifer Allsopp. 2018. "The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals." *Social & Legal Studies* 27, no. 1: 49–78.

Good, Anthony, and Tobias Kelly. 2013. "New Best Practice Guide for Country Evidence Expert Witnesses in UK Immigration and Asylum Cases." *EIN – Electronic Immigration Network*, August 19, 2013.

Hamlin, Rebecca. 2014. *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia*. Oxford: Oxford University Press.

Holden, Livia. 2020. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1: 29–46.

Human Rights Watch. 2003. *The Horn of Africa War. Mass Expulsions and the Nationality Issue*. January 30, 2003. https://www.refworld.org/docid/3f4f59523.html

Moore, Sally Falk. 1973. "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study." *Law & Society Review* 7: 719–46.

Nader, Laura. 2002. "The Life of the Law – A Moving Story." *Valparaiso University Law Review* 36: 655–75.

Riles, Annelise. 2006. "Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage." *American Anthropologist* 108, no. 1: 52–65.

Schoenholtz, Andrew I., Jaya Ramji-Nogales and Philip G. Schrag. 2007. "Refugee Roulette: Disparities in Asylum Adjudication." *Stanford Law Review* 60, no. 2: 295–412.

Thomas, Nicole J. 2007. "'They Told Me He Said He Would Kill Me' – Why Hearsay Should Get Full Weight in Asylum Proceedings." *California Western International Law Journal* 37: 299–328.

Cases Cited

AM & AM, TB7-05972 & TB7-0593 (Immigration and Refugee Board of Canada. Refugee Appeal Division 2017).

Eritrea-Ethiopia Claims Commission. Case no. 2001-02 (Permanent Court of Arbitration 2009).

Negusie v. Holder, 555 US 511 (US S. Ct. 2009).

ST (Ethnic Eritrean – nationality – return) Ethiopia, CG [2011] UKUT 00252(IAC) (United Kingdom Upper Tribunal Immigration and Asylum Chamber 2011).

13

CULTURAL EXPERTISE AND TERRORISM INVESTIGATIONS

Ariel Planeix

LEARNING OBJECTIVES

This chapter illustrates how culture does or does not matter through three French cases of terrorism. After reading this chapter you will learn to identify the complex relationship between culture and terrorist ideology. You will furthermore learn about the ethical challenges of providing cultural expertise at the office of the public prosecutor.

Introduction

This chapter focuses on the social scientists who have been appointed as independent experts as part of the public prosecutor's office for terrorism investigations. Their role is to provide unbiased knowledge to analyse the religious, political and social logics that drive the behaviour and discourse of terrorists. The case studies help to situate the work of the cultural experts and their ethical positioning as independent and unbiased scientists.

Theory and Concepts

Experts' Appointment in Terrorism Cases

After the deadly terrorist attacks in France in 2015 and 2016, the judicial institution recruited researchers from several disciplines to enhance the effectiveness of

DOI: 10.4324/9781003167075-17

magistrates in understanding and evaluating the increasing threat. These experts (historians, anthropologists, geopolitical scientists) work in the prosecutor's office and produce analyses that are communicated to the prosecutors (and to the judges upon request). Some of the analyses may be added to the proceedings and thus be communicated to all parties. Cultural experts retrace the personal trajectories of individuals, describe the specificities of their socio-cultural universe to disclose the nuances of the socio-cultural and religious background of the defendants and offer a better appraisal of the facts at the investigation, accusation and judgement level. Cultural expertise may explain the reasons for the commitment of the defendants to a cause as those reasons differ from one case to another and are impacted by the age, degree of knowledge and the history of the family.

What Is Terrorism

There is no consensus on the definition of terrorism. The list of terrorist organizations varies according to states as well as the assessment of international organizations. The PKK, the Kurdish Workers Party, is classified as a terrorist organization in Turkey and is still classified as such in France, despite disagreement within the framework of the European Commission. Yet, not only did France support the Kurds engaged in the Iraqi Syrian war theatre, but to date, it has not prosecuted French nationals who have gone to fight alongside them. Lebanon classifies Hezbollah, a Shiite party, as a terrorist group, although Hezbollah is in power in Lebanon. Hezbollah is no longer classified as a terrorist party in France, although this group committed bloody attacks in Paris in the 1980s.

Terrorism and Ideologies

While many terrorist acts are committed today in the name of Islam, the fear that Islam arouses in non-specialists often undermines the different schools of thought of Islam and the variety of social backgrounds that differentiate terrorist groups that refer to Islam. Radical ideas do not have, necessarily, terrorist implications. Some Salafists groups, reform branch movements that are considered to have an extreme interpretation of Islam, are often useful allies in the pacification of the Muslims who are seduced by terrorism, of which there are also several branches (Burgat 2019). In Syria, some Islamist groups were able to fight alongside Al Qaeda and commit the same abuses as the Islamic State of Iraq and Syria (ISIS) without being classified as terrorists because of the logics of international cooperation that exempted its foreign fighters from criminal prosecution (Pierret 2017).

Islamism is, thus, the bearer of several logics, the most violent of which is the sacrifice of oneself and of others (Asad 2007). The personal motives for enlistment in terrorist organizations differ according to the place of birth, family history, gender, mental health or ideological trajectories of all individuals. The extent to which religion plays a role is difficult to ascertain. Often participants in

terrorist acts are often ignorant of Islam and usually improve their knowledge in prison. According to Atran (2010), religious ideology then becomes a distorted expression of suffering, a quest for sense or, in the end, a mystical delirium that is consistent with a literal interpretation of religion, according to which the real world is in the afterlife, which seeks to awaken consciences here below. Ideology appears as a moral representation of the world and motivations are rooted in the family situations of the defendants, before being culturally translated as terrorist ideology.

The Ethics of Cultural Expertise at the Public Prosecutor's Office

Experts working with the investigations judges must be particularly aware of their ethical obligations (see Cole, Chapter 2, and Holden, Chapter 1 in this volume). Experts who are appointed to the office of the public prosecutor are exposed to both the scrutiny of the public and their own disciplinary communities. In cases that affect the emotions of the public, the experts can also become the target of the media (see Steuer, Chapter 14 in this volume) and depending on the political position of the critics, the experts working with the office of the public prosecutor may be accused of bias. The issue lies less in who commissions cultural expertise and more in the capacity of the experts to develop a scientific awareness about the ideologies that govern people's decisions and institutional policies. The reason why cultural knowledge is often disregarded in court is not necessarily because judges and anthropologists speak a different language, but because they happen in those specific circumstances to subscribe to different ideologies (Brandmayr 2021). Hence, the ethics of the cultural experts appointed at the public prosecutor's office are dependent on their capacity to identify and make abstraction from conflicting ideologies at play in court.

Case Studies

A Kurdish Minor Attempting to Murder a Jewish Teacher

In January 2016 a 15-year-old boy was accused of attempted murder against a Jewish teacher in Marseilles. The boy of Kurdish origin had never been in trouble with the law. He was described as a very good pupil; his family was not very, or not at all, religious. His father declared himself an atheist and the pupils and teachers of his school identified a radicalization of his behaviour and his speech only three months before the attempted murder.

How can we understand that a seemingly unproblematic 15-year-old suddenly decides to murder someone he knows nothing about? And even more, how can one understand a Kurdish individual taking a stand against his own community, since some of the women of his Turkish family were fighting against ISIS? While preparing the questions separately with the prosecutor and the juvenile

judge in advance of the hearing, we unravelled the story of his involvement. When the boy was arrested, he did not speak at all, seemed to be caught up in a mystical delirium and remained inaccessible to anyone. The mobilization of the father gradually made it possible to establish a dialogue. The boy acknowledged the facts and understood the harm he had done to his family by espousing a terrorist cause, in addition to the obvious crime. He knew nothing about the Kurds' struggle for autonomy. Despite meetings with psychologists or educators, the boy could not explain his acts. He had avidly consulted terrorist sites, where he learnt in a short time the codes of the terrorist ideology, which he eventually abandoned while in detention after a few months.

The hearing insisted on the origin of the violence, the history of the family and its taboos, which allowed for the foundations of the boy's personal story to emerge. His grandfather was a religious activist and his father was a pro-Kurdish communist activist. The latter was taken prisoner in Turkey and tortured while his family fled to France. His grandfather joined his family five years later and remained silent about his past. It also emerged that the boy's father used to beat his wife in front of the children and forced her to have an abortion three months before the attempted murder was carried out. The boy had also travelled to Turkey, where he had developed an idealized vision of his origins. Many details were told by the elder brother who asked to speak in the absence of the parents, which, in a traditional Turkish-Kurdish context, would have been disrespectful of the honour of the family and of the father. Such cultural constraints had lost their strength in the French context, which had been internalized by the children of the couple who also felt solidarity in the face of domestic violence.

In March 2017 the defendant was sentenced to seven years imprisonment and a long psychological follow-up. The assaulted man had no physical injury as the machete that was used for the attempted murder was not sharp enough to cause harm. During the hearing, the defendant stated that since he had been arrested, he had abandoned his radical ideology for a desire to learn. The boy, now a man, is no longer considered a social or criminal danger.

How to Establish the Complicity of a Child Murderer's Brother

The second case is that of Abdelkader Merah, whose brother murdered three French soldiers and three children in a Jewish school in 2012. Mohamed Merah was shot dead after a manhunt lasting several days. His brother was accused of complicity and terrorist criminal conspiracy in the preparation of terrorist acts. The aim of the prosecution was to demonstrate, on the one hand, the consistency of his thinking with the sequence of his actions prior to the murder, and on the other hand, the nature of the ideology that brought the two brothers together. The most decisive elements of the investigation were fragile material evidence, a motor scooter robbery, a jacket bought by his brother and a seemingly unprepared meeting between the two brothers and their sister. The defence rested on their trivialization.

Terrorism allows theft and robbery, on the condition that the money collected, stolen from the unbelievers, be put to the service of the cause – what is called *ghanima* (booty). In this light, petty crimes can find a moral justification within the ideology of terrorism. Concomitantly, dynamics within the family and in the extended social environment of the two brothers helped to set the background: because of the extreme violence and mistreatment in the family, the five children were taken into care; they later joined banditry and were attracted into the network of a religious leader who trained many future terrorists on his farm.

All the literature found in Abdelkader's home, and on his computer, was about the justification of the murder and the identification of the enemies: Jews, Shiites and any secular Muslim in the service of the state. These texts make up a terrorist compendium that is well known to the specialists, but one that is impervious to the investigators of the public prosecution. The purpose of this ideology is to achieve martyrdom, the most honourable death, and give one's life to Allah in a fight to establish his reign over humankind. Inherited from the practices of Al Qaeda, terrorists aim to mobilize the believer and to build the superior legitimacy of terrorism within Islam, giving itself the appearance of a simple portable theology. Cultural expertise helped the court to have some access key to this material and to provide a contradictory interpretation of the defendant's religious justification.

A Former Al Qaeda Member

The last case study concerns a former member of Al Qaeda, born in France but who lived in Algeria. After travelling to London from Algeria at the age of 20, he lived around Finsbury Park Mosque for a long time among the most well-known terrorists in London, including some of the perpetrators of the 2005 London attacks. Arrested in 2003 in Paris for possession of false identity papers and fake credit cards, he fled to Algeria in 2006 just before his trial. He was tortured by the Algerian intelligence services and upon his release, after three months, he applied to return to France for a retrial.

The major identifiable risk in this case was that he would be sent to prison in France, and he would train a new generation of terrorists in forgery and computer encryption techniques, in which he had expertise. This was interpreted as self-sacrifice, which was perfectly consistent with the idea of a sacrifice for the cause, as based on the prosecution file there was no doubt about his responsibility. Hence, it was a matter of exploring the justification that he gave for his past and present allegiances to Al Qaeda, since he claimed to be repentant.

In court, not only was his speech extremely clear and lucid, but his disavowal, the explanation of his life in Algeria and the reasons for his return never used religious arguments: his father was dying, his brother was seriously ill, he had the desire for a better life for his children and eventually he wished to stop running away. Yet, our experience with the prosecution team also indicated that there is often no limit to the capacity of strategic disavowal that can be professed in matters

of terrorism. Most struggle to appear detached and resort to *hadiths* (written essays about what the Prophet said and did) to justify their harmlessness. But these *hadiths* are expressly recommended by terrorism theorists – similar to the coded communication of the mega mafia trials in Italy (Jacquemet 1996) – and are intended to communicate messages to their terrorist environment as well.

Conclusion

Assessing someone's dangerousness is not a science. There is always an unknown, but the known part, itself, is always complex. The militant commitment that gives rise to violent acts is based on very diverse logics and involves modes of thought and identification that require an understanding to judge them. The first case shows a truncated family transmission and marital violence. It is because of a lack of ethnic and political culture that the accused chose a terrorist cause to express intimate violence. The second case is a family's collective adherence to terrorist ideology through the religious recourse to violence that has long been present in the environment of the two brothers. The practices of concealment, the readings and the vocabulary that were used attest to the loyalty of the offending brother and the use of a strategy, consistent with other terrorist profiles. The third case shows how a terrorist commitment can be deconstructed by its author through the recognition of facts, the expression of life choices, emotions and the critical distance from the religious motives of a violent ideology.

When exogenous cultural elements are invited, experts expose themselves to two risks: to consider nothing, or to lend everything to them. In both cases, we are wrong to deprive ourselves of all the subtleties and arrangements that a culture or system of reference allows. Experts in these situations should be aware of both the requirements of the legal system and the ethics of anthropology, but also know how cultural codes can be mobilized to the service of a certain ideology in all fields and ethically position themselves to shed light on the complex relationship between the facts and their ideological interpretations.

Further Reading

Goody, Jack. 2002. "What is a Terrorist?" *History and Anthropology* 13, no. 2: 139–42.

Jack Goody's text shows how social sciences deconstruct the political figure of the enemy to ground it in the historical, political and socio-cultural landscapes of where it arises.

Tilly, Charles. 2005. "Terror as Strategy and Relational Process." *International Journal of Comparative Sociology* 46, no. 1–2: 11–32.

Charles Tilly's article confronts the way biographical trajectory reveals the intimate paths that lead to participation in terrorist actions.

Burnett, Jonny, and Dave Whyte. 2005. "Embedded Expertise and the New Terrorism." *Journal for Crime, Conflict and the Media* 1, no. 4: 1–18.

This article points out a major ambiguity in this field (also explored in the previous article): what makes an expert? Where does he speak from and what is his value?

Q&A

1. Can you say how religion matters in terrorist cases?

Key: Religion (or ideology) seems central but often acts as a moral justification for crimes. Its evocation is ideologically shaped, while social and familial factors may reveal a more profound explanation for the acts, individualizing them.

2. Family system also plays a decisive role in involvement in terrorist groups, but can and should the judiciary and magistrates take this into account?

Key: Domestic violence is of many orders and the loyalty of family members to each other is an obstacle to the manifestation of the truth. However, knowledge of intra-familial relations nevertheless makes it possible to understand a body of unsaid facts and to free the word, enabling the accused to better understand the seriousness of his acts and to better defend himself.

3. Explain why trial, as a very particular moment in the life of the defendant, has an interest in exposing background topics of a terrorist case.

Key: Perpetrators of terrorist acts are not immune to local, family, religious, regional, professional or class cultures that dictate patterns of behaviour and communication. The judiciary is objective in its assessment of not only the acts attributed to the accused but also the speeches and behaviours that obey these plural logics. By better understanding the real motivations of the accused and by better objectivizing the justifications, justice is fairer and better accepted, which prevents subsequent excesses.

References

Asad, Talal. 2007. *On Suicide Bombing*. New York: Columbia University Press.

Atran, Scott. 2010. *Talking to the Enemy: Faith, Brotherhood, and the (Un) Making of Terrorists*. New York: Harper Collins.

Brandmayr, Federico. 2021. "Explanations and Excuses in French Sociology." *European Journal of Social Theory* 24, no. 3: 374–93.

Burgat, François. 2019. *Understanding Political Islam*. Manchester: Manchester University Press.

Jacquemet, Marco. 1996. *Credibility in Court: Communicative Practices in the Camorra Trials*. Cambridge: Cambridge University Press.

Pierret, Thomas. 2017. "Salafis at War in Syria: Logics of Fragmentation and Realignment." In *Salafism After the Arab Awakening: Contending with People's Power*, edited by Francesco Cavatorta and Fabio Merone, 137–54. New York, NY: Oxford University Press.

14

CULTURAL EXPERTISE AND EXTREME SPEECH

Max Steuer

LEARNING OBJECTIVES

This chapter allows you to learn (1) why extreme speech cases benefit from cultural expertise and yet why it may be particularly challenging for experts to be involved in them, (2) what strategies can be employed by different stakeholders, including courts, the media and the experts themselves to mitigate the risks stemming from expert witnessing in extreme speech cases and (3) what socio-legal methods can help to analyse expert involvement in extreme speech cases. After reading this chapter you will have learnt to identify the challenges and mitigating strategies associated with expert witnessing in extreme speech cases.

Introduction

The regulation of speech has become widespread to fight against ideologies advocating the restrictions of the political rights of minorities or spreading anti-minority sentiments (Molnár 2014; Steuer 2019). This chapter explains why cultural expertise (Holden 2019; see also Holden, Chapter 1 in this volume) in extreme speech cases is particularly challenging in court and highlights several mitigation strategies available in response to these challenges. The Irving case in the UK and the Kotleba case in Slovakia illustrate the importance of cultural expertise to generate an interdisciplinary discourse as well as the usage of risk

DOI: 10.4324/9781003167075-18

mitigation strategies and the ways how such strategies can be tailored through analysing expert involvement.

Theory and Concepts

FORMS OF EXTREME SPEECH

Extreme speech may take a wide variety of forms and contain symbolic or visual expressions as well as challenging historical or other facts through selective reporting and analysis. Extreme speech has been defined as presenting a "clear and present danger" to societal values and hence potentially justifying the use of coercive power of the state to suppress it (Weinstein and Hare 2009, 2).

Evidence of extreme speech is difficult to pin down because of the inherent evaluative dimension of determining when speech acts meet the threshold of extreme speech (Boromisza-Habashi 2013; Pohjonen and Udupa 2017).

Challenges to Cultural Expertise in Extreme Speech

Experts are accused of bias. In extreme speech cases, experts are frequently asked to *interpret* whether and how speech acts qualify as extreme in the specific context. Such interpretation then fuels charges of bias and lack of qualification that might undermine trust in interpretive social science and cultural expertise.

Involuntary boost of media presence. The experts' involvement in extreme speech trials may further boost the media presence of the extreme speakers who are also prominent actors in public life (see also Jacobs and van Spanje 2020). Experts themselves may be targeted by denigratory claims and thereby discouraged from offering their expertise in future cases (Mareš 2015). By challenging or generating controversies about the personality of the expert and their alleged bias, the extreme speaker may gain media attention beneficial for their voter support.

The supply of experts. An interdisciplinary treatment of the case may require multiple experts. Small countries might face a shortage of experts with globally acknowledged qualifications and willingness to testify. Local experts may lack interdisciplinary qualifications if the education system does not encourage interdisciplinarity. Depending on regulations, experts' appointments in court might be limited to nationals.

The "factual" versus the "legal" perspective. Extreme speech cases evade a neat distinction between questions of law and questions of fact (Baker 1992). If experts are asked to assess the potential of the speech to incite hatred or violence, their response may question the boundary between the assessment of the facts and the facts themselves (see Cole, Chapter 2 in this volume). Legal training

of cultural experts may help to appreciate the relationship between the assessment and the facts (see Planeix, Chapter 13 in this volume). For example, in Slovakia, one of the registered expert witnesses on political extremism with over 40 expert testimonies has a primarily legal background and used to work at a court.

Expert failures. High-profile litigants in extreme speech cases may be aided by their sympathizers with formal qualifications to provide expert reports or testimonies, using pseudoscientific practices to support the speaker.

Methods such as contextual analysis (Tilly and Goodin 2008), thick description (Ponterotto 2006), content analysis (Schreier 2012) and narrative analysis (Patterson and Monroe 1998) help identify the challenges in specific jurisdictions.

Mitigating the Challenges

A broad coalition of actors, including the state, media and experts themselves, is needed to mitigate the aforementioned challenges.

Legislation should protect the independence of experts, such that cultural expertise is recognized as essential in securing justice in the proceeding and its outcome, provide assurances of a balanced workload with some control over how many cases the expert is asked to address and provide the expert with feedback about the case outcome.

The appointment of experts should be done according to a transparent procedure that identifies competent experts and provides adequate institutional support to them. Multiple experts, or institutions where experts can collaborate on their testimony, should be instructed in politically most salient cases.

The state and other institutions should encourage interdisciplinary education and rhetorical and legal training for experts. Courts should foster capacity building to assess the qualification of expert witnesses, offsetting attempts to recognize individuals with a history of pseudoscientific claims (see Winiecki 2008). Courts should also recognize the complexity of scientific discourse, which often precludes clear-cut responses that are often in high demand by the attorneys (see also Grillo, Chapter 7 in this volume).

Media are vital in countering unwarranted charges of bias by emphasizing the content and context of the expert appearance. This might be accompanied by disseminating publishable materials or testimonies by the expert (see also Lisowska-Magdziarz, Chapter 9 in this volume).

Experts themselves can engage with the media while being mindful of local regulations that may require them to decline media engagement before they complete their testimony. They should participate in specialized training, if accessible, especially if they appear in high-profile cases.

Case Studies

Two case studies illustrate the aforementioned challenges and mitigation measures: the UK libel suit of the self-proclaimed historian David Irving against

Deborah Lipstadt's book and the criminal prosecution of the leader of an extreme right parliamentary party in Slovakia, Marian Kotleba. Both cases demanded expertise in interpretive social science and encompassed public figures. In such cases, experts have been particularly vulnerable to charges of bias.

The Irving Case

In *Irving*, Deborah Lipstadt identified David Irving as a Holocaust denier in her book *Denying the Holocaust* (Lipstadt 1993). Irving sued Lipstadt in 1996 in a civil suit, aiming to limit the circulation of Lipstadt's book. A struggle for history and the profession of historians ensued, with Irving claiming that Lipstadt has undermined his reputation and spread false accusations (Johnson and Clifford 2011, 44). The judge had to engage with historical reasoning. Expert witnesses played a key role in this process (Hasian 2002).

The suit was initiated by Irving, and so the expert witnesses' work identifying Irving as a Holocaust denier could be read as supporting a commitment to free speech. Multiple expert witnesses with international reputations were instructed, including Cambridge historian Richard Evans, who "placed special emphasis on historiography" (Lipstadt 2006, 199; see also Holden, Chapter 20 in this volume). The international coverage and the high complexity of the Irving case given the scope and sheer amount of Irving's writing were challenging for expert witness participation and public portrayal thereof. Evans recounts how even mainstream media often provided factually inaccurate or misleading reporting (Evans 2002, Chapter 6(I)). Evans' own media engagement contributed to providing an authentic picture of the trial, which ended with a dismissal of Irving's suit (*Irving v. Penguin Books Limited, Deborah E. Lipstadt* 2000).

EXPERT TESTIMONIES AND THE MEDIA

The media coverage of expert testimonies is an important avenue for educating and engaging with the broader public in complicated trials. However, given the complexity of the cases, some media might opt for presenting only brief, superficial information about the expert testimonies, with the risk of negatively affecting the public perception of cultural expertise.

The Kotleba Case

Kotleba addresses the Slovak authorities' response to an extreme-right parliamentary party leader. This criminal law case was initiated by the Slovak prosecution in 2017, prompted by Marian Kotleba issuing cheques in the value of 1,488 euros

at a charitable event. Cultural expertise became indispensable in order to evaluate the use of the neo-Nazi symbols of 14 and 88 (e.g. Croft 2011) in the context of Kotleba's broader profile and statements. In addition to historians, specialists on contemporary extremism, a political scientist and a cultural anthropologist were instructed (see the 'Talking to Expert Witnesses' box). Three historians in *Kotleba* were called to the case via their institution, which allowed them to collaborate on the expert report. In October 2020, Kotleba was convicted with a prison sentence of four years and four months (*Kotleba v. Slovakia* 2020). The appeal was pending before the Slovak Supreme Court at the time of writing.

Unlike in *Irving*, Kotleba's case required awareness of the Slovak realities, which limited the pool of available experts. Experts from abroad with awareness of these realities were not instructed. Kotleba's trial boosted his media presence, providing some validity to the risk of such trials amplifying extreme actors' voices.

TALKING TO EXPERT WITNESSES

In support of preparing this chapter, several interviews with Slovak expert witnesses in extreme speech cases were conducted. Due to the absence of publicly available information about the proceedings, talking to the expert witnesses directly may often be the only way to learn more about their involvement, as well as to appreciate their perspective. The time and availability of the interviewees deserves appropriate recognition and appreciation, even if they do not agree to disclose their identities.

Conclusion

Expert witnesses in extreme speech cases stand at the core of clashes between extreme political actors demanding unrestricted rights to express their ideas and defenders of restrictions advocating duties and responsibilities associated with democratic life. The complexity of extreme speech amplifies the significance of cultural expertise whenever their assessment is necessary. The specific context of extreme speech, however, makes it easier to challenge expert testimonies and accuse experts of biased reporting. If the cases involve public figures, the motivation to undermine expert authority may go beyond the courtroom and reach the public. In addition, a neat distinction between facts and value judgments is impossible to make.

There are several strategies available that can help experts on extreme speech cases navigate this terrain. Developing the combination of approaches best tailored to the concrete case requires a jurisdiction-specific understanding of how cultural expertise works.

Expert training in court communication, careful engagement with the media in high-profile cases, accurate media reports and joint interdisciplinary testimonies can all help mitigate these challenges.

Further Reading

Belavusau, Uladzislau. 2014. "Experts in Hate Speech Cases: Towards a Higher Standard of Proof in Strasbourg?" In *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, edited by Lukasz Gruszczynski and Wouter Werner, 254–71. Oxford: Oxford University Press.

Belavusau examines the reliance on cultural expertise in cases by the European Court of Human Rights (see also Arajärvi, Chapter 17 in this volume). He identifies three models of the use of expertise in these cases, helping readers understand the variety of ways in which cultural expertise is essential for the adjudication of extreme speech.

Brandmayr, Federico. 2018. "Order and Conflict Theories of Science as Competing Ideologies." *Social Epistemology* 32, no. 3: 175–95.

Brandmayr highlights how expert witnessing correlates with the "order theory of science", which builds on scientific authority but can be undermined by "conflict theorists" claiming that all truths can be challenged. This dialectic is particularly significant for extreme speech cases, given the high degree of contextuality they entail.

Evans, Richard J. 2002. *Lying About Hitler: History, Holocaust, and the David Irving Trial.* New York: Basic Books.

A first-hand account of the role of the historian as an expert witness in the Irving trial, Evans' book provides the historical and political context for the trial and includes a focus on the role and significance of media reporting about his and other expert witnesses' involvement.

Q&A

1. What are the risks associated with cultural expertise in extreme speech cases?

Key: Risks include (1) portraying the practice of cultural expertise as unscientific and partisan via accusing individual experts as biased without credible evidence, (2) using the expert involvement as means for campaigns of extreme political actors, (3) questioning the "scientific nature" of the social sciences as such, particularly when it comes to interdisciplinary specializations and (4) presenting expert involvement via the parties' positions only without established media providing evidence-based reporting.

2. What strategies are available to various actors in order to mitigate the risk of the expert's position being undermined in extreme speech cases?

Key: Expert witnesses can engage in communication with each other, exchanging experience and building networks. The domestic environment can encourage interdisciplinary qualifications. The media can report on expert involvement, but they should be attentive to the content and context of the testimony and prioritize it over the personality of the expert. The judges can

recognize that expert discourse is rarely straightforward and support more nuanced analyses over simplified "yes–no" positions.

3. Which risks for cultural expertise and strategies to overcome those risks can you identify in the jurisdiction(s) you are familiar with?

Key: The risks of various forms of backlash against the experts differ depending on factors such as (a) the procedural framework (guaranteeing publicity for the trial including independent media reporting), (b) signs of genuine interest in social scientific expertise by some or all actors in the process and (c) possibilities to consult with other experts if the issue turns out to be more complicated and in need of more examination.

4. You are called in as an expert in a publicly controversial extreme speech case. The court asks a set of narrowly framed "yes–no" questions. Furthermore, concerns have been raised over the independence of the judiciary in the country. Do you testify?

Key: In such cases, there is a risk of legitimization of the deficits in the judiciary or the speech in question by the expert witness involvement. If the questions prevent a more robust analysis, the value of the expert testimony might decrease regardless of the qualification and efforts of the expert. Such risks need to be weighed against the benefits of expert involvement, such as providing social scientific evidence to improve the parties' knowledge and public discourse.

References

Baker, Thomas E. 1992. "The Impropriety of Expert Witness Testimony on the Law." *University of Kansas Law Review* 40, no. 2: 325–64.

Boromisza-Habashi, David. 2013. *Speaking Hatefully: Culture, Communication, and Political Action in Hungary*. University Park, PA: The Pennsylvania State University Press.

Croft, Stuart. 2011. "The Far Right and Radicalisation: Understanding Radicalised Identities." *Radicalisation Research*. November 18, 2011. https://www.radicalisationresearch.org/research/croft-2011-far-2/?it=debate/croft-2011-far-2/

Evans, Richard J. 2002. *Lying About Hitler: History, Holocaust, and the David Irving Trial*. New York: Basic Books.

Hasian, Marouf. 2002. "Holocaust Denial Debates: The Symbolic Significance of Irving v. Penguin & Lipstadt." *Communication Studies* 53, no. 2: 129–50.

Holden, Livia. 2019. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

Jacobs, Laura, and Joost van Spanje. 2020. "Prosecuted, yet Popular? Hate Speech Prosecution of Anti-Immigration Politicians in the News and Electoral Support." *Comparative European Politics* 18, no. 6: 899–924.

Johnson, Alison, and Ruth Clifford. 2011. "Polite Incivility in Defensive Attack: Strategic Politeness and Impoliteness in Cross-Examination in the David Irving vs. Penguin

Books Ltd and Deborah Lipstadt Trial." *Journal of Politeness: Language, Behaviour, Culture* 7, no. 1: 43–71.

Lipstadt, Deborah E. 1993. *Denying the Holocaust: The Growing Assault on Truth and Memory*. New York: Plume.

———. 2006. *History on Trial: My Day in Court with a Holocaust Denier*. New York; London: Harper Perennial.

Mareš, Miroslav. 2015. "'Znalci na extremismus': Sociální vědy ve službách vnitřní bezpečnosti?" *Sociální Studia/Social Studies* 12, no. 2: 69–82.

Molnár, Péter, ed. 2014. *Free Speech and Censorship Around the Globe*. Budapest; New York: Central European University Press.

Patterson, Molly, and Kristen Renwick Monroe. 1998. "Narrative in Political Science." *Annual Review of Political Science* 1, no. 1: 315–31.

Pohjonen, Matti, and Sahana Udupa. 2017. "Extreme Speech Online: An Anthropological Critique of Hate Speech Debates." *International Journal of Communication* 11: 1173–91.

Ponterotto, Joseph G. 2006. "Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept 'Thick Description'." *Qualitative Report* 11, no. 3: 538–49.

Schreier, Margrit. 2012. *Qualitative Content Analysis in Practice*. London: SAGE.

Steuer, Max. 2019. "Militant Democracy on the Rise: Consequences of Legal Restrictions on Extreme Speech in the Czech Republic, Slovakia and Hungary." *Review of Central and East European Law* 44, no. 2: 162–201.

Tilly, Charles, and Robert E. Goodin. 2008. "It Depends." In *The Oxford Handbook of Contextual Political Analysis*, edited by Robert E. Goodin and Charles Tilly, 3–32. Oxford: Oxford University Press.

Weinstein, James, and Ivan Hare. 2009. "General Introduction: Free Speech, Democracy, and the Suppression of Extreme Speech Past and Present." In *Extreme Speech and Democracy*, edited by Ivan Hare and James Weinstein, 1–8. Oxford: Oxford University Press.

Winiecki, Don. 2009. "The Expert Witnesses and Courtroom Discourse: Applying Micro and Macro Forms of Discourse Analysis to Study Process and the 'Doings of Doings' for Individuals and for Society." *Discourse & Society* 19, no. 6: 765–81.

Cases Cited

Irving v. Penguin Books Limited, Deborah E. Lipstadt. [2000] EWHC QB 115 (UK High Court of Justice 2000).

Kotleba v. Slovakia, expert testimonies on 29 May and 8 June 2020 (Specialized Criminal Court of Slovakia 2020).

15

CULTURAL EXPERTISE AND COMMERCIAL ARBITRATION

Giorgio Fabio Colombo

LEARNING OBJECTIVES

This chapter focuses on cultural expertise in commercial arbitration for what pertains to the identity of the arbitrator; the applicable rules or laws to the dispute; and the procedural rules. After reading this chapter, you will understand the important role of culture in international commercial arbitration, an area normally perceived as purely technical, and as such devoid of culture.

Introduction

This chapter analyses the relationship between cultural expertise and arbitration under three possible patterns: cultural considerations affecting the *arbitrator*, relating to the *law/rules applicable to the merits* and relevant to the *arbitration procedure*.

Theory and Concepts

International commercial arbitration is a primary tool for settling international disputes of a business nature (Born 2000). It involves parties coming from different countries, may require the use of different languages and involves arbitrators of different nationalities; because of its very nature, this procedure happens across borders and cultures (Kidane 2017). The world of arbitration has often been criticized for its Euro-centric, male-dominated features: "pale, male, stale" is an expression often used to describe the overall problem. Another prong of the

DOI: 10.4324/9781003167075-19

debate deals with the culture of arbitration (Karton 2013), mostly from a common law/civil law perspective. International arbitration has been influenced by American-style techniques (Bergsten 2006): this is seen by many as a problem, as an "international" procedure should not be affected by one particular domestic style. The "Americanization" of arbitration (Martínez-Fraga 2020) has provoked recently a reaction from civil law jurisdictions (Henriques 2018), and the search for an ideal balance is ongoing.

As for the first of the aforementioned patterns, commercial arbitration deals with business matters. However, irrespective of the content of the dispute, parties may want their arbitrators to meet some cultural requirement. The topic is controversial, as – in the uncertainty about the legal nature of the relationship between the parties and the arbitrators (mandate, power of attorney, etc.) (Bedjaoui 1988; Brode 1989) – this may lead to discrimination. The leading case dealing with this issue is *Jivraj v. Hashwani*.

As for the second pattern, international commercial arbitration is an area in which some degree of creativity about the applicable law may be seen: arbitrators sometimes employ *lex mercatoria* (often in the form of the UNIDROIT Principles) (Berger 1998) or rely on other non-state law. Notwithstanding this flexibility, the world of business is uncomfortable with allowing the applicability of other bodies of rules, such as religious law, or non-state customary practices. This does not mean, however, that arbitrators are allowed to ignore sets of rules that do not fall within the ordinary sets of sources of law, should the parties desire otherwise.

In the case of the New York Diamond Dealers Club (DDC) arbitration, for example, applicable rules involved a complex blend of trade customs, New York law and provisions from the Hasidic legal tradition: this requires a specific cultural preparation on the side of the arbitrators, who would otherwise be unable to properly adjudicate the case.

The third pattern deals with the arbitration procedure itself: as mentioned, procedural styles are different across legal traditions. Civil law practitioners are not used to the cross-examination of witnesses, or massive document discovery typical of a common law (and more specifically American) system. Conversely, lawyers from a common law background are puzzled by the stiffness of civil law's style of evidentiary practice. Civil law jurisdictions are more inclined to accept attempts to mediate a pending dispute by the judge or arbitrator, while in common law, this may be seen as undue interference.

Case Studies

One of the key advantages of arbitration is the possibility for the parties to choose as arbitrator the person that they find most suitable to decide their specific dispute.

However, this freedom is not unlimited. There are several rules in place to ensure that the choice does not result in undue benefits for either party or in other violations of due process: the most significant limitation is that arbitrators

must be independent of the parties and impartial (Lawson 2005; Schafler, Dutt, and Eckler 2017).

Moreover, frivolous requirements may cause the invalidity of the arbitration agreement. The choice needs to be evaluated according to the circumstances: for example, the requirement of an arbitrator who has worked as a fashion model may be considered inappropriate in a case involving a construction contract, but valid in a dispute about a modelling service agreement.

To avoid any appearance of bias, there are also rules to make sure that parties are not exposed to situations in which they may feel uncomfortable because of the language or nationality of the arbitrators involved. For example, it is not permitted, in an international case, that either the sole arbitrator or the chairperson of the arbitral tribunal is of the same nationality as either party.

The broader question is: while parties are free to choose their arbitrators, and are entitled to an arbitral tribunal which makes them feel at ease, to what extent should the law accommodate their wishes?

Jivraj v. Hashwani Case

Jivraj v. Hashwani, finally decided by the UK Supreme Court on 27 July 2011, is probably the most significant case dealing with the religious qualification of arbitrators in a commercial dispute. The case has been widely commented on by scholars and practitioners (Rabinowitz 2011; Dasteel 2012; Licari 2019).

In 1981, the parties, two businessmen both belonging to the Shia Imami Ismaili Muslim religion, entered into a joint venture agreement for the management of their property investments. The law applicable to the main contract was English law; the arbitration agreement read as follows:

> [any dispute] shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.

The place of arbitration was London.

In 2008, Mr Hashwani started a claim against Mr Jivraj. Mr Hashwani, however, chose as party-appointed arbitrator Sir Anthony Colman, an expert and experienced lawyer but not a member of the Ismaili community. Mr Jivraj objected to this appointment arguing that the arbitration agreement required an Ismaili arbitrator. Mr Hashwani replied that the entry into force of the Employment Equality (Religion or Belief) Regulations 2003 (now superseded by the Equality Act 2010), had made the arbitration agreement illegal in the part in which it required the arbitrator to be Ismaili. The matter was brought to the Commercial Court, which had jurisdiction over the case.

The Court ruled in favour of Mr Jivraj: according to the judge, arbitrators cannot be considered employees; hence the Regulations were not applicable to them. More so given that the religious qualification was considered to fall under the "Exception for genuine occupational requirement" and the parties had specifically formulated the arbitration agreement in order to foster their sense of belonging to a community.

The Court of Appeals, however, overturned the judgment and held that: a) for the purpose of the Regulations, the task of the arbitrator fell under the definition of employment and as such was subject to the relevant provisions; b) there was no true, legally justifiable, need to attach to the arbitrator a religious affiliation: the applicable law was English law, and no religious expertise was necessary to arbitrate the case; and c) removing the – illicit – religious requirement would create a radically different arbitration agreement: hence, the solution would be to declare the entire provision void, referring the dispute to the jurisdiction of state courts.

The decision sent shockwaves across the arbitration community, and the reaction was almost unanimous: the Court of Appeals had made a serious mistake which could make the UK an unattractive place for arbitration. Even the London Court of International Arbitration decided to join the proceedings and stand before the Supreme Court.

The Supreme Justices restored the arbitration community's peace of mind. In addressing the main concerns raised by the case, the judges established that arbitrators are not, at least in the sense of the 2003 Regulations, workers. According to the norm, employees work under the direction of their employers: arbitrators are not under the control of the parties who appoint them. Moreover, to the delight of the arbitration community, the judges held that implying that there is no need to be a member of the Ismaili community to apply English law denoted "a very narrow view on the function of arbitration proceedings" (*Jivraj v. Hashwani* 2011).

The decision, however, is not immune from criticism: if we were to take the judgement literally, then forms of discrimination that are forbidden in employment relationships may be acceptable in arbitration. As was correctly pointed out (Dasteel 2012, 384), several anti-discrimination laws in various countries are applicable *irrespective* of the subordinate relationship implied in an employment situation. To fully appreciate *Jivrai*, then, it is necessary to broaden the scope and engage with Licari's definition of paideic arbitration, i.e. the form of dispute resolution suitable for a community of people belonging to the same ethnic, religious or moral creed (Licari 2019). Context, in this case, was extremely relevant and supported the interpretation of a genuine religious requirement to perform the function of arbitrator, which, *prima facie*, only required an adequate knowledge of English law and joint venture agreements. Context was crucial: (1) both parties belonged to the same religious community, a community which also has some distinct legal institutions, such as the Ismaili Constitution, which provides, in Articles 12 and 13, systems of dispute resolution; (2) the arbitration agreement

itself had a religious requirement not only for the party-appointed arbitrator but also for the president of the tribunal. To borrow Licari's analysis:

> it is not only a question of resolving a conflict, but of restoring peace in the respect of the community ethos, of ensuring that the […] arbitrator respects and protects the values of the litigants in a liberal society where traditional values have taken a back seat.
>
> *(Licari 2019, 186)*

The question of to what extent the law should accommodate the wishes of the parties involved is indeed a delicate one. The solution is probably to be found on a case-by-case basis, and it is necessary to balance the parties' right to choose their arbitrators with mandatorily applicable rules and laws. Arbitration agreements may not be employed to endorse discrimination. While some cultural or religious-based requirements may be tolerated (as shown in *Jivraj*), it is very likely that a court would find that agreements which provide for arbitrators *not* to belong to a certain religion or gender would be in breach of public policy, hence problematic in the vast majority of jurisdictions. The question of whether such a requirement would make the entire arbitration agreement inoperative (as was held by the Court of Appeals), or simply be *in itself* invalid would need to be evaluated each time, taking into account how fundamental the requirement is in the eyes of the parties – and of course the applicable law.

Cultural Aspects Relating to Applicable Law

International commercial law is an area of law where usages and customs play a very important role.

This is particularly true in sectors where the concerned trade is based on deeply rooted traditions and the majority of operators belong to the same ethnic or religious group. A perfect example of this intersection is the diamond trade.

The diamond trade industry has been, for historical reasons, long dominated by Jewish traders (Richman 2002). While currently, other players have entered the field (in particular Jain merchants from India – Gómez 2013), the well-established connection between the professional commerce of precious stones and the Hasidic tradition has resulted in a racking up of usages embedded in the Jewish Orthodox community in the diamond trade, and even traders belonging to other religions or cultures feel bound by those usages. For instance, in the commerce of diamonds, a contract is not considered valid if the parties do not shake hands and say "mazal u' bracha", a Yiddish expression to wish good luck (Bernstein 1992; Gómez 2013, 128).

It is well known that close-knit communities have effective tools to enforce compliance with the rules on their members even without recourse to formal means of dispute resolution: this tends to be true – with differences in modalities and norms – in Tokugawa Japan (Henderson 1965), as well as in the

cattle-breeding communities of contemporary California (Ellickson 1991). The diamond trading industry, a relatively small social environment, is no exception to this rule, and studies have demonstrated the presence of more or less institutionalized mechanisms of culturally sensitive tools of informal dispute resolution (Bernstein 1992; Richman 2006). The practice of contemporary adjudicative procedures has its roots in long-established, societal-elite managed, community-based settlement systems, the *beth din* typical of the Jewish *kehillah*.

The New York Diamond Dealers Club arbitration procedure (DDC arbitration), which is the primary and, according to some, the only way of settling disputes for diamond traders in New York (Shield 2006; Zirhlioglu 2013), shows the morphing of informal arbitration into formal, adjudicative commercial arbitration which remains moulded by its cultural background. While mandatory for Club members (Shield 2006, 195), DDC arbitration has recently opened its doors to non-Club members and is encouraging its members to actively promote the procedure by inserting arbitration agreements in their contracts (Bernstein 1992, 120). "Why is arbitration so important in the diamond industry?" (New York Diamond Dealers Club 2019), DDC asks rhetorically, and the answer – which includes of course significant aspects of confidentiality and swiftness – leads exactly to the point scrutinized under this paragraph:

> expertise. As those of you in the industry might know, our industry is quite unique. The diamond industry is highly technical, and functions on longstanding industry traditions that are unusual anywhere else. So as you might imagine, it's hard for judges and especially juries to understand diamond cases. Our arbitrators are all chosen from within the industry, and are therefore immediately familiar both with the trade custom and technical aspects of the diamond industry.
>
> *(New York Diamond Dealers Club 2019)*

The arbitrator's expertise, which is indeed a central factor in any arbitration, becomes crucial when access to the required knowledge is restricted to a limited number of individuals. As pointed out by Bernstein:

> The DDC Board of Arbitrators does not apply the New York law of contract and damages, rather it resolves disputes on the basis of trade customs and usages. Many of these are set forth with particularity in the club's bylaws, and others simply are generally known and accepted […]
>
> Arbitrators explain that they decide complex cases on the basis of trade custom and usage, a little common sense, some Jewish law, and, last, common-law legal principles.
>
> *(Bernstein 1992, 127)*

While the pre-selection carried out by DDC restricts parties in their freedom of choice of the arbitrators, it would make little sense to appoint an outsider, more

so as it is the specific ethical duty of the arbitrator to accept an appointment only when they consider themselves adequately equipped to deal with the subject-matter of the dispute. Hence, a culture-sensitive selection of the arbitrator is crucial.

Cultural Aspects Relating to the Arbitration Procedure

International commercial arbitration is claimed to be, in principle, detached from any specific legal system (Kaufmann-Kohler 2003). While the law of the place of arbitration has indeed a significant impact on the procedure, international arbitration should be considered a special procedure. One of the most frequent misunderstandings in this regard is the tendency of some lawyers to apply to arbitration, *sic et simpliciter*, procedural rules practised in litigation before state courts.

The perception of the pervasiveness of some practices in a given jurisdiction, or of the path dependency of its practitioners, could actually cripple the successful positioning of that country as an attractive place of arbitration. This is indeed the case in Japan, whose legal culture has been affected by frequent stereotypes (Haley 1978).

Japan was, and still is, to some extent, perceived as a country where litigation and arbitration favour local parties against foreign competitors (Trakman 2007). This representation, which is the result of some English-language scholarship (Coleman 1983; Greig 1989; Ragan 1991), mainly written during the years of Japan's economic boom, is groundless: there is no hard evidence of any unbalanced or biased decision in favour of Japanese entities by either local courts or arbitral tribunals.

Another frequent stereotype concerns the Japanese style of arbitration as the tendency to try to mediate the dispute during the arbitration proceedings – sometimes aggressively (Hanlon 1991; Taniguchi 1999). While mediation-arbitration (med-arb) procedures are not unique to Japan, the representation was of a distinctive Japanese attitude towards them: an undue pressure to mediate by arbitral tribunals, resulting in a violation of the parties' freedom to choose a dispute resolution mechanism of their preference, and the mixing of the role of arbitrator and mediator. This attitude, however, is not found in practice to an extent which could justify defining it as a feature of arbitration in Japan.

Notwithstanding, the misperception of Japan as a place where a party cannot obtain clean, neat arbitration proceedings has percolated in the collective perception: this was, in the late 1990s, still the prevailing depiction of Japan (Hayakawa 1999).

A Japanese arbitrator, or even a foreign arbitrator in proceedings based in Japan, should be aware of the cultural bias that many non-Japanese parties have towards "Japanese" arbitration: they should be particularly cautious in clearly separating their roles as *arbitrator* and *mediator*, even when they see, in good faith, a chance to settle the dispute. Parties who expect arbitrators to push for settlement will be particularly sensitive to any interference with their choice for

arbitration and may react accordingly. As noted by Karton (2014), the matter would be extremely delicate in cases of parties coming from jurisdictions where these attempts are generally met with hostility.

This caution is aimed at avoiding procedural problems: in fact, arbitrators' attempts to mediate the dispute while the proceeding is pending may lead to their removal due to a violation of the process. The Japan Commercial Arbitration Association (JCAA) rules are straightforward on this point: when parties wish to have their dispute settled by mediation they can make a request to this effect, and the case will be moved to a separate mediation under the International Commercial Mediation Rules (ICMR) (Art. 58, JCAA Rules). This seems an almost direct response to commentators such as Fan (2016, 282). "Arbitration is understood to be closer to conciliation than litigation in Japanese culture. Consequently, the same person assuming the role of a mediator, and later the role of an arbitrator is also culturally acceptable by the Japanese arbitrators and parties". No arbitrator may serve as a mediator in such a new procedure unless specifically authorized by both parties: even when authorized, they can only do so with limited procedural powers compared to a mediator regularly appointed under the ICMR.

Conclusions

Business disputes may seem a field where the technicalities of commercial law rule unopposed, and culture has little impact: this chapter shows the contrary (see Holden, Chapter 1 in this volume). Sometimes cultural elements may simply remain in the background, but on other occasions, they need to be dealt with from a specific procedural angle (see Burdziej, Chapter 11 in this volume). The awareness of the relevance of culture in commercial arbitration as such is certainly a recent phenomenon, but solid cultural preparation has constituted the know-how of a good arbitrator since the very beginning of commercial arbitration. At the same time, the issues dealt with here demonstrate that cultural expertise in commercial arbitration is often necessary to avoid procedural violations which could result in setting aside an award, or in the impossibility to have the award recognized and enforced.

Further Reading

Watt, HoratiaMiur, Lucia Bíziková, Agatha Brandão de Oliveira, and Diego P. Fernández Arroyo, eds. 2019. *Global Private International Law: Adjudication Without Frontiers*. Cheltenham, UK; Northampton, MA: Edward Elgar Publishing.

Licari's chapter in this volume is clear in framing the issue of the arbitrators' cultural identity in general and provides a clear analysis of the *Jivraj* case. Such analysis is not limited to the specific decision but broadens its scope to the ideas of cultural identity and community.

Bernstein, Lisa. 1992. "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry." *The Journal of Legal Studies* 21, no. 1: 115–57.

Bernstein's paper, although a bit dated, is an introduction to the world of diamond arbitration and to the community behind it. It provides an easy-to-follow explanation of the dynamics behind dispute resolution in such a closely knit industry.

Hayakawa, Yoshihisa. 1999. "The Distorted Image of the Japanese System of International Commercial Arbitration." *JCAA Newsletter* 5: 1–13.

Hayakawa's short contribution fully addresses the issue of how a stereotypical depiction (in cultural terms) of a given legal environment may have direct consequences on the conduct of the proceeding itself; also, it indirectly introduces students to the topic of "legal Orientalism".

Q&A

1. Why did the Supreme Court in *Jivraj v. Hashwani* decide that the religious requirement imposed on the arbitrators was not a form of discrimination?

Key: Students should reflect on the role of arbitrators. They are not exactly "employees" of the parties, as they perform a different (adjudicative) function. Also, belonging to a community may assure parties about the fact that arbitrators share with them a common set of values.

2. What is the relevance of the Hasidic tradition in the procedures managed by the New York Diamond Dealers Club?

Key: Traditionally, the trade of diamonds was largely dominated by merchants of Jewish origin. This common religious belonging made it inevitable that some practices of the community entered into the informal, yet binding, regulation of the diamond trade. The entrance of players belonging to different ethnicities or religious groups did not fundamentally alter this regulation.

3. What kind of bias should an arbitrator based in Japan be specifically aware of, and how should they prevent procedural complaints in that regard?

Key: Stereotypical depictions of Japanese arbitrators include their tendency to push parties towards a settlement of the dispute. Lawyers from a *common law* background may see this as a procedural violation unless the parties specifically agreed to empower arbitrators to mediate the dispute.

References

Bedjaoui, Mohammed. 1988. "The Arbitrator: One Man – Three Roles: Some Independent Comments on the Ethical and Legal Obligations of an Arbitrator." *Journal of International Arbitration* 5, no. 1: 7–20.

Berger, Klaus Peter. 1998. "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts." *The American Journal of Comparative Law* 46, no. 1: 129–50.

Bergsten, Eric. 2006. "The Americanization of International Arbitration." *Pace International Law Review* 18: 289–301.

Bernstein, Lisa. 1992. "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry." *The Journal of Legal Studies* 21, no. 1: 115–57.

Born, Gary B. 2000. "Planning for International Dispute Resolution." *Journal of International Arbitration* 17, no. 3: 61–72.

Brode, Patrick T. 1989. "The Arbitrator's Role: A Conservative View." *Windsor Review of Legal and Social Issues* 1: 17–33.

Coleman, Rexford. 1983. "A Preliminary Investigation of Possible Areas of Discrimination Against Foreign Litigants in Japanese Court and Arbitration Practice." In *Business Transactions with China, Japan, and South Korea*, edited by Parviz Saney and Hans Smit, 9–45. New York: Matthew Bender.

Dasteel, Jeff. 2012. "Arbitration Agreements That Discriminate in the Appointment and Selection of Arbitrators." *Richmond Journal of Global Law and Business* 11, no. 4: 383–405.

Diamond Dealers Club New York. 2019. "Online Webinar: Non-Members and Arbitration." *nyddc.com*. Accessed February 19, 2023. https://www.nyddc.com/webinars.html

Ellickson, Robert C. 1991. *Order Without Law: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press.

Fan, Kun. 2016. "'Glocalization' of International Arbitration – Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan." *University of Pennsylvania Asian Law Review* 11, no. 2: 244–92.

Gómez, Manuel A. 2013. "Precious Resolution: The Use of Intra-Community Arbitration by Jain Diamond Merchants." *b-Arbitra* 2: 119–39.

Greig, Robert T. 1989. "International Commercial Arbitration in Japan: A User's Report." *Journal of International Arbitration* 6, no. 4: 21–5.

Haley, John Owen. 1978. "The Myth of the Reluctant Litigant." *The Journal of Japanese Studies* 4, no. 2: 359–90.

Hanlon, Michelle L. D. 1991. "The Japan Commercial Arbitration Association: Arbitration with the Flavor of Conciliation." *Law and Policy in International Business* 22, no. 3: 603–26.

Hayakawa, Yoshihisa. 1999. "The Distorted Image of the Japanese System of International Commercial Arbitration." *JCAA Newsletter* 5: 1–13.

Henderson, Dan Fenno 1965. *Conciliation and Japanese Law, Tokugawa and Modern*. 2 Vol. Seattle, WA: University of Washington Press.

Henriques, Duarte G. 2018. "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?" *ASA Bulletin* 36, no. 2: 351–63.

Karton, Joshua. 2013. *The Culture of International Arbitration and the Evolution of Contract Law*. Oxford: Oxford University Press.

———. 2014. "International Arbitration Culture and Global Governance." In *International Arbitration and Global Governance: Contending Theories and Evidence*, edited by Walter Mattli and Thomas Dietz, 74–116. Oxford: Oxford University Press.

Kaufmann-Kohler, Gabrielle. 2003. "Globalization of Arbitration Procedure." *Vanderbilt Journal of Transnational Law* 36: 1313–33.

Kidane, Won. 2017. *The Culture of International Arbitration*. New York: Oxford University Press.

Lawson, David A. 2005. "Impartiality and Independence of International Arbitrators: Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration." *ASA Bulletin* 23, no. 1: 22–44.

Licari, François-Xavier. 2019. "Beyond Legal Pluralism: Some Thoughts on Paideic Arbitation." In *Global Private International Law: Adjudication without Frontiers*, edited by Horatia Miur Watt, Lucia Bíziková, Agatha Brandão de Oliveira and Diego P. Fernández Arroyo, 182–190. Northampton, MA: Edward Elgar.

Martínez-Fraga, Pedro J. 2020. *The American Influence on International Commercial Arbitration: Doctrinal Developments and Discovery Methods*, 2nd ed. Cambridge: Cambridge University Press.

Rabinowitz, Laurence. 2011. "Arbitration and Equality: Jivraj v Hashwani." *Business Law International* 12, no. 1: 119–26.

Ragan, Charles R. 1991. "Arbitration in Japan: Caveat Foreign Drafter and Other Lessons." *Arbitration International* 7, no. 2: 93–120.

Richman, Barak D. 2002. "Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York." *Harvard Law School John Olin Center for Law, Economics, and Business Discussion Paper Series* 384: 1–55.

———. 2006. "How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York." *Law & Social Inquiry* 31, no. 2: 383–420.

Schafler, Michael D., Deepshikha Dutt, and Alexander Eckler. 2017. "The Appearance of Justice: Independence and Impartiality of Arbitrators under Indian and Canadian Law." *Indian Journal of Arbitration* 5, no. 2: 150–63.

Shield, Renée Rose. 2006. *Diamond Stories: Enduring Change on 47th Street*. Ithaca, NY: Cornell University Press.

Taniguchi, Yasuhei. 1999. "Settlement in International Commercial Arbitration." *JCAA Newsletter* 4, no. 1: 1.

Trakman, Leon. 2007. "'Legal Traditions' and International Commercial Arbitration." *University of New South Wales Faculty of Law Research Series* 29: 1–35.

Zirhlioglu, Ersoy. 2013. "The Diamond Industry and the Industry's Dispute Resolution Mechanism." *Arizona Journal of International and Comparative Law* 30, no. 3: 447–507.

Case Cited

Jivraj v. Hashwani, [2011] UKSC 40 (United Kingdom Supreme Court 2011).

16

CULTURAL EXPERTISE AND INTERNATIONAL CRIMINAL LAW

Joshua Isaac Bishay

LEARNING OBJECTIVES

This chapter reviews the use of cultural expertise by three international tribunals – the International Criminal Tribunal for Rwanda, the International Criminal Court and the Special Court for Sierra Leone – to highlight the interdisciplinary challenges of incorporating anthropological perspectives into a legal setting and how these can be overcome. After reading this chapter you will understand (1) why cultural expertise is important to international tribunals, (2) how international tribunals gather cultural knowledge, (3) examples where cultural expertise has influenced the decisions of the court and (4) how to assess cultural expertise in the form of expert witnessing in international criminal law.

Introduction

International criminal tribunals (ICTs) such as the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) are places where legal professionals from around the world participate in a trial on behalf of the international community for the benefit of an affected community who may not be able to without international assistance. This chapter will demonstrate how cultural expert witnessing can be and has been used before three international courts or tribunals.

DOI: 10.4324/9781003167075-20

Theory and Concepts

There is no consensus about what culture is, and various definitions of culture have been formulated by social scientists. For the purpose of this chapter, I propose culture as a

> shared set of (implicit and explicit) values, ideas, concepts, and rules of behaviour that allow a social group to function and perpetuate itself … [it is] the dynamic and evolving socially constructed reality that exists in the minds of social group members.
>
> *(Hudelson 2004)*

The cultural expert, therefore, is someone who can provide "the specialised knowledge … 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 2019b; see also Holden, Chapter 1 in this volume).

APPOINTMENT OF CULTURAL EXPERTS

Cultural experts can be appointed both by the court and by the parties and guide courtroom actors through the complex web of cultural meanings. They can be "anthropologists, academics, leaders or elders from a particular traditional community", very much anyone who can meet the Chamber's (i.e., court) qualifications for an expert on a particular matter (International Criminal Court 2018, Regulations of the Court, reg. 44; Holden 2019a, 182; Rautenbach 2019, 161).

Expert witnesses in ICTs are generally appointed either on the basis of their inclusion on the list of experts or by motion of the prosecution, defence or victims. Since all experts have an overall duty to the court, their reliability is usually assessed by the judge. Generally, the Chambers give equal treatment towards expert witnesses to testify in court regardless of which party called them, and they have shown a willingness to allow cultural experts to testify.

THREE CRITICISMS OF CULTURAL EXPERT WITNESSES IN COURTROOMS

Three types of criticism have been raised by academics, and at times by courtroom actors:

1. Expertise provided by the individuals appointed by parties is usually perceived as being to the benefit of that specific party. The expert must overcome the widespread presumption by the tribunal that they are not neutral. The view that experts appointed by the parties are "hired guns" makes testifying on cultural facts unfairly difficult.
2. A lack of predictability regarding how lawyers and judges use expert witnesses makes it unclear how cultural experts affect the legal outcomes of trials.
3. There are major epistemological differences between anthropologists; some argue that their observations cannot be authoritative in a court of law and others argue that anthropologists should engage in problem-solving (Holden 2019a).

Since lawyers trained in civil and common law systems work together in ICTs, it is important to consider the difference between expert witnessing in both legal traditions – a blend of which forms the foundation of the general international criminal law system. Such systems were historically developed in Europe and North America, leading some scholars to suggest that the international law system is itself ethnocentric (Swigart 2020, 28). However, between these two systems, the approach to cultural expertise varies greatly. Common law countries appear more willing to use anthropologists in court while in civil law countries, especially those in continental Europe, the concept of *ordre public* has often acted "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" (Holden 2019a, 196).

Case Studies

This section discusses three case studies, each of which explores a particular instance where an expert witness was appointed to shed light on cultural questions which were identified as important to understand the background of the accusations. The first is the testimony of Mr Acama, a "clerk to the spirits" (another term for witch doctor), called to discuss Acholi spiritualism as it relates to the structure and functioning of the Lord's Resistance Army in Uganda; the second is the testimony of Ms Bangura before the SCSL, who was called to discuss traditional marriages in Sierra Leone before and during the Sierra Leonean Civil War; the third is the testimony of Dr Ruzindana before the ICTR, who provided ethnolinguistic testimony to prepare the court for the linguistic and cultural particularities they might face during the witness testimony. Each of these cases was chosen to shed light on the various ways cultural experts have been received and have interacted with ICTs as witnesses, and the various forms of cultural expertise that they provided.

Testimony on Witchcraft before the International Criminal Court

The ICC is the first permanent international criminal law mechanism with "the power to exercise its jurisdiction over persons for the most serious crimes of international concern" (Rome Statute of the ICC 2011, Article 1). The ICC investigated and brought charges against the leaders of the Lord's Resistance Army (LRA) rebel group for war crimes and crimes against humanity committed in the context of a conflict with the national authorities in Uganda since 1 July 2002. The investigation is still ongoing at the date of writing this chapter. The *Ongwen* trial examined allegations against Mr Dominic Ongwen for crimes committed between 1 July 2002 and 31 December 2005.

RELEVANT FACTS OF THE *ONGWEN* TRIAL

Mr Ongwen was a child soldier and moved up the ranks to become Brigade Commander of the Sina Brigade of the LRA under the command of Mr Joseph Kony (*Ongwen* Judgement 2021, paras. 27 and 173). One of the defences that Mr Ongwen put forward was that Mr Kony had spiritual powers which were used to keep him and others under control (*Ongwen* Judgement 2021, para. 2586). Once it became apparent that Acholi cosmology would play a major role in the trial of the Northern Ugandan conflict, the Trial Chamber saw the prosecution, victims and the defence calling for expert witnesses to provide testimony on the historical, cultural and spiritual aspects of the LRA (Nistor, Merrylees, and Holá 2020). The Court became aware that Kony had exploited a feature of Acholi spiritualism during his military campaign, in particular witchcraft and *cen* – *cen* being a spirit which can possess people (Nistor, Merrylees, and Holá 2020). The *Ongwen* defence put forward the argument that spiritual indoctrination was part of a process whereby Ongwen and numerous other child soldiers were "brainwashed" as a means of solidifying Kony's control over his soldiers (Nistor, Merrylees, and Holá 2020).

The experts called by the parties were asked to "elaborate on cultural concepts … [which had already] been extensively explained by the local population" and weigh in on whether they felt this was a reflection on Ongwen's mental health (*Ongwen* 2017, Decision on Prosecution Request in Relation to Its Mental Health Experts Examining the Accused; Nistor, Merrylees, and Holá 2020). Such testimony found these experts trying to place *cen* within the Western cultural framework, attempting to equate *cen* possession with post-traumatic stress disorder (*Ongwen* 2018, T-176, 25–26). Thus, these experts effectively equated a belief system to a mental disorder.

Of the religious figures called to testify on the Acholi belief system within the LRA, Jackson Acama, a "clerk to the spirits" was asked to testify on his cultural

knowledge learned during his 17 years with the LRA and its predecessor the Holy Spirit Mobile Forces (Maliti 2019). During his testimony, Mr Acama described the various spirits that Kony would commune with and the powers associated with them – including with spiritual operational commanders (*Ongwen* 2018, T-188, 20, lns. 2–4). Mr Acama also explained that a failure to comply with Kony's orders would result in the spirits notifying Kony of their insubordination (*Ongwen* 2018, T-188, 19, ln. 13). However, again, there was a propensity by the trial teams (on all sides of the courtroom) to try and force this testimony into "neat little boxes" delineated by the international criminal law framework. This is especially problematic when considering the historical and cultural complexity which can be found in all cultures – complexity which can lend itself to virtually any legal argument (Wilson 2011, 70; Eltringham 2013, 339; Nistor, Merrylees, and Holá 2020).

In its judgement, the Chambers relied on Mr Acama's testimony seven times, although more often as it related to the organizational structure of the LRA, Kony's position and the role of Sudan (*Ongwen* 2021, Judgement, paras. 854, 876, 985). Only on two occasions did they rely on Mr Acama's testimony on cultural issues. The first instance was that "LRA girls who did not menstruate were considered under age, but those who did were considered 'mature'" (*Ongwen* 2021, Judgement, para. 2250). The second, and more relevant to the foregoing discussion, directly addressed the role of Acholi spiritualism. The Chambers explained that they had heard witnesses discuss "the effect of LRA spiritualism", and specifically the "spiritual powers of Joseph Kony" on LRA members (citing Mr Acama), but chose to accept the evidence of other witnesses who "outgrew" their belief in Kony's spiritual powers as they grew older (*Ongwen* 2021, Judgement, paras. 2644–2645). They reasoned that Ongwen had stayed with Mr Kony in the LRA long enough to have had these spiritual ideas subside.

Testimony on Traditional Marriages in Sierra Leone before the Special Court for Sierra Leone

RELEVANT FACTS OF THE *BRIMA ET AL.* CASE

The SCSL tried violations of international humanitarian law during the Sierra Leonean Civil War, which lasted between 1991 and 2002, and the violence in the aftermath of the 1997 coup d'état lasting between 1997 and 1999. After the Revolutionary United Front (RUF) had begun its operations against the Sierra Leonean government and the Sierra Leonean army had successfully staged the coup, the army invited the RUF to form the Armed Forces Revolutionary Council (AFRC). Eventually, the country's former president Kabbah was reinstated in 1998 and the hostilities continued until 2002. After the war, in *Brima et al.*, three high-ranking members of the AFRC (Alex Tamba

Brima, Brima Bazzy Kamara and Santigie Borbor Kanu) were tried for crimes against humanity including murder, rape, sexual slavery and other forms of sexual violence, violations of Article 3 common to the Geneva Conventions and Additional Protocol II (*Brima et al.* 2007, Judgment).

During the trial, five expert witnesses were heard by the court, with a third expert accepted for the defence submitted as a written report, with no *viva voce* testimony. Notably, the court called prosecution expert witness Zainab Bangura to draw a distinction between "traditional arranged marriages [in Sierra Leone], and the type of forced marriage practised during the war". The prosecution's filing argued that Ms Bangura would assist the court in understanding the "context and consequences … from a Sierra Leonean" of the issue of forced marriages during the Sierra Leonean Civil War (*Brima et al.* 2005, Decision on Prosecution Request for Leave to Call an Additional Witness Zainab Hawa Bangura, paras. 4 and 13).

During her testimony, she explained that the time to marry in Sierra Leone was not based on age, as it typically is in other parts of the world, but instead on when the signs of puberty become visible. Once visible, a husband is then typically chosen by the families, although in such traditional marriages, the consent of the bride is important – even if there is considerable duress from the family and the community (Appazov 2016; Kelsall 2009, 246). Ms Bangura explained that during the war, a rebel soldier or commander could "seize a woman, often in the course of an attack, and claim her as his wife" (Kelsall 2009, 247). She explained that the harm caused by such marriages came from "the loss of family support, loss of dignity, and psychological harm" as well as the possibility of becoming outright rejected by their community after the war's end, considering many women tried to return to their communities after (Kelsall 2009, 248).

The defence, in turn, argued that "in normal Sierra Leonean society many girls under the age of eighteen married without giving their consent, and were thus victims of forced marriage", and that the crime committed was more akin to forcible abduction, as opposed to forcible marriage (Kelsall 2009, 249–250). To support this, the defence called expert witness Dr Thorsen, an expert on gender relations and marriage in West Africa who argued that that the prosecution's approach failed to account for the duties which the husband had to uphold in the marriage, the "ability of women to strategise" and the "significant power" that came with what he called "bush marriages" – negating the argument that such marriages were akin to slavery (Kelsall 2009, 249).

In the end, the Chambers reasoned that the facts fulfilled all the elements of sexual slavery when considered in their totality. The court said: "the use of the term 'wife' by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership over the victim, and not

an attempt to assume a marital or quasi-marital status", but that the elements were not substantially different enough from other sexual crimes of which the defendants were accused (*Brima et al.* 2007, Judgment). The SCSL is a good example of a trial where the cultural expertise provided by a member of the affected community was rejected by the Chambers because the laws established in international humanitarian law can, at times, be in conflict with local customs.

Testimony of Dr Ruzindana before the International Criminal Tribunal for Rwanda

RELEVANT FACTS OF THE *AKAYASU* TRIAL

The ICTR was an *ad hoc* tribunal tasked with trying the individuals most responsible for the Rwandan Genocide in 1994 with over half a million Tutsis and sympathetic Hutus being killed. The ICTR charged Mr Akayesu, the *bourgmestre*, an official similar to a mayor, of the Taba commune in Rwanda with violations of Article 3 of the Geneva Conventions and crimes against humanity including acts of sexual violence. As Mr Akayesu was the highest authority in the commune, the prosecution alleged that he must have been aware of, or was complicit in, crimes which were committed in his commune resulting in 15 charges of genocide and crimes against humanity (*Akayasu* 1998, Judgement, para. 4 and counts 1–15).

During the *Akayesu* trial, the ICTR appointed Dr Ruzindana as an expert on language and culture in order to reduce the likelihood of confusion on sensitive and delicate wording (Cryer 2003, 427). Ruzindana also offered testimony on body language in Rwanda, directness of answers and that "answers given will very often have to be 'decoded' in order to be understood correctly" (Cryer 2003, 428; *Akayasu* 1998, Judgement, paras. 146 and 156).

In a later writing, Ruzindana (2013, 146–147) explained that Chambers

> seldom take the necessary precaution to define context so as to minimise contention and apparent subjectivity, and that some of them have adopted a simplistic approach, failing to grasp the complexity of understanding the language used and the cultural overtones which underlie the use of the terms

while the defence tended "to interpret polysemic key terms in a narrow sense, rejecting figurative and extended usages".

Ruzindana explained that Rwandans may describe first-hand witnessing differently than what is traditionally associated with forensic, judicial truth in

Western law. In Rwanda, the "facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else" (*Akayasu* 1998, Judgement, para. 155). In events that involve the feelings and the responsibility of entire social groups, social actors tend to supply the version that is perceived as more socially beneficial – additionally, a witness who fails to adopt the mediated version of "the truth" is socially ostracized (Molenaar 2005, 107 and 129).

In their decision, the Chambers mentioned Dr Ruzindana 14 times and credited him for helping them understand the meaning of words and other linguistic subtleties and said:

> the Chamber has relied substantially on the testimony of Dr Mathias Ruzindana, an expert witness on linguistics, for its understanding of these terms … [and] ascertaining the specific meaning of certain words and expressions in Kinyarwanda, it is necessary to place them contextually, both in time and in space.
>
> *(*Akayesu *1998, Judgement, para. 146)*

The ICTR offers an example where cultural expertise not only aided the court in how to approach questions of culture (in this case linguistics) but where the court substantially relied on the evidence presented by the cultural expert.

Conclusion

ICTs generally avoid cultural defence, as this could potentially undercut the universality of international humanitarian law if specific cultures became exempt because of their values or customary law. The appointment of cultural experts who can position themselves ethically and ensure at the same time procedural neutrality fulfils the requirement to judge the accused fairly and consistently. However, studies have found a "lack of superior skills in truthfulness assessments in professional judges, especially in cross-cultural settings" (Chlevickaité, Holá, and Bijleveld 2020, 188). The foregoing three case studies demonstrate that, although cultural experts were appointed, judges and lawyers still need to bridge cultural information with the framework of international law. Nistor et al. concluded that the tribunals tend to translate new information into the closest concepts which are legally meaningful in the Euro-American setting (Nistor, Merrylees, and Holá 2020, 162). However, on the basis of these three case studies, potential trends can be seen.

In the SCSL and the ICC, the courts struggled to make sense of the testimonies provided by Ms Bangura and Mr Acama in the framework of the ICTs. However, these two cases have something in common, as their testimonies touch directly on the link between culture and the crimes committed and could have allowed cultural expertise (see Holden, Chapter 1 in this volume; Renteln 2011, 271; Fischer 1997).

In the case of Zainab Bangura, it was explained that the type of "marriage" which occurred during the war was not the same as in traditional Sierra Leonean society before the war. The court broke down the forced marriage into its components to determine if a crime had occurred, even though Ms Bangura demonstrated it had unique ramifications for the women it affected.

Meanwhile, before the ICC, the Chambers ignored the link with the Acholi worldview and instead asserted that child soldiers tended to abandon it as they grew older. According to the International Justice Monitor, Northern Uganda has seen "hundreds of children" escaping the LRA facing "spiritual complications" and turning to "spiritual mediums" for care (Ogora 2018). Additionally, "many people in northern Uganda still rely on spirit mediums for solutions they consider supernatural" (Ogora 2018). This expectation that an individual is bound to outgrow their religious worldview would be preposterous within the context of Christianity or Islam.

Dr Ruzindana's testimony stands in contrast. His testimony not only helped the court understand what to expect from the Rwandan witnesses but also clarified key terms and how they would be used by Rwandans – and how the court could interpret them. Thus, in the context of ICTs, the neutral positioning of cultural expertise is better suited than cultural defence, or expertise which could be construed as cultural defence, to assist the procedure of international trials.

Further Reading

Clark, Philip. 2018. *Distant Justice: The Impact of the International Criminal Court on African Politics*. Cambridge: Cambridge University Press.

Phil Clark's book explains the concept of the political and cultural distance of the ICC from its affected communities and the situation countries. The book is written from the perspective of an anthropologist who was himself embedded in the Court.

Eltringham, Nigel. 2013. "'Illuminating the Broader Context': Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda." *The Journal of the Royal Anthropological Institute* 19, no. 2: 338–55.

This article looks at the ICTR from an anthropological perspective. There were numerous cultural practices and expectations of how Rwandans view justice and how a trial would be conducted – which at times had to be brought to the courtroom as testimony. This explains how a court can try and reduce that distance.

Q&A

1. How can cultural expertise improve the international trial procedure?

Key: Cultural experts are in a better position to describe the worldviews, judicial expectations and historical context of the affected community. They act as translators who can bring the affected community's culture into the courtroom from their own view. They can improve the court's awareness of linguistic, historical and spiritual practices.

2. Why did the cultural expertise provided in the SCSL fail to be adopted by the court? Was it the same as a cultural defence? Explain how they are different using examples from the ICTR.

Key: The testimony of Zainab Bangura tried to draw a distinction between traditional arranged marriages in Sierra Leone and the type of forced marriage seen during the war to provide context. Although it was not supposed to support or attack the elements of the crime itself, it still spoke to the elements of the crime. In comparison, the ICTR's calling of Mr Mathias Ruzindana was primarily to explain language, body language and other issues which the court may expect to find when calling Rwandan witnesses.

3. What are the dangers of solely relying on the testimony of cultural experts who are not from the affected community in international criminal trials? Can you identify problems which may arise from relying solely on the testimony of cultural experts who are from the affected community?

Key: Relying only on the cultural expertise of those who are not from the affected community risks misinterpreting and undermining the voices of the beneficiaries of cultural expertise. However, relying solely on the expert testimony of the affected community may overlook the power dynamics within communities and impair the capacity of the judge to assesss the reliability of the testimony.

References

Appazov, Artur. 2016. *Expert Evidence and International Criminal Justice*. Cham: Springer.

Chlevickaité, Gabrielé, Barbara Holá, and Catrien Bijleveld. 2020. "Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There 'Standard Practice' in International Criminal Justice?" *Journal of International Criminal Justice* 18, no. 1: 185–210.

Cryer, Robert. 2003. "Witness Evidence before the International Criminal Tribunals." *The Law and Practice of International Courts and Tribunals* 2: 411.

Eltringham, Nigel. 2013. "'Illuminating the Broader Context': Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda." *The Journal of the Royal Anthropological Institute* 19, no. 2: 338–55.

Fischer, Michael. 1997. "The Human Rights Implications of a 'Cultural Defense'." *Southern California Interdisciplinary Law Journal* 6, no. 3: 663–702.

Holden, Livia. 2019a. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

———. 2019b. "Cultural Expertise and Socio-Legal Studies: Introduction." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 1–9. Bingley: Emerald.

Hudelson, Patricia M. 2004. "Culture and Quality: An Anthropological Perspective." *International Journal for Quality Health Care* 16, no. 5: 345–6.

Kelsall, Tim. 2009. *Culture Under Cross-Examination: International Justice and the Special Court for Sierra Leone*. Cambridge: Cambridge University Press.

Maliti, Tom. 2019. "The Ongwen Defense: Evidence Presented So Far." *International Justice Monitor*, 14 November 2019. https://www.ijmonitor.org/2019/11/the-ongwen-defense-evidence-presented-so-far/

Molenaar, Arthur. 2005. *Gacaca, Grassroots Justice after Genocide: The Key to Reconciliation in Rwanda?* African Studies Centre Research Report 77/2005. Leiden: African Studies Centre.

Nistor, Adina-Loredana, Andrew Merrylees, and Barbora Holá. 2020. "Spellbound at the International Criminal Court: The Intersection of Spiritualism & International Criminal Law." In *Intersections of Law and Culture at the International Criminal Court*, edited by Julie Fraser and Brianne McGonigle, 147–68. Cheltenham, UK; Northampton, MA: Edward Elgar.

Ogora, Lino O. 2018. "Spiritualism in the Trial of Dominic Ongwen: Myth or Reality?" *International Justice Monitor*, October 17, 2018. https://www.ijmonitor.org/2018/10/spiritualism-in-the-trial-of-dominic-ongwen-myth-or-reality/

Rautenbach, Christa. 2019. "Cultural Expertise in Litigation in South Africa: Can the Western World Learn Anything from a Mixed, Pluralistic Legal System?" In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 157–78. Bingley: Emerald.

Renteln, Alison D. 2011. "Cultural Defenses in International Criminal Tribunals: A Preliminary Consideration of the Issues". *Southwestern Journal of International Law* 18: 267–86.

Ruzindana, Mathias. 2013. "The Challenges of Understanding Kinyarwanda Key Terms Used to Instigate the 1994 Genocide in Rwanda." In *Propaganda, War Crimes Trials and International Law*, edited by Predrag Dojčinović, 146–69. Abingdon: Routledge.

Swigart, Leigh. 2020. "Now You See It, Now You Don't: Culture at the International Criminal Court." In *Intersections of Law and Culture at the International Criminal Court*, edited by Julie Fraser and Brianne McGonigle, 14–37. Cheltenham, UK; Northampton, MA: Edward Elgar.

Wilson, Richard. 2011. *Writing History in International Criminal Trials*. Cambridge; New York: Cambridge University Press.

Cases Cited

The Prosecutor v. Alex Tamba Brima, Brima Bazzy Mamara and Santigie Borbor Kanu. "Decision on Prosecution Request for Leave to Call an Additional Witness Zainab Hawa Bangura Pursuant to Rule 73 bis(E), and on Joint Defence Notice to Inform the Trial Chamber of its Position vis-à-vis the Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94 bis." Trial Chamber II (Special Court for Sierra Leone August 25, 2005).

The Prosecutor v. Alex Tamba Brima, Brima Bazzy Mamara and Santigie Borbor Kanu. "Judgement," SCSL-04-16-T-613 (Special Court for Sierra Leone June 20, 2007).

The Prosecutor v. Dominic Ongwen. "Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused," ICC-02/04-01/15-902 (International Criminal Court June 28, 2017).

The Prosecutor v. Dominic Ongwen. "Judgement," ICC-02/04-01/15-1762-Red (International Criminal Court February 4, 2021).

The Prosecutor v. Dominic Ongwen. "Transcript of Hearing 15 May 2018," ICC-02/04-01/15-T-176-ENG (International Criminal Court 2018).

The Prosecutor v. Dominic Ongwen. "Transcript of Hearing 25 October 2018," ICC-02/04-01/15-T-188-ENG (International Criminal Court 2018).

The Prosecutor v. Jean-Paul Akayesu. "Judgement," ICTR-96–4-T (International Criminal Tribunal for Rwanda September 2, 1998).

17

CULTURAL EXPERTISE AND INTERNATIONAL HUMAN RIGHTS LAW

Noora Arajärvi

LEARNING OBJECTIVES

This chapter explains the procedural requirements for providing cultural expertise and appointing cultural experts and discusses the differences in utilising cultural expertise in the two main regional human rights courts: the European Court of Human Rights and the Inter-American Court of Human Rights. It does this by engaging in two case studies: (1) the European Court of Human Rights and the headscarf ban; and (2) the Inter-American Court of Human Rights and Indigenous rights. After reading this chapter you will understand (1) how and in which context cultural expertise is invoked in international human rights law, (2) how cultural expertise is presented in different regional courts for the protection of human rights and (3) what has been the role of cultural experts in human rights litigation in selected case studies.

Introduction

In Paraguay, the Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities were dispossessed of their ancestral territories by the expansion of the cattle ranching industry starting in 1890. These communities were driven to live at the margins of a highway near their former lands. Due to a lack of clean water, access to hunting and agricultural land and the absence of state services,

DOI: 10.4324/9781003167075-21

living conditions were extremely difficult. The state kept no record of births and deaths of the Indigenous peoples, but the accounts of mothers revealed that many babies and young children died from tetanus, measles, pneumonia, dehydration, malnutrition, dysentery, sepsis and bronchitis. Yakye Axa, Sawhoyamaxa and Xákmok Kásek Indigenous communities brought cases to the Inter-American Commission, and eventually, to the Inter-American Court of Human Rights, which found Paraguay guilty of numerous human rights violations. The cases included several cultural experts who, on the one hand, showed the importance of preserving Indigenous ways of life, and on the other, the difficulty of reconciling statutory provisions and customary law regarding the notions of land, territory, property and ownership:

> With regard to possession of indigenous land, it is necessary to point out that the way it is adopted differs considerably from how it is regulated in legal codes. Occupation is … is not always evident due to the cultural mode of production … [the] historical memory, inseparably associated with geography, is the main sign of traditional possession.
>
> *(Statement by José Alberto Braunstein, expert witness in* Yakye Axa Indigenous Community v. Paraguay *2005)*

Theory and Concepts

WHAT IS INTERNATIONAL HUMAN RIGHTS LAW?

What is international human rights law? Elements of international human rights law can be traced to philosophical and religious thought in all cultures and regions. Conversely, both Donnelly (2003) and Merry (2003) have described international human rights, respectively, as "a set of social practices that regulate relations between, and help to constitute, citizens and states in 'modern societies'" and as "a particular cultural system […] rooted in a secular transnational modernity". All cultural traditions contain elements supporting some international human rights and elements which may be problematic or contravene some other human rights standards (Lenzerini 2014).

Cultural considerations in relation to human rights law are often linked to minority rights, in particular group rights of Indigenous peoples. The UN Human Rights Committee has observed that

> culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as

> fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.
>
> *(CCPR General Comment No. 23 1994)*

Perhaps the most authoritative legal text on the protection of culture as a human right can be found in Article 27 of the International Covenant on Civil and Political Rights (1966), which reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Further, Article 4 of the UNESCO Universal Declaration on Cultural Diversity (2001) outlines the relationship between human rights and cultural diversity:

> The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of Indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

General Comment No. 21 on Article 15 of the International Covenant on Economic, Social and Cultural Rights (2009) outlines the right of everyone to take part in cultural life, and that concerned individuals and communities should be consulted, but that the right may be limited "in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights" (General Comment No. 21, Art. 16(c) and 19 2009).

Several international human rights instruments include references to cultural diversity and touch upon the potential clash between international human rights law and cultural practices. For instance, the UN Convention on the Rights of the Child recognises the Islamic law concept of *kafalah*, which provides alternative care for children deprived of their natural family environment. Some instruments explicitly prohibit certain practices that some may consider cultural, such as FGM (CEDAW General Recommendation No. 14 1990) (see Mestre i Mestre, Wendel and Johnsdotter, Chapter 6 in this volume).

Institutionally, international human rights law is monitored and enforced by human rights courts and treaty mechanisms. These have been agreed upon by states, often within an international institutional setting, such as the United Nations, or in the case of regional human rights treaties, among the members of the Council of Europe, the Organization of American States and the African

Union. Human rights courts exercise an international judicial function and address state-to-state and individual applications. Many monitoring mechanisms and reporting procedures – for example, set up by the ten main international human rights treaties, or the Universal Periodic Review of the UN Human Rights Council – entail an individual complaints mechanism, and usually meet as an expert committee examining complaints and issuing recommendations. On occasion, there may be some overlap between different mechanisms, as illustrated in the following case study on the headscarf/veil ban.

In 2009, the Human Rights Council established the UN Special Rapporteur in the field of cultural rights, who promotes and protects cultural rights at local, national, regional and international levels and produces reports on cultural diversity, religious extremism, women, cultural heritage and the relation of these topics to international human rights. Similarly, in 2001, the Commission on Human Rights – the predecessor of the Human Rights Council – appointed a Special Rapporteur on the rights of Indigenous peoples (UN Commission on Human Rights, Res. 2001/57). This was followed by the adoption of the UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007, the first time that the UN included Indigenous participation and Indigenous experts in the process of negotiating a declaration.

In applying international human rights law to specific cultural contexts, international courts and other mechanisms may require additional knowledge, which can be provided by cultural experts. Cultural experts can relieve the tensions between the universalist project of human rights and the calls for acknowledging cultural relativism and legal pluralism in the interpretation and application of the law. These experts – their utility having become increasingly recognised in recent years – come from a variety of disciplines: from anthropology and legal geography to sociology and psychology. They provide specialised knowledge in disputes where culture and cultural arguments are deemed useful for dispute resolution and for the claim of rights (Holden 2011, 2020). Although the emergence of definitions and the systematic identification of cultural expertise are recent, the use of arguments that fall under the umbrella definition of cultural expertise is not a new phenomenon. For example, *O. Sara et al. v. Finland* (1994) discussed whether logging within areas used for reindeer husbandry constituted an interference with the Indigenous Samis' right to enjoy their own culture. The Human Rights Committee took note of two expert statements, submitted previously to the national Supreme Administrative Court, which concluded that logging negatively affects nature-based methods of reindeer herding.

Case Studies

Both case studies, first, introduce the legal instrument, the institution and the rules of procedure on the instruction of experts – including *amicus curiae* submissions by experts and expert organisations. This is followed by a presentation of the legal issue and a summary of the relevant case law, including the utilisation of

cultural expertise. Finally, the impact of the use or non-use of cultural expertise regarding the substantive issue in respective institutions is evaluated.

The European Court of Human Rights: Headscarf Ban

The European Convention on Human Rights (ECHR) is a regional human rights treaty adopted in 1950 by the members of the Council of Europe. It established the European Court of Human Rights (ECtHR), which considers applications of violations of human rights committed by the contracting parties.

The ECtHR utilises both court-appointed experts and experts appointed by the parties and is generous in granting leave to third parties to intervene in proceedings. Article 36 ECHR concerns third-party interventions by states and experts. For example, under this article, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted an intervention in which he shared expert knowledge on the issue at hand (*OOO Flavus v. Russia* 2020). Rule 44 of the Rules of Court specifies the procedure for third-party submissions. The Annex to the Rules determines that the ECtHR may at the request of a party or of its own motion adopt any investigative measures, including instructing experts, and it clarifies the procedure for the convocation and hearing of witnesses and experts. Starting with the interventions of Amnesty International and the German government in *Soering v. United Kingdom* (1989), more than 100 significant third-party interventions have since taken place in the ECtHR jurisprudence, some of which by states parties and others by experts, NGOs and international institutions (Harvey 2015).

One of the most debated issues pertaining to cultural and religious rights in ECtHR jurisprudence concerns the banning of veils and headscarves (see Figure 17.1). The saga began in 2005 with the Grand Chamber upholding the ban on headscarves on university campuses in Turkey, stating that while this ban did interfere with the right to freedom of religion under Article 9, it was legitimately prescribed by law based on the principles of secularism and equality of men and women and that the interference could be considered as "necessary in a democratic society" (*Şahin v. Turkey* 2005). In 2008, the ECtHR found no violation of Article 9 in the cases of *Dogru v. France* and *Kervanci v. France* for the prohibition to wear headscarves during physical education classes in state secondary schools. In these cases, the court records indicate that no expert was instructed or third-party interventions granted.

In 2014, the Grand Chamber considered whether France's ban on the full-face veil violated Articles 8 (right to private and family life) and 9 (right to religion) under the Convention. With heavy reliance on the *Şahin* judgement, despite the stark political and social differences between Turkey and France, and with reference to "the margin of appreciation", it stated that the full-face veil ban was valid to preserve the goal of "living together" (*S.A.S. v. France* 2014).

In *S.A.S.*, several third parties intervened, namely the Open Society Foundation, Article 19, Amnesty International, Liberty and the Ghent Human

FIGURE 17.1 Woman wearing a veil. Source: Nicola Fioravanti.

Rights Centre (HRC). Conversely to the ECtHR, in 2018 the United Nations Human Rights Committee held that France's prohibition on concealing one's face violates the right to freedom of religion enshrined in Article 18 of the ICCPR. Moreover, it noted that the ban has a disproportionate impact on Muslim women, violating the right to non-discrimination. This is directly at odds with *S.A.S. v. France*. Adding to the mix of decisions by different institutions, on 15 July 2021, the Court of Justice of the European Union found that private companies and employers in the EU can ban people from wearing religious symbols, including headscarves, justified by the "employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, in order to take account of their legitimate wishes" (*WABE eV & MH Müller Handels GmbH v. MJ* 2021).

In the 2018 Belgium cases (*Dakir v. Belgium* and *Belcacemi and Oussar v. Belgium*), the EctHR followed the reasoning in *S.A.S.* and found no violation. In *Dakir*, the HRC submitted written comments, noting that the submission may also provide useful background information for the case of *Belcacemi and Oussar v. Belgium* for which the HRC was not able to introduce a timely request for leave to intervene. *Lachiri v. Belgium* concerned the expulsion of an ordinary citizen from a courtroom because of her refusal to remove her hijab, an Islamic headscarf. The HRC, again, submitted written comments, and argued that the case would offer "a fine opportunity for the Court to clarify the limits of States' discretion to ban religious dress/symbols". The ECtHR did, indeed, find a violation of the right to religion under Article 9 as there were no proper grounds

to restrict the freedom to manifest the applicant's religion and the infringement was not justified in a democratic society. In contradiction to previous cases, the government focused its arguments for removing the hijab on respecting the judiciary and the smooth operation of the judicial process, and not on secular and/or democratic values. This is also an illustration of the ECtHR acknowledging the margin of appreciation with regard to different countries – although the margin itself might be labelled as a cultural relativist tool (Sweeney 2005): it considered that there is uncertainty among Belgian judges on the matter, as was highlighted also in the report by the HRC based on their survey of over 500 Belgian judges.

In the veil and headscarf cases of the ECtHR, cultural expertise has been presented in the form of *amicus curiae* briefs in support of the applicants. These third-party interventions have presented the court with analyses of comparative case law, national trends on the necessity and proportionality of restrictions on wearing religious dress and an assessment of the living-together argument in the context of the face veil discussion. Despite persuasive arguments presented by expert groups through the briefs, to date, the ECtHR has been reluctant to recognise the change in the cultural and religious landscape in many European countries.

The Inter-American Court of Human Rights: Indigenous Rights

The American Convention on Human Rights is a regional human rights treaty adopted in 1969 by members of the Organization of the American States. In 1979, the Inter-American Court of Human Rights (IACtHR) was established to enforce and interpret the Convention through its jurisprudence. Cases can be referred to the IACtHR by either the Inter-American Commission on Human Rights (IACommHR) or a state party. In contrast to the European human rights system, individuals cannot apply directly to the IACtHR but must first lodge a complaint with the IACommHR, which then rules on the admissibility of the claim. In 2016, the Organization of American States adopted the American Declaration on the Rights of Indigenous Peoples (2016), which together with the UN Declaration (2007) and Indigenous and Tribal Peoples Convention (1989) by the International Labour Organization can serve as interpretative tools and provide content in the consideration of topics on Indigenous rights.

The Rules of Procedure grants the IACtHR the power to instruct expert witnesses, invite parties to provide any evidence at their disposal, request any entity to obtain information, express an opinion or deliver a report and commission one or more of its members to conduct an inquiry. Expert witnesses can also be named by any party, and the party who wishes to do so must submit the identity and the subject of the expert's statement (Rules of Procedure 2009, Art. 35(f) and 36(f)). Sometimes, parties call experts as ordinary witnesses in order to overcome procedural hurdles (e.g., *García Lucero et al. v. Chile* 2013). The IACtHR accepts documents or written opinions presented by expert witnesses (*Boyce et al. v. Barbados* 2007; *Vélez-Loor v. Panama* 2010). It has adopted an

inclusive and integrated methodology, relying on anthropologists, sociologists and other professionals for a contextual and comprehensive approach to judicial decision-making. The role of an expert in the IACtHR has been described as "an advisor that offers to the judges their specialised culture, different from the general and judicial of that of the judges" whose "testimony is the means of proof used to obtain an opinion based in specialized scientific, technical, or artistic knowledge; useful for the discovery and understanding of the elements of proof" (Monge 1999).

The IACtHR has developed a rich jurisprudence on Indigenous peoples' rights, especially rights to land and cultural identity, drawing much focus on the effective participation of communities and collective rights. It has "set out a series of parameters to be respected by the States in order to protect land rights and, ultimately, the cultural rights of Indigenous peoples" (D'Addetta 2014). In this context, anthropologists and sociologists, among others, have provided expert evidence on Indigenous history, culture and lifestyle.

The first IACtHR judgement on Indigenous land rights was *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), which concerned the absence of official title to territory by Awas Tingni, an Indigenous community living on the Atlantic Coast of Nicaragua. Several judges noted that "the attention due to the cultural diversity seems to us to constitute an essential requisite to secure the efficacy of the norms of protection of human rights, at national and international levels" and accepted the Indigenous communal and ancestral right to property. Many NGOs, human rights groups and a law firm on behalf of another Indigenous community submitted *amicus curiae* briefs. The IACommHR, as a party to the case on behalf of the Awas Tingni, offered several experts, including sociologists, anthropologists and Indigenous rights attorneys. The IACtHR also heard members and leaders of Indigenous communities. The distinction between a witness and an expert witness was somewhat blurred, and some experts were included as witnesses. The witnesses and expert witnesses successfully showed that "in Nicaragua there is a general lack of knowledge about the issue, an uncertainty of what should be done, and to whom the request for demarcation and title should be addressed" (Picolotti and Taillant 2003).

The reasoning and reliance on expert witnesses were followed in similar subsequent cases on Indigenous communities. Three Paraguayan cases concerned Indigenous groups whose "ways of life were on the way to extinction" and who were denied legal rights as their births and deaths were not even acknowledged or recorded by the state (Feria Tinta 2008). In *Yakye Axa Indigenous Community v. Paraguay* (2005), the IACtHR received expert opinions from the IACommHR, representatives of the Yakye Axa and the state, some of which were delivered in a public hearing and others in writing. The experts consisted of a linguist, physicians who had worked in the Indigenous community, a human rights lawyer and anthropologists. Also, Organización Nacional Indígena de Colombia filed an *amicus curiae* brief.

In *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), Judge Cançado Trindade in his separate opinion noted that the case was very similar to the *Yakye Axa* case, with regards to the breaches, evidence and expert testimony – including six expert reports prepared for the *Yakye Axa* case to the record in the *Sawhoyamaxa* case. In addition, the IACtHR received in the form of affidavits several expert statements, instructed by the parties, from medical professionals, a geographer expert in Indigenous people's land rights, the president of the Paraguayan Institute of Indigenous Peoples and a legal expert, who came to serve as an *ad hoc* judge in a subsequent case, *Xákmok Kásek Indigenous Community v. Paraguay* (2010). In *Xákmok Kásek*, again, the IACtHR included several expert opinions previously presented in the *Yakye Axa* case and instructed some of the experts who were involved in the *Awas Tingni Community* case. In addition, the IACtHR received written testimonies from expert witnesses in the fields of geography, anthropology and medicine and many community members and leaders. The IACommHR considered that disconnection from ancestral lands and natural resources had damaged the community's cultural identity. In all three cases, albeit to differing degrees, the IACtHR found Paraguay responsible for numerous violations, in particular failing to take the necessary measures to ensure the community members' right to life, guarantee dignified living conditions and recognise the cultural and spiritual value of ancestral territory.

The IACtHR receives expert reports and statements from the parties – the state, the IACommHR and representatives of the individuals and communities – and at its own instruction. Also, *amicus curiae* briefs are common. In *Awas Tingni* and in the three aforementioned Paraguay cases (Antkowiak 2013), experts of various disciplines were involved, many of whom attested to cultural aspects of the rights and cultural consequences of their violations. The IACtHR's renewed inclusion of, and probable reliance on, expert reports delivered in previous cases illustrates their impact in materialising Indigenous land and resource rights in the IACtHR.

Conclusion

This chapter shows that in both the ECtHR and IACtHR cultural expertise in the form of expert witnesses and *amicus curiae* submissions by experts and expert groups serve an important function in providing the courts with detailed information on specific issues – such as the judges' views on headscarves in Belgium in the *Lachiri* case. Two main conclusions can be drawn. First, overall institutional cultures differ: the IACtHR is more welcoming to a wider range of experts and takes these into account in its decision-making – expert reports are accessible, summarised in judgements and discussed often at length. Meanwhile, the ECtHR is more hesitant and less transparent in this regard and not all expert reports are readily available – this calls for further research into the court documents and archives to comprehensively assess the types, numbers and impact of cultural expert witnesses and reports. Secondly, the types of experts vary: the ECtHR expert submissions – at least in the cases considered – were offered by legal experts rather than experts in, say, religion,

anthropology, sociology or psychology. In the IACtHR cases, witnesses have included experts in linguistics, geography, anthropology, sociology and medicine, and, importantly, community representatives. This is explained – in addition to the institutional culture – by the different subject matter of the case studies: simply put, the breadth of topics related to the Indigenous cases justifies and benefits from the inclusion of many experts from different disciplines. Nonetheless, the ECtHR may need to welcome, appoint and take more seriously cultural experts as cases involving complex considerations of sociocultural diversity, equality, non-discrimination and assimilation, to name but a few, continue to emerge in European courtrooms.

Further Reading

Lenzerini, Federico. 2014. "Chapter 3: Reconceptualizing International Human Rights Law Through a Culturally Based Approach: International and Regional Practice." In *The Culturalization of Human Rights Law*, 116–212. Oxford: Oxford University Press.

This piece provides a focused discussion of the theory and practical application, supported by examples from regional and international institutions.

Brems, Eva. 2016. "SAS v. France: A Reality Check." *Nottingham Law Journal* 25: 58.

This article discusses the ECtHR's jurisprudence on the burqa/veil ban, drawing draws on empirical research based on interviews with women who wear/wore a face veil in Belgium and France. It builds a mediated dialogue between the face veil wearers' realities and the reasoning of the ECtHR.

Loperena, Christopher A. 2020. "Adjudicating Indigeneity: Anthropological Testimony in the Inter-American Court of Human Rights." *American Anthropologist* 122, no. 3: 595–605.

Written by an expert witness in a case concerning the communal property rights of the Garifuna people, this article examines the challenges of presenting cultural evidence in a court and the coarticulation of anthropology and law.

Q&A

1. What are some of the conflicting interests in ensuring cultural diversity and the prohibition of harmful cultural practices in international human rights law?

Key: This question should open a discussion about cultural relativism and universalism of human rights, supported by examples found in the case studies. The aim is to encourage students' critical thinking and ways to reconcile important but potentially conflicting values under international human rights law.

2. Do you think cultural norms are embedded in human rights norms or vice versa? How would you assess their relationship?

Key: Students should discuss the history of human rights as a value system and the impact of formalised and institutionalised international human rights law. They should grasp the interlinkages between culture and cultural norms, with references to regional, religious and other differences.

3. Why are cultural experts needed in international human rights disputes?

Key: Students should discuss the instruments, the rules of procedure allowing the instruction of cultural experts and the underlying need to supplement the courts' knowledge of cultural issues.

4. Can international and regional instruments respond to specific national issues adequately?

Key: Students should show an understanding of different instruments and the hierarchy between national courts and international/regional institutions and note the bindingness of decisions. With the concept of "margin of appreciation", students should consider the limits of legal pluralism at the national and international levels.

References

Antkowiak, Thomas M. 2013. "Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court." *University of Pennsylvania Journal of International Law* 35, no. 1: 113–87.

D'Addetta, Michele. 2014. "The Practices of the Regional Human Rights Bodies on the Protection of Indigenous Peoples' Right to Culture." *Rivista Giuridica dell'Ambiente* 29, no. 5: 586–627.

Donnelly, Jack. 2003. *Universal Human Rights in Theory and Practice*, 2nd ed., Ithaca, NY; London: Cornell University Press.

Feria Tinta, Mónica. 2008. *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child: Protecting the Most Vulnerable at the Edge*. Boston, MA: Martinus Nijhoff Publishers.

Harvey, Paul. 2015. "Third Party Interventions Before the ECtHR: A Rough Guide." *Strasbourg Observers*, February 24, 2015. https://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/

Holden, Livia. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.

———. 2020. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1: 29–46.

Lenzerini, Federico. 2014. "Chapter 3: Reconceptualizing International Human Rights Law Through a Culturally Based Approach: International and Regional Practice." In *The Culturalization of the Human Rights Law*, authored by Federico Lenzerini, 116–212. Oxford: Oxford University Press.

Merry, Sally Engle. 2003. "Constructing a Global Law? Violence Against Women and the Human Rights System." *Law and Social Inquiry* 28, no. 4: 941–77.

Monge, Ma. Auxiliadora Solano. 1999. "The Expert Testimony before the Inter-American Court of Human Rights." *ILSA Journal of International & Comparative Law* 5, no. 3: 567–81.

Picolotti, Romina and Jorge Daniel Taillant. 2003. *Linking Human Rights and the Environment*. Tucson, AZ: University of Arizona Press.

Sweeney, James A. 2005. "Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era." *The International and Comparative Law Quarterly* 54, no. 2: 459–74.

Legislation

Council of Europe. 1950. *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14*. European Treaty Series – No. 5. Rome, November 4, 1950.

Inter-American Court of Human Rights. 2009. *Rules of Procedure of the Inter-American Court of Human Rights*. Approved November 28, 2009.

International Labour Organization (ILO). 1989. *Indigenous and Tribal Peoples Convention*. No. 169.

Organization of American States (OAS). 1969. *American Convention on Human Rights, 'Pact of San Jose, Costa Rica'*. San José, November 22, 1969.

Organization of American States (OAS). 2016. *American Declaration on the Rights of Indigenous Peoples*. AG/RES. 2888 (XLVI-O/16), Adopted at the third plenary session held on June 15, 2016.

UNESCO. 2001. *UNESCO Universal Declaration on Cultural Diversity*. 31/Res. 25, Annex I. Paris November 2, 2001.

United Nations – Committee on Economic, Social and Cultural Rights (CESCR). 2009. *General comment No. 21, Right of everyone to take part in cultural life (Art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*. E/C.12/GC/21, December 21, 2009.

United Nations – Committee on the Elimination of Discrimination against Women (CEDAW). 1990. *CEDAW General Recommendation No. 14: Female Circumcision*, 1990, A/45/38 and Corrigendum.

United Nations – Department of Economic and Social Affairs Indigenous Peoples. 2007. *United Nations Resolution on the United Nations Declaration on the Rights of Indigenous Peoples*. A/RES/61/295, adopted on September 13, 2007.

United Nations – Human Rights Office of the High Commissioner. 1966. *International Covenant on Civil and Political Rights*. Adopted December 16, 1966. Entry into force March 23, 1976.

United Nations – Human Rights Office of the High Commissioner. 2001. *Human Rights and Indigenous Issues*. Commission on Human Rights resolution 2001/57, April 24, 2001.

United Nations – Human Rights Committee (HRC). 1994. *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*. CCPR/C/21/Rev.1/Add.5. April 8, 1994.

Cases Cited

Belcacemi and Oussar v. Belgium. Application No. 37798/13, [2017] ECHR 655 (European Court of Human Rights July 11, 2017).

Boyce et al. v. Barbados. IACHR Series C no. 169 (Inter-American Commission of Human Rights November 20, 2007).

Dakir v. Belgium. Application No. 4619/12, [2017] ECHR 656 (European Court of Human Rights July 11, 2017).

Dogru v. France. Application No. 27058/05, [2009] 49 EHRR 8 (European Court of Human Rights June 30, 2009).

García Lucero et al. v. Chile. IACHR Series C no. 267 (Inter-American Commission of Human Rights August 28, 2013).

Kervanci v. France. Application No. 31645/04, XIV ECHR 1 (European Court of Human Rights December 4, 2008).

Lachiri v. Belgium. Application No. 3413/09 ECHR (European Court of Human Rights September 18, 2018).

OOO Flavus and Others v. Russia. Application No. 12468/15, [2020] ECHR 463. (European Court of Human Rights June 23, 2020).

O. Sara et al v. Finland. Communication No. 431/1990 (UN Human Rights Committee March 23, 1994).

Şahin v. Turkey. Application No. 44774/98, 2005-XI ECHR 173, [2005] ECHR 819 (European Court of Human Rights November 10, 2005).

S.A.S. v. France. Application No. 43835/11, [2014] ECHR 695 (European Court of Human Rights July 1, 2014).

Soering v. United Kingdom. Application No. 14038/88, A/161 [1989] ECHR 14 (European Court of Human Rights July 7, 1989).

The Mayagna (Sumo) Awas Tingni Community v. Nicaragua. IACHR Series C no. 79 (Inter-American Commission of Human Rights August 31, 2001).

The Sawhoyamaxa Indigenous Community v. Paraguay. IACHR Series C no. 146 (Inter-American Commission of Human Rights March 29, 2006).

The Yakye Axa Indigenous Community v. Paraguay. IACHR Series C no. 125 (Inter-American Commission of Human Rights June 17, 2005).

The Xákmok Kásek Indigenous Community v. Paraguay. IACtHR Series C no. 214 (Inter-American Court of Human Rights August 24, 2010).

Vélez-Loor v. Panama. IACtHR Series C no. 218 (Inter-American Court of Human Rights November 23, 2010).

WABE eV & MH Müller Handels GmbH v. MJ. C804/18 & C341/19 (Court of Justice of the European Union July 15, 2021).

18

CULTURAL EXPERTISE AND INDIGENOUS RIGHTS

Noelle Higgins

LEARNING OBJECTIVES

This chapter highlights the ways in which the current international legal framework could be improved to facilitate the contribution of Indigenous expertise. After reading this chapter you will be familiar with information and analysis relating to (1) the concept of Indigenous expertise, (2) the place of Indigenous peoples in the international law framework and (3) the importance of Indigenous expertise through an exploration of the world heritage framework.

Introduction

Cambodia's temple complex of Angkor Wat, Ireland's island monastery of Sceilg Mhicíl and the Statute of Liberty: these entities are all included on the World Heritage List, maintained by the United Nations Educational, Scientific and Cultural Organization (UNESCO), which recognises cultural and natural heritage sites worldwide that are considered to be of outstanding value to humanity. Currently, there is a total of 1,121 World Heritage List sites in 167 states. The list emanates from UNESCO's Convention Concerning the Protection of the World's Cultural and Natural Heritage (WHC), adopted in 1972.

This chapter focuses on the world heritage framework as it relates to Indigenous peoples. Indigenous peoples, approximately 370 million of whom live in numerous states globally, have inherited, and are practitioners of, unique cultures and

DOI: 10.4324/9781003167075-22

traditions and ways of relating to the natural world (see Bouayad, Chapter 24 in this volume). These peoples were subjugated through conquest, occupation and settlement and their traditions, practices and cultures have been suppressed by states (Watson 2014) but they have retained social, cultural, economic and political characteristics that differ from those of the dominant or majority societies in which they live.

Theory and Concepts

The international legal framework, based as it is on state sovereignty, can pose numerous difficulties for Indigenous peoples, who are represented by states, rather than their own agents, in treaty negotiations and in decision-making bodies (see Srinivasan, Chapter 3 in this volume). This is particularly detrimental regarding heritage, as the traditional heritage knowledge of Indigenous peoples is based on millennia of practice and custom. Because Indigenous peoples have an important relationship with, and respect for, the natural world, their perspectives on natural heritage should play a primary role in law-making (Ens et al. 2012), and decisions without Indigenous peoples' input may have negative impacts on their lives and wellbeing (Kingsley et al. 2013).

This chapter outlines (1) the International legal framework and the place of Indigenous peoples and (2) how Indigenous expertise is incorporated into the world heritage framework.

THE CONCEPT OF INDIGENOUS EXPERTISE

Indigenous peoples have inherited, and are practitioners of, unique cultures and traditions and ways of relating to people and the environment. Indigenous expertise is the special knowledge and experience of Indigenous peoples which locates and describes relevant facts in light of their particular history, background and context and facilitates the explanation of Indigenous concepts to a non-Indigenous audience. In the context of the world heritage framework, cultural Indigenous expertise illuminates the value of Indigenous cultural objects, sites and traditions and elucidates how they should be treated and managed (see Holden, Chapter 1 in this volume).

The International Legal Framework and the place of Indigenous Peoples

The International Legal Framework

While attempts have been made to reimagine international law recently through the Third World Approach to International Law theory, the nature

of international law as a product of the West is widely acknowledged (Fukurai 2018). One of the precepts of the international legal system is state sovereignty, with the state speaking on behalf of all the people(s) within its jurisdiction (Shrinkhal 2021), including Indigenous peoples. This has led to a lack of an Indigenous voice within the international law framework (Wilmer 1993) as Indigenous peoples cannot negotiate treaties or sit on decision-making bodies in their own right. Therefore, questions arise about whether and how their specific expertise on issues such as heritage can be incorporated into the international legal framework.

Indigenous Peoples and International Law

While Indigenous peoples had been the subject of International Labour Organisation initiatives, such as the paternalistic and assimilationist Indigenous and Tribal Peoples Convention 1957 (Larsen and Gilbert 2020), it was not until 1977 that the first delegation of Indigenous peoples visited the UN and that Indigenous peoples began to be acknowledged as rights holders. This led to work on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), beginning in 1993. UNDRIP (2007) constitutes the most comprehensive universal legal instrument on the rights of Indigenous peoples and certain of its provisions are reflective of customary law, and are, therefore, binding (Davis 2012).

Two very important principles relevant to the issue of Indigenous expertise are included in UNDRIP, i.e., the principle of Free, Prior and Informed Consent (FPIC) and the right to self-determination. Generally, the FPIC principle dictates that Indigenous peoples should be informed of, consulted with, and give their consent to, initiatives which impact their lives. FPIC thus requires that Indigenous peoples be consulted on decisions regarding heritage sites on which they live.

Interconnected with the FPIC principle is the right to self-determination, a well-established tenet of international law, which holds that "peoples" have a right to have a say in their own destiny by determining their social, economic, cultural and political systems (Shrinkhal 2021). To ensure the adequate implementation of their right to self-determination, Indigenous peoples should have a right to contribute their expertise to decision-making processes impacting them in the field of heritage. The UN has also created several bodies which focus on Indigenous issues and whose work supports the argument that Indigenous expertise should be included in decisions impacting them, i.e., the UN Permanent Forum on Indigenous Issues, the UN Expert Mechanism on the Rights of Indigenous Peoples and the UN Special Rapporteur on the Rights of Indigenous Peoples. These provide the UN with important reports on Indigenous issues and oversee the creation and implementation of policies and programmes in this field; however, none have a decision-making role themselves.

Incorporating Indigenous Expertise into the International Legal System

Following on from, and reinforcing, the recognition of the FPIC principle and the right to self-determination of Indigenous peoples, the UN has recently focused its attention on the participation of Indigenous peoples in international law and policy. In 2017, the General Assembly adopted Resolution 71/321, entitled "The Participation of Indigenous Peoples' Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them". This illustrates an understanding on the part of the UN that the participation of Indigenous peoples within its organisation is needed. Unfortunately, very little has been done to implement this resolution to date.

World Heritage Law and Indigenous Expertise

The current world heritage framework is complex and multifaceted, composed of a web of instruments, overseen and implemented by various bodies. The keystone of the framework is the WHC, adopted in 1972, and overseen by the World Heritage Committee, a body of 21 states parties to the Convention, elected by their General Assembly. The Committee, advised by the International Council on Monuments and Sites (ICOMOS), the International Union for the Conservation of Nature (IUCN) and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), has developed criteria for the inscription of properties on the World Heritage List (Anglin 2008), which recognises sites of "Outstanding Universal Value". The sites chosen for inscription must possess a

> cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity and the permanent protection of its heritage is of the highest importance to the international community as a whole.
>
> *(UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention 2019, para. 49)*

The inscription criteria are contained in the Operational Guidelines for the Implementation of the World Heritage Convention, which have been amended and revised several times by the Committee in response to new concepts, knowledge or experiences (UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention 2019), including developments in international law on Indigenous peoples.

The inscription process is a laborious one, taking two to three years, and can be fraught with politics, concerning issues of identity and representation (Lindström 2019). States parties must first prepare a "Tentative List", setting out

all the natural and cultural heritage sites in their jurisdiction for which they may wish to seek inscription in the next five to ten years. Second, the state seeking inscription must prepare a "Nomination File", providing details about the site, including maps and other relevant documentation concerning its "value". The File is submitted to the World Heritage Centre for review and, afterwards, to the Advisory Bodies for their evaluation. ICOMOS provides the World Heritage Committee with an evaluation of cultural sites and IUCN provides the Committee with advice on natural sites. ICCROM provides advice regarding conservation and training. The World Heritage Committee then considers all the information from the state and advisory bodies and makes a final decision on the inscription with reference to the inscription criteria. To date, as can be seen from the World Heritage List statistics, there has been a clear preference for European and cultural sites over non-European and natural sites (Norman 2011).

Inscription of sites on the World Heritage List can be beneficial in several ways. UNESCO World Heritage Site status is a form of "branding" and can attract tourism and spending (Bertacchini and Saccone 2012). In addition, a place on the World Heritage List can enhance the protection and conservation approach to the site, as the WHC places requirements on states in this sphere. Financial support for the maintenance and conservation of these sites can also be requested from the World Heritage Fund. Furthermore, the inscription of a site which is of special importance culturally, physically and/or spiritually to a particular community can be important in creating sustainable communities (Lindström 2019).

Despite the benefits which may accrue to states from inscription, many states are unable to engage with the process because, as Norman (2011) comments, "many countries [do] not have the experience or technical capacity to assess their heritage sites, to prepare nominations, or to manage sites adequately". The process is also very time-consuming and expensive (Norman 2011). The increased level of site protection required is a burden, and increased tourism may be detrimental to the site, depending on its nature. Identity conflicts may also be fuelled by a state's choice to nominate one site over another (Maurel 2017).

While the world heritage framework is substantial in terms of the number of legal instruments and expert bodies, there exist information and expertise deficits regarding the heritage of Indigenous peoples therein.

The Meaning of "Cultural and Natural Heritage" and Indigenous Expertise

One area in which the need for Indigenous expertise is clear is the meaning of "cultural and natural heritage", to use the phrasing of the WHC. When the world heritage framework was first developed, it was framed from a Western perspective, with an emphasis on the built environment, and with no input from Indigenous peoples on their understandings of heritage (Blake 2015, 134; Kuruk 2004; Vrdoljak 2018).

The WHC seeks to protect both cultural and natural heritage, not just the built environment, and is more inclusive of non-Western conceptions of heritage than previous instruments. It includes in its definition of heritage, references to "combined works of nature and of man" and to "archaeological sites" (UNESCO 1972, Convention Concerning the Protection of the World Cultural and Natural Heritage, Art. 1), thus including some non-Western understandings of heritage. However, while Article 2 includes "natural" sites within its remit, the separation of heritage into cultural and natural categories is not recognised by Indigenous peoples (Blake 2015, 129). The situation was remedied somewhat by the recognition of "cultural landscapes" and "living traditions" as heritage, by means of an amendment to the Operational Guidelines to the WHC in the 1990s. Simpson, discussing Indigenous views of heritage, comments that in general, Indigenous peoples

> value tradition and cultural heritage not just in terms of nostalgia or as an industry that can be exploited for economic development, but as an intrinsic component of efforts to sustain their own cultural practices and to maintain cultural distinctiveness in the face of globalization.
>
> *(Simpson 2018)*

In addition, she notes that Indigenous peoples emphasise "the religious and spiritual dimensions of culture", and thus have a wider conception of heritage than was traditionally accepted in the West, and concludes that while originally the inscription criteria emanated from Western perspectives on heritage, this understanding of heritage was modified over time to include the viewpoint of Indigenous peoples (Simpson 2018).

The concept of heritage has been clarified through other amendments made to the Convention's Operational Guidelines, influenced by the Expert Group for a Global Strategy, whose work led to "conceptual shifts in the scope and application of the notion of 'cultural heritage' … [including] a stronger recognition of the link between cultural and natural heritage" (Yusuf 2008, 36), better reflecting Indigenous understandings of heritage.

The fact that the 1972 Convention was drafted without the benefit of input from Indigenous experts means that it, without amendments to its Operational Guidelines, could not adequately reflect Indigenous conceptions of heritage (Gfeller 2015, 367). However, the changes in the recognition of the rights of Indigenous peoples, especially since the adoption of UNDRIP, have been acknowledged by the World Heritage Committee, and this is reflected in their reports (UNESCO – WHC 1998, 6; Logan 2013).

The following two case studies illustrate that while progress has been made with regard to including an Indigenous viewpoint in the world heritage framework, additional modifications are needed to ensure that Indigenous expertise can be fully exploited in this field.

Inscription of Sites on the World Heritage List – Lake Bogoria

In 2011, the Kenya Lake System in the Great Rift Valley, which includes Lake Bogoria, Lake Nakuru and Lake Elementaita, was inscribed on the World Heritage List, in the absence of discussion with the Endorois people. The decision of the Kenyan government to proceed with its submission for inscription, in violation of the FPIC principle and the right to self-determination of the Endorois people, was shocking, given that just one year earlier, this issue was the subject of a ruling of the African Commission on Human and Peoples' Rights, whereby the Commission condemned the forcible eviction of the Endorois people from their ancestral lands around Lake Bogoria to create a wildlife reserve and tourist facilities (*Centre for Minority Rights Development v. Kenya* 2010). The Commission held that the evictions and the failure of the Kenyan government to adequately involve the Endorois in the management and decision-making of the reserve had violated several of their rights protected by the African Charter on Human and Peoples' Rights. The Commission commented that it was of the view that in

> any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.
>
> *(*Centre for Minority Rights Development v. Kenya *2010, para. 291)*

To reinforce its decision, in 2011 the African Commission on Human and Peoples' Rights adopted Resolution 197 on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site (Resolution 197 2011). The Commission stated that inscription on the list "without involving the Endorois in the decision-making process and without obtaining their free, prior and informed consent" constituted a "violation of the Endorois' right to development under Article 22 of the African Charter" (Resolution 197(L) 2011).

In spite of the Commission's ruling, the World Heritage Committee inscribed Lake Bogoria on the World Heritage List in 2010. The Endorois Welfare Council (the representative body of the Endorois) along with numerous non-governmental organisations representing Indigenous peoples had urged the Committee to defer the inscription because of the absence of FPIC (UN Permanent Forum on Indigenous Issues 2011); however, the Committee's decision on the inscription fails to even refer to the Endorois or the African Commission's ruling. This illustrates the lack of an Indigenous viewpoint in the Committee's decision-making process.

The Committee eventually recognised the importance of the rights of the Endorois in the context of the inscription of Lake Bogoria, and in 2014 adopted a decision requiring the Kenyan government to "ensure full and effective

participation of the Endorois in the management of Lake Bogoria through their own representative institutions" (Kenya Lake System in the Great Rift Valley 2014).

This case study illustrates that it is imperative that international bodies such as the World Heritage Committee work in line with UNDRIP and incorporate Indigenous expertise into their systems. The (unexplained) decision of the Committee to inscribe a site on the World Heritage List without an understanding of the role of the site in the lives of the peoples on whose land it is located, and in violation of the FPIC principle, undermines the entire world heritage framework and is to the detriment of Indigenous peoples. The case study also demonstrates that Indigenous expertise should be included in the nomination process at the domestic level (Logan 2013). Otherwise, states are in danger of breaching various international human rights laws.

Conservation and Management of Heritage Sites – Kakadu National Park

Traditional Indigenous conservation practices date back millennia and their importance is recognised in Articles 29 and 31 of UNDRIP, whereby states are encouraged to ensure the right of Indigenous peoples to develop their heritage and protect the environment according to these practices (Ens et al. 2012).

A good example of the use of Indigenous expertise in the conservation of a World Heritage Site is that of Kakadu National Park in Australia (see Trigger, Chapter 21 in this volume). The land on which the park is located has been inhabited continuously for more than 40,000 years and is a unique archaeological and ethnological reserve, with cave paintings, rock carvings and archaeological sites as well as a scheme of ecosystems, including tidal flats, floodplains, lowlands and plateaux, providing a habitat for a variety of rare species of plants and animals (UNESCO 1982, Nomination to the World Heritage List). The Park was first inscribed on the World Heritage List in 1981, with further areas added in 1987, 1992 and 2011.

It was the world's first experiment in joint management of a heritage site, with the property being co-managed by the Australian state and the Traditional Aboriginal Owners of the area. Under the Park's management plan, the Director of National Parks acts in accordance with the Environment Protection and Biodiversity Conservation Act 1999, as well as relevant decisions of the Kakadu National Park Board of Management, a majority of whom represent the Park's Traditional Aboriginal Owners. Given that these Owners understand the significance of paintings and carvings for their people and the way in which the environment was successfully protected and conserved for millennia, their expertise in the management of the park cannot be overstated.

While the original joint management plan was welcomed, by the mid-1990s its effectiveness was questioned (Haynes 2017). Haynes identifies several differences between the Traditional Aboriginal Owners and the state officials, including differences in legal status, levels of education, worldview, etc. (Haynes 2017, 73). Yet, Haynes maintains,

> over nearly four decades such differences have not led to complete breakdown of functionality. Social structures and practices that contradict those that foster separateness have developed, forestalling the threats Otherness poses to joint management, drawing together members of the two groups and maintaining at least some form of cohesive whole.
>
> *(Haynes 2017, 73)*

Unfortunately, in 2020 the joint management system of Kakadu was described as "untenable" by a member of the management board (Allam 2020), given a series of disagreements between the Traditional Aboriginal Owners and state authorities, although attempts have been made to resolve the differences and strengthen the joint management system.

The concept of the joint management initiative is to be welcomed, as it clearly acknowledges the value of Indigenous expertise in land conservation. However, the initiative also illustrates that difficulties can arise in any system which seeks to be inclusive of a variety of approaches to, and conceptions of, heritage. Worldviews can often clash; however, perseverance in such joint initiatives is needed to ensure that heritage sites benefit from modern innovations as well as Indigenous techniques.

Incorporating Indigenous Expertise in the World Heritage Framework

While the world heritage framework has reacted to the growing recognition of the rights of Indigenous peoples through the Operations Guidelines of the World Heritage Convention, a more explicit mechanism to ensure that Indigenous expertise can contribute to decisions on heritage issues at the international level is needed. A proposal for the establishment of a World Heritage Indigenous Peoples Council of Experts (WHIPCOE) was made to the World Heritage Committee in 2000. This was foreseen as a mechanism through which Indigenous experts could advise on the implementation of the WHC. Unfortunately, the proposal was eventually abandoned, as states could not agree on the scope or operation of WHIPCOE, and in essence, WHIPCOE fell foul of the sovereignty concerns of states (Meskell 2013).

The international legal framework on Indigenous peoples has, however, developed since the WHIPCOE proposal was considered, with an additional emphasis now placed on the participation of Indigenous peoples in decision-making

within the UN, and obligations on states regarding Indigenous peoples, especially since the adoption of UNDRIP. Specifically in the context of world heritage, several UNDRIP provisions focus on the importance of participation and decision-making of Indigenous peoples regarding their own culture and heritage. In addition, UNESCO adopted its Policy on Engaging with Indigenous Peoples in 2017, highlighting, in principle at least, the organisation's commitment to implementing UNDRIP. The Policy calls on the governing bodies of UNESCO's instruments, along with states, to develop and implement mechanisms for the effective participation of Indigenous peoples in the processes of these instruments.

Furthermore, as part of the move to be more inclusive of Indigenous voices, the International Indigenous Peoples' Forum on World Heritage was established in 2017. The aim of this Forum is to elevate the role of Indigenous communities in the identification, conservation and management of World Heritage properties. The Forum's role is to engage with the World Heritage Committee to represent the voice of Indigenous peoples concerning the WHC. It supports and provides advice to Indigenous peoples regarding various world heritage processes, including World Heritage List nomination, conservation and site management. The Forum operates on the basis of 11 Core Principles, with Principle VII confirming that UNDRIP and UNESCO's Policy on Engaging with Indigenous Peoples (2017) serve as reference points for engagement. It is hoped that the Forum will provide a direct avenue for Indigenous expertise into the world heritage framework, although it is too early yet to judge.

Conclusion

Indigenous expertise is needed to ensure that international decision-making processes which impact Indigenous peoples are legitimate and fit for purpose. Unfortunately, the UN did not recognise the importance of allowing Indigenous peoples a voice within its system until recently. In the world heritage framework, some attempts have been made to accommodate Indigenous perspectives, particularly through the WHC and its Operational Guidelines. These Guidelines have been amended to ensure a more inclusive paradigm over time. However, deficits in respect of Indigenous expertise remain apparent within the world heritage system, as illustrated earlier by means of the case studies on Lake Bogoria and Kakadu National Park. The former highlighted the need for Indigenous expertise in decision-making on heritage issues at the domestic level and the importance of the principle of FPIC when making decisions on issues impacting Indigenous peoples. The latter underscored the importance of, and problems inherent in, incorporating Indigenous expertise in the management and conservation of world heritage sites on Indigenous land.

It is hoped that recent initiatives, such as the establishment of the International Indigenous Peoples' Forum on World Heritage, will ensure that decision-making processes will further address the rights of Indigenous peoples and that Indigenous heritage will find enhanced protection as a result.

Further Reading

Kuruk, P. 2004. "Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage." *Macquarie Journal of International and Comparative Law* 1, no. 1: 111–34.

Kuruk's work focuses on the meaning of cultural heritage and the development of the international legal system to encompass intangible cultural heritage, which reflects a growing understanding of heritage from an Indigenous perspective. It illustrates how the international legal framework could be amended to better reflect Indigenous concerns.

Meskell, Lynn. 2013. "UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)." *International Journal of Cultural Property* 20, no. 2: 155–74.

This article provides an analysis of the proposed, but unfortunately abandoned, plan to establish a World Heritage Indigenous Peoples Council of Experts as part of the world heritage system. The article illustrates the various political considerations which led to the abandonment of the proposal, underlining the politics that permeate this area of law.

Vrdoljak, Ana Filipa. 2018. "Indigenous Peoples, World Heritage, and Human Rights." *International Journal of Cultural Property* 25, no. 3: 245–81.

The focus of this article is how Indigenous peoples have emphasised a human rights–based approach to world heritage. It illustrates the relationship between UNDRIP and the world heritage framework, particularly the World Heritage Convention, and identifies gaps in the latter by reference to the former.

Q&A

1. Why is Indigenous expertise needed in the international legal framework?

Key: Students should reflect on the importance of Indigenous knowledge in various spheres of life, from climate change to heritage. This knowledge has been rooted in millennia of custom and practice and if incorporated into decision-making on the domestic and international level will be of benefit to all humanity. In addition, students should investigate UNDRIP and its requirements in terms of FPIC and participation in decision-making. Students should be able to identify how the input of Indigenous expertise to decision-making regarding heritage relates to the right of Indigenous peoples to self-determination.

2. How can Indigenous expertise be better incorporated into the international legal framework?

Key: Students can look to the international legal framework on heritage as an example. They should reflect on how decisions are made by the World Heritage

Committee and if a place for Indigenous expertise exists, or should exist, to influence these decisions.

3. Why and how has Indigenous expertise been sidelined in the international legal framework?

Key: To answer this question, students should address the Western underpinnings of the international legal order. They should focus on the participation of Indigenous peoples in international institutions, such as the UN, and identify how the rights of Indigenous peoples have gradually gained importance within these institutions.

References

Allam, Lorena. 2020. "Kakadu: How a Bitter Feud Over Managing the National Park Reached Boiling Point." *The Guardian*, July 10, 2020. https://www.theguardian.com/australia-news/2020/jul/11/kakadu-how-a-bitter-feud-over-managing-the-national-park-reached-boiling-point

Anglin, Raechel. 2008. "The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide." *Yale Journal of Law and the Humanities* 20: 241–75.

Bertacchini, Enrico E., and Donatella Saccone. 2012. "Toward a Political Economy of World Heritage." *Journal of Cultural Economics* 36, no. 4: 327–52.

Blake, Janet. 2015. *International Cultural Heritage Law.* Oxford: Oxford University Press.

Davis, Megan. 2012. "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On." *Australian International Law Journal* 9: 17–48.

Ens, Emilie J., Max Finlayson, Karissa Preuss, Sue Jackson, and Sarah Holcombe. 2012. "Australian Approaches for Managing 'Country' Using Indigenous and Non-Indigenous Knowledge." *Ecological Management and Restoration* 13, no. 1: 100–7.

Fukurai, Hiroshi. 2018. "Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition Under International Law." *Asian Journal of Law and Society* 5, no. 1: 221–31.

Gfeller, Aurélie Elisa. 2015. "Anthropologizing and Indigenizing Heritage: The Origins of the UNESCO Global Strategy for a Representative, Balanced and Credible World Heritage List." *Journal of Social Archaeology* 15, no. 3: 366–86.

Haynes, Chris. 2017. "The Value of Work and 'Common Discourse' in the Joint Management of Kakadu National Park." *The Australian Journal of Anthropology* 28, no. 1: 72–87.

Kingsley, Jonathan, Mardie Townsend, Claire Henderson-Wilson, and Bruce Bolam. 2013. "Developing an Exploratory Framework Linking Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing." *International Journal of Environmental Research and Public Health* 10, no. 2: 678–98.

Kuruk, Paul. 2004. "Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage." *Macquarie Journal of International and Comparative Law* 1, no. 1: 111–34.

Larsen, Peter Bille, and Jérémie Gilbert. 2020. "Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future." *The International Journal of Human Rights* 24, no. 2–3: 83–93.

Lindström, Kati. 2019. "Universal Heritage Value, Community Identities and World Heritage: Forms, Functions, Processes and Context at a Changing Mt Fuji." *Landscape Research* 44, no. 3: 278–91.

Logan, William. 2013. "Australia, Indigenous Peoples and World Heritage from Kakadu to Cape York: State Party Behaviour Under the World Heritage Convention." *Journal of Social Archaeology* 13, no. 2: 153–76.

Maurel, Chloé. 2017. "The Unintended Consequences of UNESCO World Heritage Listing." *The Conversation*, January 11,2017. https://theconversation.com/the-unintended-consequences-of-unesco-world-heritage-listing-71047

Meskell, Lynn. 2013. "UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)." *International Journal of Cultural Property* 20, no. 2: 155–74.

Norman, Kirsty. 2011. "Should the UK be Nominating More World Heritage Sites?" *Present Pasts* 3, no. 2: 72–9.

Shrinkhal, Rashwet. 2021. "'Indigenous Sovereignty' and Right to Self-Determination in International Law: A Critical Appraisal." *AlterNative: An International Journal of Indigenous Peoples* 17, no. 1: 71–82.

Simpson, Moira. 2018. "Heritage: Nonwestern Understandings." In *The Encyclopedia of Archaeological Sciences*, edited by Sandra L. López Varela, 1–5. Chichester, West Sussex; Malden, MA: Wiley Blackwell.

UNESCO. 1972. Convention Concerning the Protection of the World Cultural and Natural Heritage. Adopted by the General Conference at its seventeenth session Paris, 16 1972. https://whc.unesco.org/archive/convention-en.pdf

UNESCO. 1982. *Nominations to the World Heritage List. ID No. 147 (Kakadu National Park).* 5th session of the World Heritage Committee, Decision 5 COM VIII.15, CC-81/CONF.003/6, January 5, 1982. https://whc.unesco.org/archive/1981/cc-81-conf003-6_e.pdf

UNESCO. 2017. *UNESCO Policy on Engaging with Indigenous Peoples*. 201 EX/Decision 6, 22, voted on August 9, 2017. Paris: UNESCO.

UNESCO – World Heritage Committee (WHC). 1998. Convention Concerning the Protection of the World Cultural and Natural Heritage. Information Document: Report on the mission to Kakadu National Park, Australia, October 26 to November 1, 1998. WHC-98/CONF.202/INF.3/Rev. Kyoto, November 26, 1998. https://whc.unesco.org/en/documents/134014

UNESCO – World Heritage Committee (WHC). 2014. *Kenya Lake System in the Great Rift Valley (Kenya).* N 1060rev, 38 COM 7B.91. https://whc.unesco.org/en/soc/2895/

UNESCO – World Heritage Committee (WHC). 2019. Operational Guidelines for the Implementation of the World Heritage Convention. WHAC.19/01, July 10, 2019. Paris: UNESCO World Heritage Centre.

United Nations – Department of Economic and Social Affairs Indigenous Peoples. 2007. *United Nations Resolution on the United Nations Declaration on the Rights of Indigenous Peoples*. A/RES/61/295, adopted on September 13, 2007. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/281/69/PDF/N1728169.pdf?OpenElement

United Nations – General Assembly. 2017. *Enhancing the Participation of Indigenous Peoples' Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them*. Resolution A/RES/71/321, adopted on September 8, 2017.

UN Permanent Forum on Indigenous Issues. 2011. *Joint Statement on Continuous Violations of the Principle of Free, Prior and Informed Consent in the Context of UNESCO's World Heritage Convention*. Agenda Item 3(c), Tenth Session, New York, May 16–27, 2021. https://www.forestpeoples.org/sites/fpp/files/publication/2012/04/joint-statement-indigenous-organizations-unesco-2.pdf

Vrdoljak, Ana Filipa. 2018. "Indigenous Peoples, World Heritage, and Human Rights." *International Journal of Cultural Property* 25, no. 3: 245–81.

Watson, Irene Margaret. 2014. *Aboriginal Peoples, Colonialism and International Law: Raw Law*. London: Routledge.

Wilmer, Franke. 1993. *The Indigenous Voice in World Politics: Since Time Immemorial*. Newbury Park; London: Sage.

Yusuf, Abdulqawi Ahmed. 2008. "Article 1 – Definition of Cultural Heritage." In *The 1972 World Heritage Convention – A Commentary*, edited by Francesco Francioni, 23–50. Oxford; New York: Oxford University Press.

Cases Cited

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya. Communication 276/2003 (African Commission on Human and Peoples' Rights 2010).

Resolution 197: Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site. ACHPR/Res.197(L)2011 (African Commission on Human and Peoples' Rights 2011).

19

CULTURAL EXPERTISE AND CONFLICT RESOLUTION

Susan F. Hirsch and Brigit R. A. Moore

LEARNING OBJECTIVES

This chapter focuses on the role that cultural expertise can play in conflict resolution research and practice. Three cases demonstrate the use of cultural expertise in different stages and types of conflict: (1) an emergent community-based conflict involving refugees; (2) active conflicts in Afghanistan and Iraq; and (3) the aftermath of civil conflict in Uganda. After reading this chapter you will have gained familiarity with the conflict resolution field and its key concepts, as well as the chapter's main argument: effective conflict resolution requires attention to culture's dynamic and complex role alongside consideration of significant ethical and logistical challenges that may arise when providing cultural expertise in conflict settings.

Introduction

Conflict resolution is an interdisciplinary field of research and practice that originated after World War I, when many initiatives to prevent another large-scale war were proposed (e.g., the League of Nations). Although these initiatives failed to prevent another war, ideas underpinning them (e.g., international cooperation) created fertile ground for the field's growth in World War II's aftermath. This chapter focuses on cultural expertise as an increasingly important element of conflict resolution. Following an overview of the conflict resolution field and its key concepts is the chapter's main argument: effective conflict analysis and

DOI: 10.4324/9781003167075-23

resolution require cultural analysis that takes full account of culture's dynamic complexity. However, providing cultural expertise in conflict settings comes with ethical and logistical challenges including, for example, the risk of increasing violence. Three cases are presented to show culture's many roles in conflict and its resolution. Each case represents a different type of conflict at a different stage of escalation: (1) an emerging communal conflict involving refugees in the US; (2) international "hot" armed conflicts in Afghanistan and Iraq; and (3) the aftermath of civil conflict in Uganda. The cases illustrate how cultural expertise informs conflict intervention and highlight the challenges that can confront cultural experts.

Theory and Concepts

Overview of the Conflict Resolution Field

The main aim of conflict resolution is to manage conflict proactively to generate positive change. The field of conflict resolution has evolved greatly since its inception. The first and second "generations" of the field focused on state-centric approaches (e.g., diplomacy); the third emphasized civil society's role in conflict resolution and management; and the fourth situated civil society within state, regional, and international systems (Ramsbotham, Miall, and Woodhouse 2005, 32–33; see also Cobb, Federman, and Castel 2019). The focus on civil society highlights the field's growing emphasis on being "more sensitive and reflective in developing appropriate context-sensitive strategies" (Ramsbotham, Miall, and Woodhouse 2005, 32–33). Culture and related constructs central to context-sensitive analysis continue to gain prominence, as the conflict resolution field shifts toward locallyfocused initiatives. Drawing on local knowledge and involving local stakeholders are key elements of fourth-generation approaches, namely peacebuilding and conflict transformation, which forge social and institutional changes designed to address injustice and other sources of violent conflict (Lederach 2014). Many practitioners endeavour to uncover the root causes of conflicts and thereby fashion more profound and sustainable change (Avruch 2013).

Defined as the pursuit of incompatible goals by individuals or groups, conflict occurs at interpersonal, communal and institutional, state, regional and international levels. Neither inherently negative nor destructive, conflict, if handled constructively, leads to creative and progressive social development (Coser 1956). Most people recognize violence as physical harm; however, the concept is broader for conflict resolution. Violence includes any action or influence that prevents a person from meeting their physical or mental potential (Galtung 1969, 168). Accordingly, direct violence exists alongside structural violence, which institutionalizes power disparities and unequal life chances (Galtung 1969, 170–171). For example, intentionally starving someone is direct violence; structural violence is when the food production

system delivers food only to those with means, thus starving those without them. The field's dyadic concept of peace identifies negative peace as the absence of physical violence. Positive peace emerges when mutually rewarding relationships replace structural violence and exploitation (Rubenstein 2017, 54–55).

Conflicts are complex and unpredictable. Conflict escalation occurs when differences between parties produce polarization; the result can be destructive violence (Ramsbotham, Miall, and Woodhouse 2005, 11). De-escalation begins when harmful tactics cease, and agreements to foster constructive relations are reached (Pruitt, Kim, and Rubin 1994). In reality, conflict dynamics rarely follow linear paths. Conflict resolution serves as an umbrella term to refer to the many practices of preventing, containing and ending destructive conflicts, as well as pursuing peace. Conflict resolution practitioners intervene before conflict begins, during active conflict and in post-conflict situations. Before intervening, practitioners analyse conflict dynamics and contexts using a variety of tools (e.g., USAID's Conflict Assessment Framework 2.0).

KEY TERMS

Diplomacy: state representatives communicate formally and informally.
Negotiation: opposing parties reach an agreement.
Mediation: third-parties assist conflicting parties in voluntarily reaching a settlement.
Dialogue and reconciliation: conflicting parties come together to increase understanding, repair relationships and make future plans.
Problem-solving workshops: practitioners engage conflict parties in unstructured discussions aimed at resolving conflict.
Restorative justice: parties affected by an offence come together to address the needs and obligations of everyone involved.
Transitional justice: a society-wide approach to large-scale harm that establishes order and promotes healing.
Peacebuilding: the creation of social institutions that sustain reconciliation and peace.

The conflict resolution field utilizes official institutions such as diplomacy and law but emphasizes informal interventions that empower individuals and communities to resolve their own conflicts. The interest in local empowerment and addressing root causes (e.g., systemic inequality) aligns many conflict resolution practitioners with social justice commitments such as anti-racism in the United States (Kochman 1981; Warfield 1996). Although the field has seen the growth of peacebuilding as a post-conflict intervention focused on rebuilding conflict-ravaged societies, some critics depict peacebuilding as a top-down approach that

disregards variation in local needs (see, e.g., Richmond 2012). Such criticism has strengthened commitments to foreground local circumstances and voices in peacebuilding initiatives (Autesserre 2014).

Conflict Resolution and Culture

Conflict resolution scholars and practitioners have not always adequately acknowledged culture's importance in explaining conflict and designing conflict interventions. Burton's foundational theory of conflict as the thwarting of "basic human needs" assumed that needs were universal and, if unmet, could be handled similarly to mitigate conflict (Burton 1990). By contrast, anthropologists Avruch and Black (1991) argued that human needs, as cultural constructions, require culturally specific remedies. The analysis of conflict to determine a remedy should also include an analysis of culture (Avruch 2013, 17), defined as the frameworks that individuals use to perceive, interpret and act in their social worlds (Avruch 2016). As conflict resolution practitioners included culture more centrally in their analyses, it became clear that dignity, honour and other culturally shaped notions held by conflict parties played crucial, previously unrecognized, roles in long-standing conflicts. Although universalist/particularist tensions in the field remain, attention to culture abounds. For instance, culturally sensitive mediation adjusts expectations about language (e.g., interruption or speaking order). Also, parties may prefer mediators or co-mediators who represent the parties' different cultural experiences (see, e.g., Pugh, Sulewski, and Moreno 2017).

In designing and implementing interventions, conflict practitioners assess how stakeholders' cultural assumptions influence positions and interests, the suitability of tactics and the overall interaction. As a best practice, they also consider how their own culturally shaped perspectives might influence analysis and intervention. In longstanding communal conflicts, interventions consider differences in the frameworks and perceptions held by each conflict party. In these deep-rooted conflicts, the parties involved understand their animosity towards one another through an explicit frame of cultural difference, yet often their notion of culture is rigid in its reflection of axiological "us/them" divisions. In citing cultural differences as a root problem, a conflict party might refuse to recognize the other party's humanity (see, e.g., Volkan 1998). When this "in-group" versus "out-group" structure characterizes a conflict, how ideas about the "other" are simplified, frozen and weaponized can be revealed through attention to culture. Such cases require analysis that incorporates a broad, dynamic notion of culture and also considers other factors, such as access to resources, political power or past violence, when determining causes and designing interventions.

Case Studies

Cultural expertise is much needed in conflict resolution, yet those who offer it must be mindful of simplistic, oppositional versions of culture that fuel

conflict. At best, getting culture wrong will fail to resolve conflict; at worst, it foments or worsens violence, as well as enshrines structural violence in institutions. Moreover, the potential for violence to disrupt conflict resolution efforts can hinder attempts to inform intervention through in-depth inquiries using the more complex notions of culture that effective cultural expertise requires. The following cases illustrate several dilemmas facing those who would provide cultural expertise in conflict at local, regional and international levels. More importantly, the cases represent differences in conflict stages, specifically, emergent conflict calling for prevention; active or "hot" conflict requiring violence reduction; and the aftermath of severe conflict when healing and accountability are needed. The variation of these cases demonstrates that conflict in its many forms requires attention to culture that cultural experts might provide. At the same time, the examples narrate a cautionary tale about the ethical challenges encountered by cultural experts, including conflict resolution practitioners.

Emerging Conflict Prevention: Lewiston, Maine (US)

A growing body of literature shows that rapid demographic shifts related to migration or refugee resettlement can generate situations ripe for conflict. Perceived differences between resident and newcomer groups are created and exacerbated by such factors as poorly managed migration and integration efforts; racism; fears about loss of status or identity; inadequate resources; and community insularity (Steele and Abdelaaty 2019). Such factors can fuel a climate of threat and distrust between groups that can be manipulated for political and other gain. Conflict resolution informed by cultural expertise can help prevent destructive conflict. The decades-long conflict over these issues featured in this section is analysed in an ethnography by Catherine Besteman (2016). In her depiction, cultural expertise was provided formally and informally by many people who sought to replace simplistic, demeaning and racist notions about a refugee population with positive and nuanced understandings designed to forge constructive relationships and prevent violence. Those who offered cultural expertise repeatedly encountered powerful institutions that resisted their message.

The conflict began in the early 2000s when refugees from Somalia were legally resettled in Lewiston, Maine. Lewiston's majority white, Christian population had little experience with racial and religious diversity. As pressure on social services mounted in this resource-poor region, long-time residents complained about the newcomers' unfamiliar lifestyles and religion. Civil society leaders tried to prevent conflict by advocating for the refugees, explaining Somali cultural practices and mounting cross-community events. For example, although Somali merchants had revitalized the shuttered downtown by starting small businesses, long-time residents viewed the shops (and their proprietors) with prejudice and suspicion, citing the unwelcome darkness of the interiors which was aggravated by cloth coverings over most shop windows. After informal cultural experts

examined the concerns, explanations were circulated for why the merchants favoured window coverings, which they viewed as decorative. Such initiatives featured cultural difference as positive and encouraged both groups to learn more about one another.

Gains in mutual understanding between the groups were repeatedly eroded by interference from national anti-immigration organizations and clumsy, self-serving decisions by local officials, both of which escalated tensions. Schools became sites of contestation, where Somali parents' high hopes for their children were dashed by insensitive policies that failed to accommodate students' needs as refugees and, worse still, depicted them as inherently, "culturally" violent. Some school counsellors and teachers took it upon themselves to acquire knowledge about Somali history and practices and deployed it to refute conflict-generating misperceptions. Yet as Besteman describes, rifts between groups that were understood through the lens of cultural difference became difficult to repair, as a result of a lack of leadership, poor communication and bureaucracies that ignored refugees' lived experiences. School administrators resented challenges from parents whose entreaties were considered disrespectful. The teachers and counsellors who had promoted cultural understanding were ordered to stop making accommodations for Somali students. Thus, powerful institutions insulated themselves from cultural expertise that might expose their culpability in structural violence.

After years of residing in Lewiston, some Somali refugees wanted to serve as cultural experts for themselves. Cultural experts with roots in refugee communities face special challenges to their legitimacy, especially in conflict situations where their partisanship might be assumed. Social service providers urged Somalis to participate in meetings and training sessions to improve their advocacy skills, but limited resources (e.g., transportation) prevented some from obtaining the credentials needed for them to gain recognition as legitimate cultural experts. Even formally trained cultural experts can experience difficulties when institutional or political resistance is strong. In Lewiston, the local university became the site for teaching, research and events that created awareness about the Somali communities (see also Lowe and DiMola 2019). Drawing on her prior research with Somali communities and her understanding of culture, Besteman worked to debunk "myths" about Somalis. Her efforts led to multiple ethical dilemmas, including concerns that providing information to school administrators and other officials, who were resistant to meeting Somali needs, might make her complicit in the structural violence that was likely to result. Besteman's ethnography draws attention to the cultures of bureaucracy and humanitarianism that position refugees as needy and thereby circumscribe their options and opportunities. Her analysis suggests that the culture of these systems, as much as the cultural frameworks held by conflicting parties, explains why conflict between residents and newcomers emerges repeatedly and why cultural experts and conflict resolvers so often fail in preventing it (see also Autesserre 2014).

"Hot" Conflict Intervention: Afghanistan and Iraq

Conflict resolution during active conflict takes different forms yet routinely poses serious challenges. For example, in counterinsurgency, the emphasis is on "winning hearts and minds", or earning and keeping the support of the local population. By identifying and addressing issues that might lead local populations to respond violently or withhold cooperation, conflict resolution is a central feature of counterinsurgency. Ostensibly, the goal of counterinsurgency is to suppress overt violence, enforce negative peace and work towards positive peace, and effective counterinsurgency requires an understanding of the local context.

In the post–11 September conflicts in Afghanistan and Iraq, the rudimentary cultural training provided to US military personnel fell short of what was needed for effective counterinsurgency. As a result, the US Army created the Human Terrain System (HTS) to embed social scientists within combat teams to improve understanding of the local context and apply it to military decision-making. Anthropologist Montgomery McFate, who designed HTS, contended that understanding the enemy meant grasping "their interests, habits, intentions, beliefs, social organizations, and political symbols – in other words, their culture", and that misunderstanding the "adversary culture" endangered troops and civilians (McFate 2005, 43). US military leaders supported efforts to understand local culture as a way to conduct war more ethically by helping military personnel identify opportunities to resolve conflict without using force (McMaster 2009). As envisioned, HTS would comprise five-member Human Terrain Teams, including a cultural expert (i.e., an anthropologist or sociologist) fluent in the local language and with experience publishing, studying and living in the region. Although HTS eventually deployed researchers from all social science disciplines, initially it specifically sought anthropologists to provide cultural knowledge.

Critics immediately raised serious concerns about HTS. The conflict resolution field emphasizes a "thick" understanding of culture that recognizes the concept's complexity and dynamism. By contrast, the US military envisaged culture as primarily another "terrain" to be navigated and conquered and rendered cultural understanding more a war tactic than an essential part of conflict resolution. It did not help that McFate (2005, 44) justified HTS using simplistic notions of culture, such as hand gestures that Americans and Iraqis might interpret differently. The American Anthropological Association opposed HTS as an unacceptable application of anthropological expertise, citing ethical problems regarding voluntary consent, the obligation to "do no harm" and increased risks to non-HTS anthropologists and their interlocutors. Sluka (2010, 108) argues that the "militarization of anthropology" is antithetical to the relationship between anthropologists and the people among whom they work, which Berreman (1980, 6) has likened to the sacred relationship between doctor and patient. Many anthropologists pledged not to participate, arguing that instead of building a more secure world, protecting soldiers or promoting cross-cultural

understanding, HTS contributed to a brutal war of occupation with unacceptable casualties.

The argument that cultural expertise through HTS could help avert violence was rejected using historical examples. When anthropologists had previously provided cultural knowledge to the military, their advice was ignored or suppressed if it differed from prevailing military wisdom (Price 2008). Months before Hiroshima and Nagasaki were bombed, for example, several anthropologists argued that Japanese surrender was possible if guarantees were made to treat the emperor respectfully. Believing Japan would never capitulate without drastic action, US officials dismissed this perspective. Furthermore, critics of HTS asserted that cultural knowledge might be used to harm the local population. This concern arose from the terrible human rights record and significant civilian casualties in prior US military campaigns (Sluka 2010). During the Vietnam War, counterinsurgency strategies resulted in the death or torture of many Vietnamese, which caused some anthropologists to disavow collaborating with the US military (Berreman 1980). Fears for the safety of HTS members were an additional, and valid, concern: before HTS ended in 2014, three team members were killed.

Although anecdotal stories of HTS successes exist, no formal assessment has measured its effectiveness. The program did, however, experience major failures, including one team member being charged with murder and another with espionage. A major contribution of HTS is the conversation it sparked about cultural expertise in active conflict. A watershed moment for the field, anthropologists' debate over participating in HTS raised important concerns about how cultural experts might unintentionally contribute to violence. In the conflict resolution field, this case highlights the need to consider seriously the ethical implications of gathering and disseminating cultural knowledge in active conflict situations.

Post-Conflict Remedies: Northern Uganda

Since the 1980s, the need has grown for post-conflict remedies that address the aftermath of massive violence. As national and international trials, truth commissions and restorative and reconciliatory initiatives proliferate, so do debates over how well they meet the needs left after severe conflicts, such as establishing security, addressing causes of conflict, providing accountability and justice and promoting societal and individual healing (see, e.g., Minow 1998). Under the umbrella of "transitional justice", quasi-legal and restorative remedies focused on truth-telling, healing and reconciliation have developed alongside international criminal law, which advanced from the *ad hoc* and hybrid tribunals of the 1990s to culminate in the International Criminal Court (ICC). Although the consideration of cultural expertise in ICC cases is a notable recent development (see Bishay, Chapter 16 in this volume), this section focuses on cultural expertise in post-conflict remedies other than courts and emphasizes the conflict field's attention to meeting the needs of those harmed while also strengthening society.

South Africa's Truth and Reconciliation Commission (TRC) was instrumental in effecting a transition from the violent, authoritarian rule of apartheid to majority governance and a relatively stable peace. Although imperfect, South Africa's TRC has served as a symbol and blueprint for similar commissions (Hayner 2010). A popular post-conflict remedy, TRCs face challenges ranging from threats of new violence to limited political and financial support (Rowen 2017). The initial hope that TRCs were universally applicable has faded, particularly after instances where the lack of cultural fit led to unsatisfactory outcomes (e.g., in Timor-Leste). Achievements of South Africa's TRC are often attributed to its embrace of widely shared cultural and religious values, such as *utu* (humanity) and forgiveness in its Christian sense. Legal professionals continue to drive the transnational transitional justice movement; support has grown for culturally sensitive, locally tailored TRCs and other post-conflict remedies (see, e.g., Shaw, Waldorf, and Hazan 2010; Drumbl 2007). When post-conflict remedies explicitly incorporate local approaches to justice, healing or reconciliation, cultural expertise is indispensable. As demonstrated in the following, questions about cultural expertise itself arise when cultural experts express different perspectives not only on local remedies but also on how culture operates in relation to power and institutions.

Following decades of violence and displacement in northern Uganda, the effort to develop a culturally appropriate post-conflict remedy encountered significant challenges. A prior TRC had failed. The ICC issued indictments, yet prosecutions of the Lord's Resistance Army leaders would not address the grave crimes of most ex-combatants, including former child soldiers. Fearful of conflict re-emerging as ex-combatants returned home, leaders from the majority Acholi ethnic group proposed adapting a ritual called *mato oput* to use in reconciling ex-combatants with local residents (see Liu Institute for Global Issues et al. 2005). The proposal was controversial, and the cultural experts who expressed perspectives included Acholi leaders who stood to regain authority if the ritual was widely adopted; expatriate and local Catholic Church leaders; peacemakers who opposed the ICC; and anthropologists who differed among themselves as to claims about *mato oput*'s authenticity and efficacy (see, e.g., Allen 2006; Branch 2014). Disagreement among cultural experts raised questions about the ethics of promoting remedies deemed culturally appropriate yet with questionable associations. Ugandan women's organizations opposed the revival of cultural practices that would empower Acholi male leadership and forgive ex-combatants rather than hold them accountable. Arguing that "it is better to speak not of traditional justice but of traditions of justice among the Acholi", Branch (2014, 628) takes aim at the international NGOs that ignored the variety of Acholi perspectives. He complained,

> it is up to experts and outsiders, with the assistance of Acholi academics and elders, to compile and formalize the traditional justice system as a coherent whole, subsequent to which it will be up to outsiders to help revive those traditions among the Acholi.
>
> *(Branch 2014, 620)*

Ultimately, *mato oput* was not widely used, yet the controversy offers a cautionary tale about cultural expertise and power, both local and international.

Although the northern Uganda example gives rise to scepticism about calls for local, culturally relevant justice, the conflict resolution field remains supportive of post-conflict remedies that reflect the wishes of those most harmed. Affording victims and other local stakeholders voice and agency, in effect treating them as cultural experts of the post-conflict remedies they seek, can facilitate healing and possibly reconciliation. Yet, accessing victims' views poses logistical and ethical difficulties, as it is difficult to reach people in conflict-ravaged areas, and discussing the issues, if done insensitively, can be retraumatizing, conflict-generating and unethical (Hirsch 2010). Noting that most transitional justice remedies serve the global elite rather than those harmed, Robins and Wilson (2015) advocate employing Participatory Action Research in post-conflict settings to elevate local perspectives when developing remedies. For conflict resolution, treating local stakeholders as cultural experts is an important next-generation approach to cultural expertise.

Conclusion

The cases demonstrate the need for conflict interventions to consider culture, especially when building sustainable peace is the aim. They also highlight the difficulty of doing so, including the ethical and logistical challenges that can accompany the provision of cultural expertise in conflict settings. In each case, powerful institutions shaped how cultural expertise was used to address conflict and its efficacy. The Lewiston example shows that cultural expertise can be held and deployed by an array of actors, even when their efforts lack official support or face structural constraints, and that even the best-equipped cultural expert can face challenges. The HTS case demonstrates that providing cultural expertise during active conflict comes with serious ethical considerations about whether the expertise will be used for peaceful or violent ends. As the Ugandan example shows, post-conflict remedies that resonate contextually can contribute to healing and lasting peace, yet uncertainty remains over how to obtain and incorporate local knowledge without causing structural violence. As the conflict-resolution field continues to emphasize local knowledge and stakeholder involvement in the design and delivery of interventions, it will be imperative to continue exposing the operation of power in the production and deployment of cultural expertise.

Further Reading

Giordano, Cristiana. 2014. *Migrants in Translation: Caring and the Logics of Difference in Contemporary Italy*. Oakland, CA: University of California Press.

This ethnography explores the rise of cultural translation and cultural mediation in the therapeutic care provided to migrants in Italy.

Hinton, Alexander Laban. 2010. *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*. New Brunswick, NJ: Rutgers.

In examining forms of local justice after atrocious harm, this volume offers a critical perspective on culture's role at the sites where local and global intersect.

Price, David. 2011. *Weaponizing Anthropology: Social Science in Service of the Militarized State*. Petrolia, CA: CounterPunch.

This book examines the expansion of military and intelligence agencies into anthropology and other social sciences and the problems that arise when anthropologists engage in these efforts.

Q&A

1. In what ways can cultural expertise contribute to reducing destructive conflict?

Key: To reduce destructive conflict, conflict resolution professionals must obtain a holistic understanding of the conflict situation, and cultural expertise can contribute by illuminating cultural aspects of the conflict. Cultural expertise can also contribute to reducing destructive conflict directly by highlighting culturally appropriate and inappropriate approaches to conflict intervention and peacebuilding.

2. What concerns should conflict resolution practitioners consider before providing cultural expertise in a conflict situation?

Key: Cultural experts should identify and consider logistical and ethical concerns that may arise from their involvement in conflict resolution, especially the intended use of their expertise. Additional concerns include the heterogeneity in communities that cultural experts might be asked to represent as well as divergent expectations regarding who is qualified and positioned to offer cultural expertise. Relatedly, different perspectives on culture itself or its role in a conflict could lead to uncertainties or disagreements over what remedy might be appropriate.

References

Allen, Tim. 2006. *Trial Justice: The International Criminal Court and the Lord's Resistance Army*. London: Zed Books in association with International African Institute.

Autesserre, Séverine. 2014. *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention*. Cambridge: Cambridge University Press.

Avruch, Kevin. 2013. "Does Our Field Have a Centre? Thoughts from the Academy." *International Journal of Conflict Engagement and Resolution* 1, no. 1: 10–31.

———. 2016. *Context and Pretext in Conflict Resolution: Culture, Identity, Power, and Practice*. New York: Routledge.

Avruch, Kevin, and Peter W. Black. 1991. "The Culture Question and Conflict Resolution." *Peace and Change* 16, no. 1: 22–45.

Berreman, Gerald D. 1980. "Are Human Rights Merely a Politicized Luxury in the World Today?" *Anthropology and Humanism Quarterly* 5, no. 1: 2–13.

Besteman, Catherine Lowe. 2016. *Making Refuge: Somali Bantu Refugees and Lewiston, Maine*. Global Insecurities. Durham, NC: Duke University Press.

Branch, Adam. 2014. "The Violence of Peace: Ethnojustice in Northern Uganda." *Development and Change* 45, no. 3: 608–30.

Burton, John Wear. 1990. *Conflict: Resolution and Provention*. New York: St. Martin's Press.

Cobb, Sara B., Sarah Federman, and Alison Castel, eds. 2019. *Introduction to Conflict Resolution: Discourses and Dynamics*. Lanham, MD: Rowman & Littlefield International.

Coser, Lewis. 1956. *The Functions of Social Conflict*. New York: The Free Press.

Drumbl, Mark A. 2007. *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press.

Galtung, Johan. 1969. "Violence, Peace, and Peace Research." *Journal of Peace Research* 6, no. 3: 167–91.

Hayner, Priscilla B. 2010. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. 2nd ed. New York: Routledge.

Hirsch, Susan F. 2010. "The Victim Deserving of Global Justice: Power, Caution, and Recovering Individuals." In *Mirrors of Justice: Law, Power, and the Making of History*, edited by Kamari Maxine Clarke and Mark Goodale, 149–170. Cambridge: Cambridge University Press.

Kochman, Thomas. 1981. *Black and White Styles in Conflict*. Chicago, IL: University of Chicago Press.

Lederach, John Paul. 2014. *The Little Book of Conflict Transformation: Clear Articulation of the Guiding Principles by a Pioneer in the Field*. New York: Good Books.

Liu Institute for Global Issues, Gulu District NGO Forum, and Ker Kwaro Acholi. 2005. *Roco Wat I Acoli: Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration*. September 2005. https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf

Lowe, Allyson M., and Sandi DiMola. 2019. "The Use of Service Learning in Teaching about Conflict." In *Conflict Zone, Comfort Zone: Ethics, Pedagogy, and Effecting Change in Field-Based Courses*, edited by Agnieszka Paczynska and Susan F. Hirsch, 119–137. Athens, OH: Ohio University Press.

McFate, Montgomery. 2005. "The Military Utility of Understanding Adversary Culture." *Joint Force Quarterly* 38: 42–8.

McMaster, Herbert R. 2009. "Preserving Soldiers' Moral Character in Counter-Insurgency Operations." In *Ethics Education for Irregular Warfare*, edited by Don Carrick, James Connelly, and Paul Robinson, 15–26. Farnham: Ashgate.

Minow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon Press.

Price, David H. 2008. *Anthropological Intelligence: The Deployment and Neglect of American Anthropology in the Second World War*. Durham, NC; London: Duke University Press.

Pruitt, Dean G., Sung Hee Kim, and Jeffrey Z. Rubin. 1994. *Social Conflict: Escalation, Stalemate, and Settlement*. 2nd ed. New York: McGraw Hill.

Pugh, Jeffrey, David Sulewski, and Julie Moreno. 2017. "Adapting Community Mediation for Colombian Forced Migrants in Ecuador." *Conflict Resolution Quarterly* 34, no. 4: 409–30.

Ramsbotham, Oliver, Hugh Miall, and Tom Woodhouse. 2005. *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts*. 2nd ed. Cambridge: Polity.

Richmond, Oliver P. 2012. *A Post-Liberal Peace*. Abingdon; New York: Routledge.

Robins, Simon, and Erik Wilson. 2015. "Participatory Methodologies with Victims: An Emancipatory Approach to Transitional Justice Research." *Canadian Journal of Law & Society* 30, no. 2: 219–36.

Rowen, Jamie. 2017. *Searching for Truth in the Transitional Justice Movement*. Cambridge: Cambridge University Press.

Rubenstein, Richard E. 2017. *Resolving Structural Conflicts: How Violent Systems Can Be Transformed*. New York: Routledge.

Shaw, Rosalind, Lars Waldorf, and Pierre Hazan. 2010. *Localizing Transitional Justice: Interventions and Priorities after Mass Violence*. Palo Alto, CA: Stanford University Press.

Sluka, Jeffrey A. 2010. "Curiouser and Curiouser: Montgomery McFate's Strange Interpretation of the Relationship between Anthropology and Counterinsurgency." *PoLAR: Political and Legal Anthropology Review* 33, no. S1: 99–115.

Steele, Liza G., and Lamis Abdelaaty. 2019. "Ethnic Diversity and Attitudes towards Refugees." *Journal of Ethnic and Migration Studies* 45, no. 11: 1833–56.

Volkan, Vamik D. 1998. *Bloodlines: From Ethnic Pride to Ethnic Terrorism*. New York: Farrar Straus and Giroux.

Warfield, Wallace. 1996. "Building Consensus for Racial Harmony in American Cities: A Case Model Approach." *Journal of Dispute Resolution* 1: 1–18.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

PART IV

Cultural Expertise in the World

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

20

CULTURAL EXPERTISE IN EUROPE

Livia Holden

LEARNING OBJECTIVES

This chapter gives an overview of the perceived usefulness of cultural expertise, including the types of expertise and the ways in which experts are identified and appointed in Europe. Three case studies illustrate the three main typologies of cultural expertise in Europe: independent country experts, experts attached to the judiciary, and informal experts, including also cultural expertise without experts. After reading this chapter, you will have acquired a set of analytical skills that emphasise the independence of experts as a paramount requirement of cultural expertise.

Introduction

This chapter surveys the understanding and perception of cultural expertise as well as the main features of cultural expertise in Europe: usefulness; typology of experts and ways of identifying them; instructions to experts; areas of law; and cultural expertise without experts. The three case studies offer a sample of the use of expert evidence in immigration, family, and criminal courts in the United Kingdom, France and Italy.

Theory and Concepts

Cultural Expertise in Europe: What Is it Useful for?

The 2022 EURO-EXPERT map (see Figure 20.1), which gives a visual representation of the perception of the usefulness of cultural expertise in court, shows

DOI: 10.4324/9781003167075-25

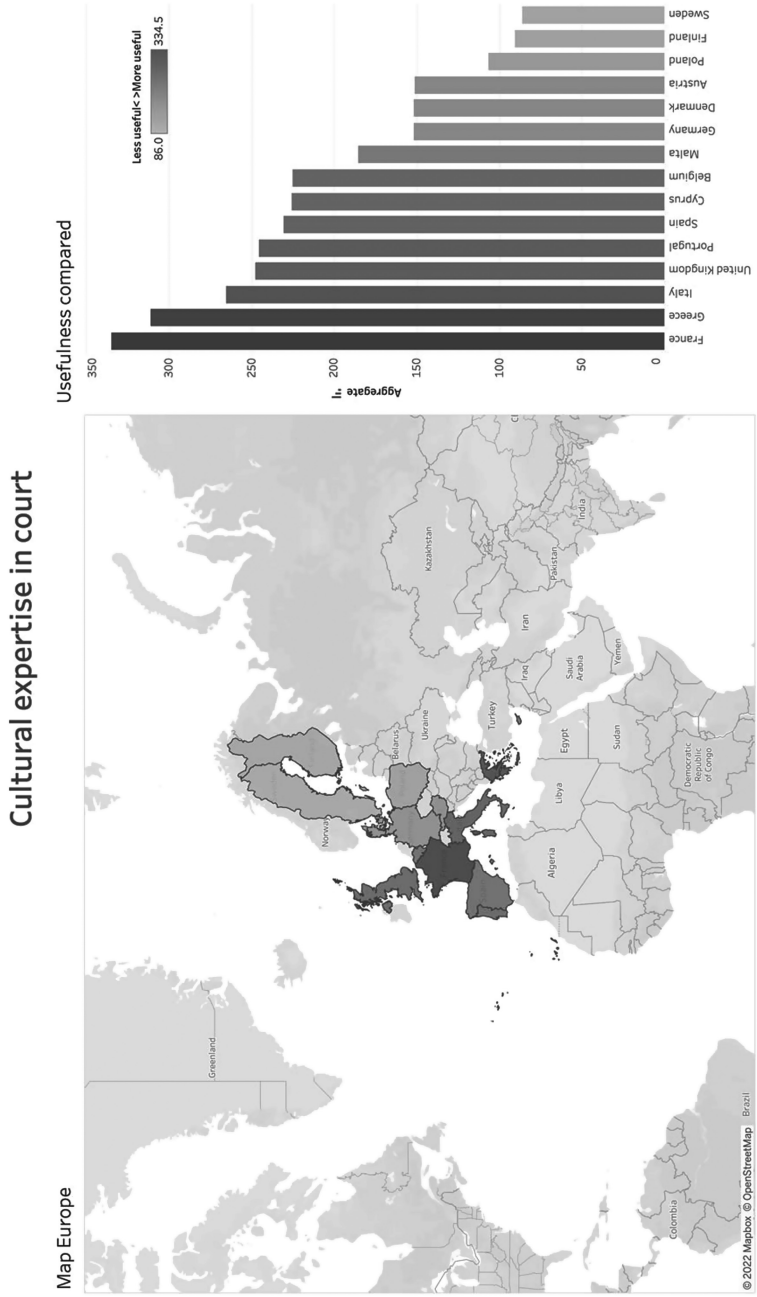


FIGURE 20.1 Cultural expertise: perceived usefulness in European courts. (Data-visualisation by Marius Holden)

four macro-areas ranging from the countries where the respondents indicated that cultural expertise is extremely useful (France and Greece), countries where cultural expertise is considered not useful at all (Poland, Finland and Sweden), countries where cultural expertise is considered to be very useful (Italy, the United Kingdom, Portugal, Spain, Cyprus and Belgium) and countries where cultural expertise is considered to be of moderate or little usefulness (Malta, Germany, Denmark and Austria). This map is not an objective measurement of the usefulness of cultural expertise; rather, it proposes an indication of trends in the perception of cultural expertise among country datasets that are considered to be reasonably comparable.

The perception of cultural expertise in Europe must be seen in combination with the disaggregated components of cultural expertise such as access, frequency, modalities and usefulness and impact (https://culturalexpertise.net/visualisation/). Qualitative data complements this by showing that many people in the legal and para-legal professions in Europe have a broad idea of what cultural expertise could be, even if they are not always familiar with the specific academic conceptualisation of cultural expertise (see Holden, Chapter 1 in this volume).

TYPES OF EXPERTS

Cultural expertise, as an umbrella concept, allows for great flexibility in the categorisation of cultural experts. Native language speakers including translators, legal professionals, sociolinguists, cultural mediators, country experts, academicians, community leaders and religious leaders can all be appointed as or act as experts under specific regulations and contexts. In addition, NGOs, ethnopsychologists, ethnopsychiatrists and ombudspersons can also play the role of cultural experts or *amici curiae* in court. This is not an exhaustive categorisation of types of cultural experts, and some roles overlap: for instance, an Imam may be both a religious leader and a community leader, a professor may be a native language speaker and a translator may occasionally serve as a country expert.

Suitable cultural experts can be identified in the following ways: (1) open-access registries of experts which list the details of experts and their experience, and which are organised on the basis of their regional skills and experience (United Kingdom); (2) restricted-access lists of experts who are registered in specific jurisdictions and police stations (Italy, Germany, Greece and Portugal); (3) experts embedded within the Home Office either as "freelancers" or integrated

into state bodies, for example experts at the public prosecutor's office for terrorism cases (France); (4) the reputations, by word of mouth, of particular experts who are routinely called by particular legal professionals or courts. All surveyed jurisdictions have regulations for the appointment of experts, but many members of the legal professions are uncertain about the possibility of appointing social scientists as experts. The style of instructions to the expert varies significantly between countries, jurisdictions, and specific legal professionals, ranging from lengthy and detailed instructions to open-ended questions.

EXPERTS' APPOINTMENT AND INSTRUCTIONS

Most countries in Europe have legislation and regulation on the appointment of experts as well as procedural rules for the assessment of expert evidence. Usually, experts can be appointed by the court or by the parties, but the appointment of experts by the parties is more frequent in common law legal systems while the appointment of experts by the court is more frequent in civil law legal systems. Cultural experts are rarely mentioned in regulations and guidelines for the appointment of experts, but nothing expressly prevents their appointment and remuneration. In most countries, while there are professional registries of experts, the court can also appoint any person of their choice to give an expert opinion. Procedurally, cultural expertise is no different from any other form of expertise in court.

The style of questions put to the experts varies significantly between countries, jurisdictions and legal professionals, ranging from lengthy, detailed instructions to open-ended questions. Recurrent questions to experts are as follows: is a certain customary practice deemed valid under the law and practices of a certain country or geographic area? Are the accounts of the litigants consistent with updated and first-hand information on a certain country? Does external evidence (updated published information and first-hand expert information) support the applicant's belonging to a persecuted social group? Is the possession of certain objects consistent with external information and expert opinion about a certain neighbourhood? Does the adoption of legislation for the protection of certain social groups, in a certain geographic area, mean that certain vulnerable social groups are effectively protected or can effectively seek protection from the state? How can one assess belonging, ethnicity and tribal ancestry, especially for individuals and social groups that do not speak minority languages and do not reside in certain areas that are traditionally inhabited by those ethnic and linguistic minorities? How can

one assess if certain language or certain behaviour is offensive, and to whom? How can one distinguish the boundaries between the intellectual provocation of art and the conditions under which such an intellectual provocation becomes an offence to a certain social group?

Cultural Expertise without Experts

Often in the presence of financial and logistic constraints that hinder the appointment of experts, courts and lawyers themselves collect information about culture, hence acting in a sense as cultural experts in interpreting the facts and applying the law. Cultural expertise is present even when an expert is not appointed or when culture is not explicitly invoked or discussed but information that falls broadly in the field of culture is collected and discussed for the resolution of the case.

Areas of Law

The following is a non-exhaustive list of areas in which cultural expertise has been recorded in Europe. In refugee, asylum and immigration law, experts may be instructed to assess whether applicants belong to persecuted or discriminated groups; the level of protection offered by state authorities in the applicants' countries of origin; the danger of returning to the applicants' countries of origin; the reasons for the request of residence permits; the requirements for family reunification and citizenship; the authenticity of personal documents; and the accounts of unaccompanied minors and political dissidents. In family law, experts may be instructed to assess the components of the best interests of the children; their security in case of a holiday planned with one of the parents who wishes to take the children to their country of origin; and the validity of polygamous marriages, arranged marriages, divorce practices, and adoption. In criminal law, experts may be instructed to explain how human trafficking works when this overlaps with customary practices; ethnic and racial discrimination; the offensive nature of certain sentences or speech; or the interpretation of honour in so-called honour killings. In human rights law, experts may be instructed to provide context for discrimination based on gender, sexuality, age, race, language or religion. In property and inheritance law, experts may be instructed to provide information on the principles and implementation of laws that discriminate against certain social groups or to describe the ancestral rights of Indigenous people to natural resources.

Case Studies

The United Kingdom, France and Italy serve here as examples of the broad application and typology of cultural expertise across Europe.

The United Kingdom

USE OF CULTURAL EXPERTISE IN THE UK COURTROOMS

In the United Kingdom, the appointment of experts on the request of the applicants has most frequently been recorded in immigration courts, where the contribution of independent experts has been affirmed as almost always useful (see *R (Es-Eldin) v. Immigration Appeal Tribunal*). Courts also appoint experts, especially in family and criminal law. Experts are selected from the various registries of country experts or by word-of-mouth recommendations vouching for the reputation of specific experts. Experts usually submit a written report and, depending on the jurisdiction and the case, experts can be cross-examined. Funding for expert evidence is available from the Legal Aid Agency (LAA), based on an hourly rate.

Experts are discouraged from communicating directly with the beneficiaries of their expertise. If experts need to ask questions to the beneficiaries, they are advised to do so in the presence of the beneficiaries' legal representatives. Irrespective of who appoints the expert, the duty of the expert is always to the court. Expert reports usually list the qualification and experience of the experts, which should include recent first-hand experience in the relevant country or the area of expertise, set out the expert's response to the instructions of the legal representative, and contain a statement of truth which might be worded as follows but changed slightly depending on the jurisdiction:

> I confirm that insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.

The decisions of UK immigration courts, many of which are available in open access, almost always, when experts are appointed, include comments by the immigration judges on the weight that was attached to the expert report as evidence, and often also include an assessment of the capacity of the expert to provide expert opinions.

While refugee and asylum lawyers have a clear appreciation of the role of cultural experts, and frequently seek to instruct one, the Home Office often disputes the evidence provided by the experts. Tensions in the courtroom arise from a specific format of cross-examination which submits the experts – most of whom are not trained to be familiar with cross-examination techniques – to pressing questions regarding their standing and experience as experts, the exact opinions that experts intend to give at trial, the basis for those opinions and

the assumptions made in connection with those opinions (Good 2007). Experts often lament that in the United Kingdom, immigration judges tend to rely on the Home Office's submissions and the information provided by the Country-of-Origin Information, whilst giving less weight to the evidence provided before them by the experts (see Campbell, Chapter 12 in this volume).

Privately managed registries of experts are available in open access, but to date, there have been no training or mentorship programmes in this regard either for cultural experts or for the members of the legal professions who seek to appoint a cultural expert in the UK. Academics from various disciplines of the social sciences are nonetheless frequently approached by the legal professions to provide expertise in court, mainly as country experts. Their training is often done on the spot or is provided thanks to the benevolence of some senior expert. Good and Kelly's 2013 *Expert Country Evidence in Asylum and Immigration Cases in the United Kingdom* remains to date the most valuable resource for social scientists who engage with cultural expertise in the UK.

France

USE OF CULTURAL EXPERTISE IN THE FRENCH COURTROOMS

In France, there are at least three approaches that fall under the umbrella concept of cultural expertise: the use of in-house experts by the Cour Nationale du Droit d'Asile (CNDA); cultural intermediation and ethnopsychological assessments; and use of *ad hoc* cultural experts at the Office of the Public Prosecution for terrorism cases. In France, either the parties or the judge may request the appointment of experts. Experts that are appointed for the investigations work under the supervision of the investigating judge or other judge designated by the court. Unless exceptional circumstances apply, experts are appointed from amongst those on the court registries and must demonstrate some knowledge of the legal procedure. In principle, experts are paid a standard hourly rate by courts.

International protection at the Cour Nationale du Droit d'Asile (CNDA) in France is the result of a process that started with the protection of refugees after World War II and then became progressively streamlined within the court itself during several revisions of its procedure. The greatest sources of information for the judges of the CNDA are the Country-of-Origin Information and the assessment provided by the French Office for the Protection of Refugees and Stateless (OFPRA), as well as reports by NGOs and international organisations. However, in some cases, *ad hoc* research is conducted, and in-house reports are produced. CNDA decisions are usually unpublished but include detailed comments on the assessment of vulnerability and sometimes also mention the experts.

Immigration lawyers in France lament that independent experts are almost never appointed for asylum proceedings. Many lawyers attempt themselves to acquire the required knowledge on the socio-legal background of their clients. However, the role of immigration lawyers is affected by a lack of funds and the impact of restrictive immigration policies on the institutional authority of the CNDA, whose judges are often temporarily appointed and do not have enough experience in the field of immigration and asylum (Gill and Good 2019).

In the 1990s, a specific type of cultural expertise, called cultural intermediation, developed from the intersectoral collaboration of juvenile court judges such as Martine De Maximy and Thierry Baranger with the ethnopsychiatrist Tobie Nathan, under the aegis of the academic framework of the Laboratoire d'Anthropologie Juridique (LAJP), headed by Etienne Le Roy at Panthéon Sorbonne university (De Maximy 2021). Cultural intermediation was conceived as a process whereby the children and, whenever possible, their parents might play an active role with the help of the cultural intermediator, who not only had training as a mediator but also shared a similar cultural background and, ideally, spoke their native language. The pool of cultural intermediators was provided mainly by the doctoral students at the LAJP. Cultural intermediation took place over several sessions during which the children were made more aware of their own cultural background and personal history and of milestones and turning points in their family lives, such as the role that their family members had in their countries of origin. The aim of these sessions was to help the judge to understand the cultural background of the children and their families as well as help them to position themselves regarding the set of rights and obligations of French society. Intercultural mediators identified themselves as different from mediators for their position of neutrality vis-à-vis the parties and the court.

Martine De Maximy, who from juvenile courts pursued her career up to the Presidency of the Assize Court, introduced the appointment of ethnopsychologists at various stages of the criminal proceedings, including appeal hearings. Cultural intermediation in criminal proceedings eventually came to consider every individual as sharing sets of cultural references with a certain social group, thus overcoming the initial risk of essentialism of the cultures of those perceived as foreigners in France.

Since the 2015 terrorism attacks in Paris, historians, anthropologists, and geopolitical scientists have been appointed at the prosecutor's office to produce expert reports that are communicated to prosecutors and judges on their instructions. This type of expert appointment raises questions regarding the independence of these experts, their capacity to abide by the "do no harm" principle, and the fulfilment of their ethical duties of support and protection of the involved social groups. The appointed experts argue that their appointment, despite being through the public prosecutor's office, provides for the necessary independence of the expert's role, and allows for adequate identification and treatment of the matters that relate to culture in terrorism investigation (see Planeix, Chapter 13 in this volume). According to these experts, their appointment in terrorism

investigations provides the investigative judges with a more nuanced knowledge of the context and prevents an essentialised approach to culture.

France stands out in Europe for including various types of cultural expertise in the training curriculum of judges. However, notwithstanding the widespread interest of the legal professions, the need to find and appoint experts on short notice and their cost are perceived as obstacles to consistent use of cultural expertise by way of the appointment of independent experts.

Italy

USE OF CULTURAL EXPERTISE IN THE ITALIAN COURTROOMS

In Italy, the court can appoint experts, either of its own motion (Consulente Tecnico d'Ufficio, CTU), or upon request by the parties (Consulente Tecnico di Parte, CTP). In civil proceedings, the experts appointed by the parties are chosen, preferentially, from the Albo dei Periti, a registry which is divided into categories for specific professionals and technical skills. While procedural rules provide for the appointment of experts in Italy, formal appointments are not commonplace and even when cultural experts are appointed, their role often remains informal and unrecorded in the court proceedings, leaving little or no trace of their involvement and impact. Cultural mediators – usually native language speakers – are often expected to play a role which exceeds their competence in basic mediation.

The biggest obstacle to the appointment of cultural experts by the parties in Italy is that while free legal assistance is provided by law under certain circumstances, expert evidence, which is categorised as technical assistance, is only reluctantly covered by legal aid. The institutional hesitation to remunerate cultural expertise in Italy is partially balanced by a flourishing civil society initiative. Centres for migrants usually provide some linguistic support and, if they have the capacity, also assist the migrants with the preparation of the application for the permit to stay and international protection.

Research officers from the European Asylum Support Office (EASO) have played a significant role in the implementation of immigration and international protection law in Italy. EASO research officers have assisted legal professionals with the information and knowledge which is usually provided by country experts in other jurisdictions, especially the UK, but they are not usually appointed as experts in proceedings and their mandate is time sensitive. Various legislative initiatives have fostered the professionalisation of cultural experts for immigration-related cases, but the selection criteria so far stress the legal background of applicants and not their training as social scientists.

The appointment of experts at the Territorial Commission and Appeal Courts, which decides immigration and asylum cases in Italy, is informal and uneven, depending on the availability of experts as well as the awareness and the social commitment of the courts and the legal representatives of the applicants. Experts often work *pro bono* and are free to focus on the issues that they deem relevant for the court, without explicit constraints concerning the format and the admissibility of evidence.

Experts are appointed also in fields of law which pertain to liability for damage and various fields of criminal law. A landmark case on the appointment and role of experts is the *L'Aquila Earthquake* trial, in which Antonello Ciccozzi, an anthropologist who originates from the area where the 2009 earthquake occurred, was appointed as expert. Ciccozzi argued that earthquake scientists predicting a sequence of minor earthquakes led the local people to mistrust their instincts and stay at home, with fatal consequences. Although the final judgement did not give much weight to Ciccozzi's expertise, it included a statement on the value and assessment of expertise as evidence in court, finding that experts are responsible regarding the accuracy of their statements (Ciccozzi and Decarli 2019).

Inspired by an example from Canada, a cultural test for judges was proposed in Italy as a tool to identify the need for cultural expertise, but its usefulness is widely debated (Ruggiu 2019). The widespread lack of awareness of the possibility of instructing an expert, both among the legal professions and among the beneficiaries of cultural expertise, is often balanced by a strong social commitment on the part of immigration lawyers and immigration judges who strive to acquire the socio-anthropological knowledge that experts could bring to the case (Civinini 2021). Voluntary and charity organisations that provide *pro bono* assistance to migrants often act as informal experts, and their reports are included in applications for international protection. Among the voluntary initiatives, the Centro Franz Fanon in Turin has been one of the first to use ethnopsychological expertise to assist the migrant population in Italy, but many other centres of assistance to migrants and asylum seekers have been established in Italy. These are often partially funded by the government and use some tools and methods of cultural intermediation that fall under the broad definition of cultural expertise.

Experts lament that cultural arguments in court have a mixed reception. The widespread level of informality of cultural expertise has allowed for a high degree of experimentation by cultural experts (Cicozzi and Decarli 2019). This has not only led to a significant reluctance of anthropologists to engage with law in Italy (Colajanni 2014), but also a very varied range of experimentation through grassroots initiatives which have encouraged the engagement of anthropologists and the development of a great variation in the styles of cultural expertise.

Conclusion

The apparent discrepancy between the perception of usefulness of cultural expertise and the lower rate of appointments of experts in Italy and France compared

with the UK must be read together with the following factors: (1) the increasing adoption of training modules to raise awareness about culture in the legal professions which leads to an appreciation of cultural expertise in principle; (2) a great variety of types of cultural expertise which do not always fall into the conventional typology of appointment of experts; and (3) the uneven authority of the various social sciences sub-disciplines in comparison with more authoritative disciplines such as psychiatry and psychology.

While the frequency of use of cultural expertise indicates that the courts aim for more inclusivity and recognition of diversity, the potential benefit is closely connected with the ethics of cultural experts. If cultural experts can afford independence and neutrality, cultural expertise has the potential to foster inclusion and enhance access to justice (see Holden, Chapter 1 in this volume). Cultural expertise can also, in the long-term, strengthen the trust of users toward the justice system, allowing for a more effective dialogue between state- and non-state jurisdictions and contribute to social cohesion.

The UK system for the appointment of experts recognises the value of independent expert evidence in court and provides funding for the instruction of experts whenever legal aid provisions apply. The legal framework is, however, largely undermined by UK anti-immigration policies that offer the ideological foundation for immigration courts to give lower weight to the evidence of cultural experts.

France occupies the first place on the EURO-EXPERT map which ranks the perceived usefulness of cultural expertise. Experts who are attached to the decision-making authority are preferred in France. The CNDA's model for the provision of cultural expertise by in-house experts is perceived as authoritative and sustainable because it relies on the state infrastructure and fits in with the inquisitorial legal system which concentrates the collection of evidence in the office of the instructing magistrate. Additionally, the dialogue between legal practitioners and universities has fostered forms of joint experimentation, such as intercultural mediation in juvenile and criminal courts. The institutional support given to various forms of cultural expertise in France has allowed its development and a favourable perception among the legal professions. As a general principle, experts who are an integral part of the decision-making authorities may be unduly impacted by government policies without much opportunity for criticism from the public or concern about their ethical position. However, cultural experts who have been permanently attached to the judiciary in France have developed a process of critical self-reflection on their own position which they argue is independent (see Planeix, Chapter 13 in this volume).

In Italy, anthropologists are often informally appointed as experts and their roles remain unacknowledged and mostly unpaid. Anthropologists suffer from a lack of acknowledgement by society which is also connected with disciplinary divides. Civil society initiatives have helped the development and experimentation with various formats of cultural expertise, inspired both by French ethnopsychology

and the British system of country experts, as well as by Canada's cultural test for judges. The widespread experimentation with cultural expertise and the civic commitment of many immigration judges and lawyers in Italy do something to counterbalance the rigid anti-immigration policies of the Italian government.

Further Reading

Brandmayr, Federico. 2020. "When Boundary Organisations Fail: Identifying Scientists and Civil Servants in L'Aquila Earthquake Trial." *Science as Culture* 30, no. 2: 237–60.
This paper illustrates the power relationships that affected cultural expertise in the *L'Aquila* trial and suggests that the credibility of the experts is often manipulated by competing politics.

Gill, Nick, and Anthony Good, eds. 2019. *Asylum Determination in Europe: Ethnographic Perspectives*. Cham, Switzerland: Palgrave Socio-legal Studies.
This book provides an ethnographic overview of asylum procedures in ten European countries to show how legal decisions are impacted by a series of factors that are sometimes very context-dependent and subjective.

Q&A

1. How is cultural expertise perceived in Europe?
   Key: Students should start from the EURO-EXPERT map that ranks the perceived usefulness of cultural expertise as a basis for discussing the ideological divide about cultural diversity in Europe, which is mirrored in the hesitation regarding cultural expertise.

2. Where is cultural expertise frequently used in Europe?
   Key: Students should survey the various areas of law and highlight the fact that cultural expertise is not only found in asylum and immigration cases.

3. What are the main types of cultural expertise in Europe?
   Key: Italy, France and the United Kingdom offer three examples in which cultural expertise has evolved respectively at the level of voluntary initiative, within the judiciary and with independent consultants.

References

Ciccozzi, Antonello, and Giorgia Decarli. 2019. "Cultural Expertise in Italian Courts: Contexts, Cases, and Issues." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 35–54. Bingley: Emerald.

Civinini, Maria Giuliana. 2021. "Cultural Expertise in Civil Proceedings in Italy." *NAVEIÑ REET: Nordic Journal of Law and Social Research* 11: 107–22.

Colajanni, Antonino. 2014. "'Pure' and 'Applied' Research: Theoretical and Applied Anthropology a Decade after the Beginning of the Third Millennium." *DADA Rivista di Antropologia Post-Globale* 2: 25–40.

De Maximy, Martine. 2021. "Intercultural Justice in France: Origins and Evolution." *NAVEIÑ REET: Nordic Journal of Law and Social Research* 11: 43–62.

Gill, Nick, and Anthony Good. 2019. *Asylum Determination in Europe: Ethnographic Perspectives*. Basingstoke: Springer Nature.

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

Good, Anthony, and Tobias Kelly. 2013. *Expert Country Evidence in Asylum and Immigration Cases in the United Kingdom: Best Practice Guide*. The University of Edinburgh, July 2013. https://www.ein.org.uk/sites/default/files/Expert%20Country%20Evidence%20BPG.pdf

Ruggiu, Ilenia. 2019. "The 'Cultural Test' as Cultural Expertise: Evolution of a Legal–Anthropological Tool for Judges." *Laws* 8, no. 3: 15.

Case Cited

R (Es-Eldin) v. Immigration Appeal Tribunal, Ex parte Shah. Unreported (Court of Appeal (England and Wales) 1997).

21

CULTURAL EXPERTISE AND INDIGENOUS PEOPLE IN AUSTRALIA

David S. Trigger

LEARNING OBJECTIVES

This chapter addresses several ways that anthropologists in Australia have been engaged as expert witnesses in Indigenous land claims and in cultural defences against prosecutions for hunting protected fauna for subsistence. It outlines, with the help of case studies, some illustrations of the types of methodological approaches for anthropological work in legal matters. I draw on my experience of legal expectations of anthropological expertise. These include expert opinions, presented in reports and in court, based on long-term fieldwork, short fieldwork and no fieldwork when carrying out peer reviews of other anthropologists' applied research. A further case study concerns a defence against prosecution for an assault that was based on customary law. After reading this chapter you will have learnt the main typology of anthropological expert witnessing in Australia for Indigenous matters, including land claims and cultural defences against criminal prosecution; the ways anthropologists can realistically engage with cultural expertise in Indigenous matters; and the importance of independent investigations rather than advocacy.

Introduction

Anthropologists in Australia are engaged as expert witnesses particularly in relation to issues involving Indigenous people and culture. The discipline brings a professional social science approach to understanding traditional and changing

DOI: 10.4324/9781003167075-26

cultural knowledge and practices across Indigenous Australia. The terminology of "cultural expertise" could be regarded as sitting somewhat ambiguously in the Australian context in that it is Indigenous people themselves who would usually be acknowledged as the inheritors and practitioners of their own "cultural" beliefs (see Holden, Chapter 1 in this volume). However, the legal relevance of anthropological expertise has become very clear in the context of cross-cultural translation and explanation. In this chapter I frame the key issues as: what are the legal expectations of anthropological expertise; what can anthropology realistically deliver to assist the court and associated legal processes; and how is the anthropologist's work situated regarding the interests of parties to legal cases?

Theory and Concepts

As decision-makers in the courts, judges and magistrates expect the expert to assist the court and not be an advocate for a party (Blowes 2017). A difficulty for anthropologists who have carried out participatory fieldwork that involves spending considerable informal time in a community, in this case with Indigenous people in Australia, is that the research participants may expect loyalty to their views. The outcomes of applied independent research may lead to conclusions that will not necessarily be accepted by all those with whom ethnographic inquiries have been carried out. A legal case clearly involves focused concerns among participants and the anthropologist may be asked during fieldwork to ensure that the research subjects' interests are supported in a report to the court.

To further complicate the issue, there may not be a unified view shared by all those consulted by the researcher, resulting in conflicting assertions about customary matters. As well, the formal instructions for the study commonly come from legal practitioners based in regional organisations, rather than from local community members where the anthropologist's fieldwork occurs. While the lawyers technically are representing local people as their clients, the issues as framed by legal practitioners do not always translate easily across cultural boundaries. The anthropologist thus addresses multiple sets of expectations: the court's requirement of clear independence; research questions as framed and worded by lawyers; community assumptions about the research necessarily supporting local interests; and the wider anthropology discipline's conventions regarding ethical fieldwork among Indigenous descendants of earlier generations of colonised people (see Cole, Chapter 2 in this volume).

In my experience with Indigenous people in land negotiations and native title claims, in cultural heritage site surveys, in negotiations with industry parties and government and as defendants in criminal cases, those with whom I have worked for lengthy periods on academic studies "may be surprised, baffled or insulted when the anthropologist seemingly suspends the relationship and takes the role of an independent, non-aligned expert" (Trigger 2004, 29). Applied anthropology in legal settings is not the place for a researcher who wishes above all else

to remain everybody's friend. In some cases, the anthropologist may choose not to be engaged as an expert if they feel the work may compromise earlier commitments given to people about the cultural knowledge documented in settings quite different from a contested legal matter some years later.

It is broadly accepted that courts are most impressed by the anthropologist's work when it begins from an independent open-minded approach that transparently does not assume the answer or findings prior to carrying out the empirical investigations. Alternative explanations and lines of inquiry need to be addressed and evaluated before conclusions are presented. It is also important for a clear distinction to be made between findings (understood as expert opinion in law) and the factual basis for them. The anthropologist needs to be aware of the issue of "hearsay", namely that information gleaned from others, who are not available to be tested on its accuracy, is inherently suspect from a court's viewpoint. However, given that much data is typically obtained from what has been said about others by an interlocutor or interviewee, the researcher will record such material and probably argue that it forms a legitimate part of the information on which the investigator relies. The anthropologist should also avoid too great a usage of leading questions (that seem to suggest the answer rather than allowing the subject free rein), and there should be some effort towards including challenges or alternatives that are put to research participants to test the consistency with which information is known across the broad social groups who are the focus of studies.

The anthropologist should be able to speak with authority in relation to their area of expertise. For example, in the Australian context with which I am most familiar, this is the nature of Indigenous cultural traditions, laws and customs. They should be able to demonstrate that they have appropriate formal qualifications and ideally a convincing track record of research to qualify as an expert. The anthropologist should be able to show how they have carried out comprehensive investigations in relation to the matter at hand. While not always feasible, these investigations may include the services of assistants or peers – in which case joint authorship of reports can be appropriate. It is important to clarify the respective roles of joint authors in terms of fieldwork completed, report writing and seniority of supervision over the research process. Cross-examination will be directed to the appropriate author, or more than one, as the case may require, and the court may need to attribute weight to parts of a report based on a record of its particular authorship.

In my opinion, anthropologists should expect to engage with their colleagues, that is, other expert anthropologists in legal cases, with professional respect such that the researchers see their role as working jointly to produce the best advice. This is consistent with the practice in some courts of requiring experts to meet before a trial so as to find their points of agreement along with the reasons for any disagreement (Brunton and Sackett 2003). In some cases, it may be possible to narrow the range of issues in dispute. There will certainly be a rigorous examination of colleagues' work. However, this can be done in a

productive rather than a competitive way. Expert anthropologists at times will agree to disagree. This will not always accord with the view of legal practitioners who may well desire experts to seek to demolish each other's arguments so that a winning version of a matter is clear. While such expectations may be understandable in terms of legal strategy, in my view the expert anthropological report is best regarded as a contribution to knowledge that helps inform the lawyers as well as assist the court. This is also true for various parties to cases, including Indigenous organisations, governments, industry groups or indeed the general public, members of which at times take an interest in the anthropologist's findings.

What Can Anthropology Deliver?

While focused on studies of all aspects of societies across the globe, we can generalise that the discipline of anthropology has always specialised in understanding cultural difference. Hence, the anthropologist brings a suite of concepts honed by the attempt at this cross-cultural understanding. These include such intellectual foci as exploring the nature of diverse worldviews via religious knowledge; rules for social interaction in everyday life as well as in sacred settings; the politics of gender relations; customary ways of owning property and inheriting rights to land; related cultural forms, norms and expectations about proper behaviour and so on.

Anthropologists who have carried out primary fieldwork typically develop communicative competence across socially and culturally diverse populations. Part of the task in legal cases is often to facilitate translation between different bodies of cultural knowledge. Anthropologists in legal cases who evaluate colleagues' reports arising from primary fieldwork may well lack that communicative competence for the particular researched groups, but they draw upon the same suite of theoretical and methodological concepts. The work of peer review involves assessing the cogency of arguments and the factual basis of conclusions in reports under consideration.

A distinctive concern in anthropology is the relationship between what people say and how they actually behave. Thus, if anthropologists in legal cases are elucidating rules of custom, the researcher will typically address not just ideals presented through interviews and informal conversations, but also aspects of actual social action where the practice of such rules can be assessed alongside prescribed norms and values. A related issue is that anthropology does not assume that all aspects of traditional law and custom in a society can necessarily be articulated by all individuals. The significance of age, gender and personal influence and related political processes will commonly be addressed by an anthropologist presenting an opinion about cultural knowledge, belief and behaviour in the society or social field being studied.

Participant observation and semi-structured interviewing are key methods used by anthropologists. This type of fieldwork results in largely qualitative data

in the form of field notes and audio (and at times video) recordings that are partly or fully transcribed. However, anthropologists necessarily rely on subjective interpretations of everyday life and not all conclusions will necessarily be based on recoverable notes or text in the database. It is simply not feasible for the researcher to write or record all of their experiences in the research situation. Certainly, field notes, genealogical charts, maps, photographs and documentary sources should be consistent with the researcher's findings. This means that information in the researcher's database that contradicts the final findings of the study should be explicable as outlier cases.

ANTHROPOLOGY, HISTORY AND LAW

A general point is that anthropological studies have been historically positioned as focused on less powerful parts of societies across the world. While fieldwork has been done amongst influential persons and elites, the tradition is for considerable empathy to be oriented towards understanding the culture and structural circumstances of "subaltern" people, often those who have survived histories of European colonialism. If there is a predominant political position across the discipline it is one that engages with marginalisation amongst those with less power and resources. In legal cases, where anthropologists are engaged by a range of parties, including different groups within marginalised populations and minorities, it is ultimately important for such a political position to be suspended. At least, anthropologists must support expert opinions with clear results of studies, whether or not their findings appear to favour one party against another.

Case Studies

Investigating Traditional Rights in Land Claimed under Legislation: Based on Long-Term Fieldwork

My work in legal cases has included Indigenous land claims and native title cases in Australia where I have been engaged by groups with whom I began academic research in the late 1970s. This has meant addressing legal issues using anthropological concepts and empirical data on customary relationships with lands and waters espoused by Indigenous people who have undergone great cultural change since their forebears were in occupation of areas at the time of British colonisation. The work has included mapping culturally significant sites as well as zones of transition between the traditional lands of different Aboriginal groups. In this type of work, the anthropologist performs the often-difficult task of rendering Indigenous understandings of customary concepts into the categories of information required by legislation.

In the case of the Aboriginal Land Rights (Northern Territory) Act (1976) (Cth), this meant addressing how Indigenous land tenure could be presented through concepts of "local descent groups", "primary spiritual responsibility" for sites on the land, "common spiritual affiliation" with sites on the land and a "right to forage" over the land (Aboriginal Land Commissioner 1985, 1991; Trigger 1982). In cases dealt with under the Aboriginal Land Act (1991) (Qld) there was a broader legal category of "traditional and/or historical association" with the land. Under the Native Title Act (1993) (Cth), key concepts required in law include the identification of "the society" in occupation of lands and waters at the time of the establishment of British sovereignty, the nature of continuity and change in traditional "law and custom" from that time and the issue of "connection" of particular claimants and their forebears with the land and waters concerned (Sutton 2003). Some of my most recent work relates to legal cases seeking compensation under the Native Title Act for the impacts of development projects on traditional connections with land and waters. This area of inquiry is likely to be a significant aspect of anthropological expertise in the coming decade.

In my own case, the anthropologist can become the known repository of information and recordings that have not been passed on (or at least only partially transmitted) to younger generations. Such information in respect of Aboriginal relations with land where I have worked in the Gulf Country of northern Australia has remained largely oral in the communities themselves. However, my reports, publications and related documentation such as maps have for some years now been used and sought after as authoritative sources about traditional knowledge, customary tenure boundaries, genealogical histories and so on. Anthropologists' research materials thus can become a resource valuable in local politics as people engage in internally competitive as well as cooperative efforts of both traditionalism and modernisation (Peterson 2017; Morgan and Wilmot 2010).

With such lengthy research experience in particular communities, the anthropologist needs to be careful to depict and explain adequately changes in everyday life and cultural knowledge, despite what can be a desire amongst both Indigenous people and other parties to identify the "real" or authentic knowledge and practices as they were in the traditional past. My work over the years has involved documenting such views but also placing them in the context of both my own previously recorded information and earlier ethnographic and historical materials where available (see Josev, Chapter 22 in this volume). The influences of local-level politics, traditional tensions and disputes between Indigenous groups and perceived financial and other benefits from new land uses by industry and government have also needed to be worked into my findings as an anthropologist asked to address the nature of continuities and changes in traditional relations with land.

It is important to note that along with the successes of applied anthropological expertise, some difficulties arise whereby legal procedures, concepts and reliance on evidence presented in formal ways can sit awkwardly with Indigenous customary approaches to what constitutes cultural knowledge and proof of tradition-based rights (Burke 2011). As anthropologist Katie Glaskin (2017, 221)

notes, the process of legal recognition can in itself be transformative of connections with "country" and of relationships amongst members of the groups formally recognised as holding rights in lands and waters. Legislation in this area is regarded by some commentators as in many respects an inadequate compromise between Indigenous interests and those of other parties (Pearson 2003; Walker 2015). Moreover, there are debates amongst anthropologists as to the politics and ethics of participating in legal procedures that can be ponderous and onerous for all parties, but particularly in tension with modes of Indigenous social action and aspirations for social justice that go beyond the definitions and requirements of particular legislation (Povinelli 1993; Vincent 2017; Monaghan 2020).

Nevertheless, especially when the involvement of anthropologists in claims has arisen from their broader long-term relationships of collaborative research with Indigenous people of particular regions, the productive outcomes are clear. A usefully indicative exemplar is a recent expression of great appreciation from an Indigenous community in northeast Australia, where the work over many years of anthropologist Athol Chase was celebrated. To quote the Lockhart River community mayor:

> Without his work with our old people, it would have been much harder to get our land back. He has been a warrior for us all and a proper strong friend and countryman. He is our greatest white Elder. We should all keep him and his family in our thoughts and prayers.

This was a case where the anthropologist maintained close relationships with research participants while producing independent outcomes from applied studies that assisted the Aboriginal people of his fieldwork location in obtaining highly valued legal rights to their traditional lands (Trigger 2021).

Investigating Traditional Rights in Land Claimed under Legislation: Based on Short-Term Fieldwork

Applied anthropology in Australia has over recent decades also included work on short-term fieldwork projects where inquiries are done without the researcher having established lengthy relationships with the relevant Indigenous groups. One of the most common such projects has been site surveys for resource industry exploration leases. Here it is broad skills and conceptual knowledge that are brought by the investigator, rather than any particular awareness in the first instance of the relevant people connected with the land, their personal biographies or the regional system of customary land tenure. In such cases, the anthropologist commonly relies on Indigenous organisations and/or industry parties to assist in the formation of the survey team; the investigator should also carry out a review of relevant research literature to establish some basic information about local Indigenous concepts of relations with the land.

Regardless of the short-term nature of such research, it remains essential for the investigator to clearly document the views of those whom they consult about areas

to be disturbed or preserved. While the work may amount to only brief visits to the relevant areas, what people say about the site is a critical aspect of the factual basis for an expert opinion about future impacts and the implications for traditional cultural relations with land. However, the task is not simply recording the comments of Indigenous people in the survey; rather it includes the performance of an analysis that takes into account diversity of opinion among those consulted as well as any broader information available about local systems of rights to speak for "country". An example of short-term fieldwork I undertook in 2017, in relation to a proposed development at a site in the town of Bathurst, New South Wales, encompassed inquiries with several Indigenous groups and corporations. As made clear in publicly available statements regarding this issue, at least two groups disagreed about the nature of the cultural significance and hence the appropriate response to the proposal.[1] In such cases, anthropological opinion may not be able to resolve the matter, and several expert reports will be taken into account in legal procedures and other negotiations.[2]

A further case of anthropological opinion based on only short-term fieldwork is my engagement on a matter involving the prosecution of an Indigenous man under Western Australia's legislation to protect native fauna (the Wildlife Conservation Act 1950, see *Wilkes v. Johnsen*). He was accused of taking for food juvenile freshwater crustaceans known as marron which were a species legally protected. As I was engaged by the defence, the brief was to give an opinion in relation to the man's claim that he was exercising a traditional right to take bush resources, according to Indigenous law and custom (see Bouayad, Chapter 24 in this volume). The legal issues revolved in part around the relationship between the Commonwealth Native Title Act and the state fauna protection legislation.

My role as an anthropologist was to consider the man's assertions of membership of a native-title-holding Aboriginal group in a context where this matter had not at the time been determined by the courts. I recorded some information from his immediate family members, prepared a genealogy and linked the group to the broader landholding population asserting native title rights. The magistrate did not allow my evidence on the issue of relevance to the charge under the law concerning the protection of native species. Subsequently, there was a Western Australian Supreme Court appeal decision that if the defendant could show native title, he would have a defence to the charge of possession of undersized marron, by reason of s211 of the Native Title Act. However, he would not have a defence to the charge of refusing to give his name and address when called upon by the fisheries officer. The appellate court sent the case back to the magistrate for further determination (see www.austlii.edu.au/au/cases/wa/WASCA/1999/74.html).

Expert Opinion Based on No Fieldwork: Evaluation of the Work of Other Anthropologists

Much anthropological work in the area of Australian Indigenous land and cultural issues involves assessing fieldwork-based reports by others against what is known in the anthropological literature. Here the expert's opinions are based not on their

own empirical materials but rather on whether colleagues' findings appear methodologically sound and consistent with the conclusions reported by other scholars. Conferences of experts, ordered by the Court, to resolve areas of agreement and disagreement can be useful – although less so, in my opinion, where lawyers prepare propositions with wording that the experts then need to change, refine or reject because it is not adequate to address the complexities of such issues as religious concepts, kinship relations or cultural continuity and change. Examining and evaluating reports prepared by other anthropologists commonly occurs when an expert is engaged by non-applicant parties in native title or cultural heritage cases, such parties including state governments or industry organisations.

It is plausible to examine conclusions in light of the data and arguments presented by a colleague without having the opportunity to carry out primary fieldwork. An illustration from a case in which I was involved was my consideration of an argument for a cultural defence proposed for two Aboriginal men prosecuted for violence (*Vale v. Hopiga*). The defence argument was that the men were required by their customary law to physically attack two non-Aboriginal men because they were intruding into a sacred area of "country". Their belief was that they had the right to act in this way partly because they had been granted native title rights to the land concerned. The defence engaged the services of a senior experienced anthropologist who had worked in the region on lengthy studies over the years; on the other hand, I was engaged by the prosecution and had not carried out primary fieldwork.

While my colleague and I were able to agree on a range of issues, including that traditional law and custom in the particular region historically allowed for a physically violent response to what was seen as trespass or illegitimate intrusion, we were not in agreement as to assessing changes over time to the system of cultural norms and behaviour. My opinion included a view that establishing the nature of contemporary attitudes to violence required broad investigations across the relevant Aboriginal "jural public", i.e., including both men and women and people across age groups. I was concerned that the view of senior men alone was not sufficient in clarifying the nature of traditional "law and custom" in relation to the practice of violence.

The magistrate decided this case without dealing with the contesting anthropological opinions before him. However, the issues broached in the anthropological opinions were indirectly of significance in his reasons for decision. The question of the assault taking place in the vicinity of a sacred site was left as marginal to the key issues of the unintentional presence of those assaulted, the expectation of self-control on the part of the accused and the lack of any physical provocation from those assaulted. While the anthropological debate was about the extent to which customary law in 2008 at the time of the assault required the accused to punish the victims, the legal decision was based on the finding that even if the cultural expectation were to be accepted (contrary to the prosecution case), customary law of this kind cannot amount to a defence under the Criminal Code. Nevertheless, the magistrate accepted that such matters raised by the defence were relevant to mitigation in respect of penalty.

Conclusion

These case studies illustrate the diversity of cultural expertise in legal matters dealing with Indigenous traditional culture. The typology encompasses expert opinions based on long-term fieldwork, short fieldwork needing to adapt to available time and funding and consideration of colleagues' reports to provide an opinion as to their adequacy in terms of supportive data and disciplinary analysis. This chapter also addresses the range of circumstances in which the professional services of an anthropologist may be sought. According to my experience as an expert in a range of cases, the main requirements are an independent open-minded approach to research inquiries; experience and authority in relation to the subjects to be investigated; and an understanding of relevant legal conventions and practices. The work of providing anthropological expertise relevant to cultural traditions and customary practices contributes to the practical resolution in Australia of legacies of colonialism including Indigenous rights in land and associated aspects of customary law.

Notes

1 See: https://yoursay.bathurst.nsw.gov.au/newscentre/news_feed/statement-aboriginal-cultural-heritage-and-proposed-go-kart-track.
2 See: www.abc.net.au/news/2021-03-31/mount-panorama-go-kart-track-block-aboriginal-heritage-concerns/100040324.

Further Reading

Bauman, Toni, and Gaynor MacDonald, eds. 2011. *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives*. Canberra: AIATSIS.
A collection of chapters concerning applied native title research.

Trigger, David. 2011. "Anthropology Pure and Profane: The Politics of Applied Research in Aboriginal Australia." *Anthropological Forum* 21, no. 3: 233–55.
This article presents an overview of debates in the discipline of anthropology regarding cultural expertise and applied research.

Q&A

1. In what sense can an anthropologist or other social scientist carry out research that is independent of the interests of the party engaging the researcher's services for a scheduled court case or related negotiation?

Key: This is likely to vary as to whether the researcher is investigating cultural issues among Indigenous people with whom the anthropologist has already had a long-term working relationship. It is important to establish, in the case of applied research by an expert, a proper understanding amongst the participants in the research that the resulting findings must be based clearly on the facts found in the study.

2. How can an anthropologist's cultural expertise inform land claim cases in Indigenous Australia?

Key: The key concepts of traditional land tenure, including concepts of spiritual and material connection to areas, will need to be tackled in fieldwork interviews, informal conversations and, where possible, participant observation.

3. What differences, and overlaps, are there between academic anthropological research and projects focused on practical and applied outcomes?

Key: The task of an expert witness is to comprehensively document issues of cultural beliefs and practices, often in a cross-examination setting where there is a greater need for defending the basis of findings than when publishing in academic journals and books.

4. Consider the arguments for and against applied anthropology research involving the descendants of colonised peoples such as in Indigenous Australia.

Key: Clarify the benefits for parties in actual legal cases as against the concern that the intellectual scope of investigations may be compromised through the constraints of a brief provided by a law firm.

References

Blowes, Robert. 2017. "Getting to Native Title: Roles and Important Distinctions for Anthropologists and Advocates." *Native Title News* 12, no. 8: 472–8.

Brunton, Ron, and Lee Sackett. 2003. "Anthropologists in the Hot Tub." *Native Title News* 6, no. 6: 86–8.

Burke, Paul. 2011. *Law's Anthropology: From Ethnography to Expert Testimony in Native Title*. Canberra: ANU Press.

Glaskin, Katie. 2017. *Crosscurrents: Law and Society in a Native Title Claim to Land and Sea*. Crawley, Western Australia: UWA Publishing.

Monaghan, Paul. 2020. "Kokatha Mula and Yabi Dinah: Hidden categories in 'Against Native Title'." *Journal of the Anthropological Society of South Australia* 44: 89–126.

Morgan, Rebecca, and Helen Wilmot. 2010. "Written Proof: The Appropriation of Genealogical Records in Contemporary Arrernte Society." *Land, Rights, Laws: Issues of Native Title* 4, no. 5: 1–12.

Pearson, Noel. 2003. "The High Court's Abandonment of 'The Time-honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerong and Yorta Yorta." *Australian Indigenous Law Reporter* 8, no. 2: 1–10.

Peterson, Nicolas. 2017. "Is There a Role for Anthropology in Cultural Reproduction? Maps, Mining, and the 'Cultural Future' in Central Australia." In *Entangled Territorialities: Negotiating Indigenous Lands in Australia and Canada*, edited by Françoise Dussart and Sylvie Poirier, 235–52. Toronto: University of Toronto Press.

Povinelli, Elizabeth A. 1993. *Labor's Lot: The Power, History, and Culture of Aboriginal Action*. Chicago, IL; London: University of Chicago Press.

Sutton, Peter. 2003. *Native Title in Australia: An Ethnographic Perspective*. Cambridge: Cambridge University Press.

Trigger, David. 1982. *Nicholson River (Waanyi/Garawa) Land Claim*. Darwin: Northern Land Council.

———. 2004. "Anthropology in Native Title Court Cases: 'Mere Pleading, Expert Opinion, or Hearsay'." In *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title*, edited by Sandy Toussaint, 24–33. Carlton, Victoria: Melbourne University Publishing.

———. 2021. "Obituary: Athol Kennedy Chase." *The Australian Journal of Anthropology* 32, no. 2: 66–70.

Vincent, Eve. 2017. *Against Native Title: Conflict and Creativity in Outback Australia*. Canberra: Aboriginal Studies Press.

Walker, Bret. 2015. "The Legal Shortcomings of Native Title." In *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, edited by Sean Brennan, Megan Davis, Brendan Edgeworth, and Leon Terrill, 29–43. Annandale: The Federation Press.

Legislation

Aboriginal Land Commissioner. 1985. *Nicholson River (Waanyi/Garawa) Land Claim: Report*. Canberra: Australian Government Publishing Service.

Aboriginal Land Commissioner. 1991. *Garawa/Mugularrangu (Robinson River) Land Claim*. Canberra: Australian Government Publishing Service.

Australian Government. 1976. *Aboriginal Land Rights (Northern Territory) Act 1976*.

Australian Parliament. 1993. *Native Title Act (1993) (Cth)*.

Western Australian Parliament. 1950. *Wildlife Conservation Act 1950 (WA)*.

Cases Cited

Peter Norman Vale v. Lenny Hopiga and John Hopiga, Unreported (Magustrates Court of Western Australia 2011).

Wilkes v. Johnsen, [1999] WASCA 74 (S. Ct. of Western Australia 1999).

22

CULTURAL EXPERTISE AND HISTORY IN AUSTRALIA

Tanya Josev

LEARNING OBJECTIVES

This chapter focuses on how historians and historical evidence are utilised by parties to litigation and how judges treat expert evidence provided by historians in Australian courtrooms. It examines (a) the types of cases in which historical evidence might be drawn upon; (b) the rules of civil procedure under which historical data can be received into evidence (with a discussion of the utility of these rules); and (c) current trends in the Australian superior courts as to how historians' work is treated. The seminal cases of *Mabo* (1992) and *Wik* (1996) are used as examples to highlight some of the methodological and political concerns with the reliance on historical evidence in judgments. After reading this chapter, you will have learnt how historians are involved in the process of litigation in the Federal and High Court of Australia; how judges might treat the evidence given by historians; and some of the more common problems with the interpretation of historical evidence in the courtroom.

Introduction

This chapter focuses on how Australian courts deal with questions of history and how Australian historians might be involved as experts in that process. Despite some of Australia's most well-known High Court cases involving questions of history – *Mabo v. Queensland (No 2)* and *Wik Peoples v. Queensland* being prominent examples – these are in fact outliers in terms of the ordinary casework of judges. Historians are seldom called as expert witnesses to assist

DOI: 10.4324/9781003167075-27

the court in its fact-finding mission. References in judgments to general works of history as secondary sources – that is, the work of prominent Australian historians – are also relatively uncommon. There are some largely practical reasons for this. In the case of the High Court, Australia's apex court, a great deal of the judges' workload relates to appellate matters, where the need for further fact-finding exercises is unlikely to arise. More generally, like many overseas jurisdictions, most of the Australian states and territorial court hierarchies, and the Australian federal court system, are governed by legislation known as statutes of limitation that prevent litigants from bringing certain claims for redress for events that occurred many decades earlier. This means that questions of history, and the need for recourse to historical documents, are relatively rare in these jurisdictions too. There is another, more controversial, reason that is sometimes given to explain why historians' work is not often relied upon by judges. In the rare cases in which historical questions are required to be answered, judges may prefer to work with archival documents directly, believing that it is not necessary to rely upon the interpretive skills of a historian. Some judges consider the fact-finding work that they do as not that far removed from the work that a historian does: history and law, to these judges, are close intellectual cousins (Curthoys, Genovese, and Reilly 2008, 53, 90). Historians take a dim view of this assertion (Luker 2016, 245, 262; Davison 2003, 54; Irving 2015, 958–961) on the basis that judges are circumscribed by narrow rules of evidence that do not circumscribe historians. By necessity, judges give emphasis to particular historical considerations over others in order to answer discrete legal questions and do not engage in the breadth and depth of research that historians do to gain a fuller picture of the relevant era.

This chapter will analyse the types of cases in which historical evidence is drawn upon in Australia; the rare circumstances in which historians are called upon as experts to assist judges in fact-finding; and examine prominent cases to illustrate the difficulties faced by judges in cases where historical interpretation is required. I adopt the broad concept of cultural expertise, in that historians appointed as experts in court are akin to cultural experts. Echoing the broad concept of cultural expertise, in which cultural arguments can be discussed in court even without the appointment of a cultural expert (see Holden, Chapter 1 in this volume), this chapter distinguishes between situations in which an expert historian is providing the interpretation of historical materials to a judge and situations in which the judge has embarked on independent historical research while writing their judgment.

Theory and Concepts

In What Type of Case Might Historical Evidence Be Drawn Upon?

While the use of archival evidence, or evidence that requires interpreting by expert historians, does not regularly arise in the Australian courtroom, there

are certain typical subject areas in which historical evidence may be considered. These include:

- Cases involving *constitutional law*, and in particular, the interpretation of particular parts of the Australian Constitution.
- Cases that involve *native title* claims, that is, Indigenous Australians seeking legal title over their traditional land.
- Some *civil cases*, where litigants seek redress for historical wrongs under statutory compensation schemes, for instance, or litigants are involved in defamation proceedings where the accusations relate to their being deniers of historical facts.
- Cases in which a judge might need to investigate the (usually English) origins of a particular legal principle or wording of a long-standing statute to assist with current legal problems. These are specialised areas and usually involve reference to what might be described as doctrinal history (i.e. history which is "internal to the law" – for instance, examining where and how a particular judgment was recorded, disseminated and subsequently cited by judges over the years). These enquiries are usually guided by research conducted by lawyers and judges. This can be contrasted with the previous three examples, in which more general archival materials are utilised. Doctrinal history is outside the scope of this chapter.

When Are Historians Engaged to Interpret Historical Materials? When Is Historical Material Used on Its Own?

The primary subject area in which historians might be called by the litigating parties to offer expertise is in *native title cases*. A recent survey of the Federal Court of Australia showed that from 2009 to 2019, only 29 judgments referred to the evidence of expert historians, and 27 of those judgments were in cases involving native title claims (Josev 2020, 1078–1079). In these cases, usually one or both litigating parties engaged the services of a professional historian to present historical materials to the judge, along with an expert interpretation of those materials, on the topic of the Indigenous claimants' continuing connection to the land at the centre of the dispute. Such evidence is usually submitted to the judge in the form of a written report. If the opposing litigating party takes issue with the contents of the report, or with the *bona fides* of the report's author, then they may apply to the judge for leave to cross-examine the historian. Once the trial concludes and the judge begins the process of making findings of fact, the judge can either rely on or place as little weight on the historian's interpretations as they think fit. In the early 2000s, there were indications that some judges, particularly in the native title jurisdiction, were dismissive of the notion that expert witness-historians provided any specialised advice to the court that could not be discerned through the judge's own critical assessment (Carter 2008, 331; Curthoys, Genovese, and Reilly 2008, 53, 90). This was attributed to these judges' (perhaps

misguided) self-assurance that they could interpret archival documents robustly owing to their legal training – and perhaps a broader assumption that the judicial skills of fact-finding are akin to the skills of analysis and synthesis possessed by historians. These early trends appear to have been tempered in the last decade, with judges in at least 18 of the aforementioned 29 cases explicitly adopting historians' reports as evidence, with scant evidence of judges expressly supplanting historians' interpretations with their own (Josev 2020, 1080). As will be shown later in the chapter, this use of historians' work has not been replicated in Australia's apex court, the High Court of Australia.

This use of historians' reports may be contrasted with the procedure in *cases involving the interpretation of the Australian Constitution*, in which judges may occasionally refer to extraneous historical materials, but will refrain from referring to secondary sources – that is, the work of historians who may have previously interpreted those original documents in their own research. To this end, judges in constitutional cases usually limit themselves to referring to a relatively small number of historical, primary materials to assist with the interpretation of a clause in the constitution: these materials usually include the records of the debates of the Constitutional Conventions that were held prior to Australia's federation (Irving 2013, 109), and the contemporaneous commentaries that were produced about the Constitution upon its enactment (e.g. Quick and Garran, 1901). The general rule in these cases, as set out in the High Court judgment in *Cole v. Whitfield*, is that historical materials can be referred to in establishing the contemporary meaning of words in the Constitution, or the subject matter of those words; or to shed light on the objectives of the Federation movement from which the Australian Constitution emerged (*Cole v. Whitfield* 1988: 385). With respect to assessing the public objectives of Federation, various scholars have noted that the courts' restricted use of historical documents is perhaps not "best practice": it favours the contributions from Convention participants who were lawyers while excluding the contributions of other popular figures (Irving 2013, 109). It further excludes news reporting or other political material produced while the campaign for Federation was live (Donaghue and Wood 2020, 253).

What Are the Rules for the Admission of Historical Material as Evidence?

Although historians are rarely engaged by litigating parties to be expert witnesses in Australia, it is worth observing that those historians who are engaged for this purpose are subject to the usual evidentiary rules that apply to other expert witnesses. Expert witnesses are recruited and usually remunerated by litigating parties to provide specialised knowledge to the court during the course of a trial. Put simply, expert witnesses' opinion evidence is only admissible in court if it can be shown that the person is an expert in their field; that their field itself is one of specialised knowledge; and that the interpretation or opinion the expert is offering is based on their specialised knowledge (Heydon 2020, para. 29045). The expertise of historians is thus not

different from any other kind of expertise presented in court. That historical study is regarded as a field of specialised study is not particularly controversial today. Of course, the requirement that experts be impartial and "objective" often sits uncomfortably with historians, who are arguably more aware than lawyers of the "relativising influences" on their work (Davison 2003, 54). Reservations aside, in terms of the employment backgrounds and qualifications of the historians recruited in Australia in recent times to act as expert witnesses, the majority have doctoral qualifications and either work as professional historians or have academic posts (Josev 2020, 1079).

The rules surrounding how *judges* may adopt general historical facts in the absence of expert evidence are less clear – that is, situations in which judges make reference to what are commonly understood to be historical events. The doctrine of *judicial notice* allows judges not to require evidentiary proof for some matters of common knowledge. Yet there is a degree of uncertainty about the bounds of this doctrine in relation to historical "facts". A similar uncertainty exists in circumstances where a judge might nevertheless *choose* to refer to a secondary source to substantiate a historical "fact". Matters of public record, such as the date upon which war broke out, can be cited by reference to authoritative secondary sources, including the works of historians, but there is limited guidance for what *other* types of historical "fact" might be proven in this way (Heydon 2020: para. 33845). It is especially unclear how judges who unearth historical material through their own independent research, unaided by submissions from the litigating parties, should proceed. If a judge relies in a judgment on historical evidence, or on a historian's work that has been discovered as part of their independent research, should that evidence have first been put to the litigating parties so that they had an opportunity to respond? Secondly, without this opportunity to respond or to put additional evidence or call upon an expert historian, are litigating parties disadvantaged? These issues, although rarely raised in Australian courts – largely because most judges do not cite works of history in their judgments – nevertheless remain live issues today.

The Judiciary's Current Trepidation in Citing Works of History to Assist in Formulating Legal Principles

The High Court has adverted to the possibility of referring to the works of historians in the course of judgment-writing since at least the 1950s (*Australian Communist Party v. Commonwealth* 1951, 196). There are some sitting High Court judges who are known to include benign references to specialist historical scholarship from time to time as part of the "scene setting" in the opening paragraphs of their judgments. It should be noted that the judges' relevant factual analysis or legal reasoning is unlikely to be related to these observations, however.

Placing reliance on historical works as part of the judge's factual analysis, or legal reasoning, is another matter entirely (Selway 2001). Since at least the 1990s, there has been a high degree of trepidation about referring to the works of historians in the essential parts of judgments. This may be attributed to the political fallout following the decision of certain High Court judges to cite well-known

historical scholarship in the landmark native title case of *Mabo v. Queensland (No 2)*. In that case, two judges in the majority, and one in dissent, made reference to the scholarship of a historian, Henry Reynolds, who was neither called as a witness nor his work brought to the attention of the Court by the litigating parties. Reynolds' work was relied upon by the two majority judges to determine that native title could continue to subsist after the reception of English common law in Australia. Certain critical commentators and influential public figures, mainly from the Australian political right, lambasted the Court for citing Reynolds, questioning this historian's methodology, his objectivity and his allegedly moralistic style of writing as being particularly unsuitable for use as the foundation for establishing legal principles (Josev 2017, 123–126). This political grouping's campaign against certain types of frontier history became known as the "history wars", as they sought to challenge the academic consensus about the extent of Indigenous dispossession and what they saw as an undue focus on the harm, rather than the advantages, arising from British settlement of Australia.

More broadly, the *Mabo* case produced some of the most bitter public criticism the Court had ever experienced, although this was related to questions much broader than the reliance on Australian historical scholarship. Pastoral and mining interests, also affiliated with the Australian political right, took the burgeoning native title jurisprudence to be a threat to their continued business operations on Indigenous peoples' ancestral lands. The majority in *Mabo* did not resile from their declaration of the existence of native title in Australia, but the advent of the "history wars" did appear to lead one of the judges, Justice Deane, to publicly disavow any suggestion that his reasoning was based on Reynolds' work (McKenna 2009, 14). The Chief Justice of the Court, Sir Anthony Mason, was even moved to make a public statement some 14 years after the judgment that he "wasn't very impressed" by Reynolds and that he would "be astonished" if his work had influenced the Court (Hope 2006, 22). The concern, it seemed, was for these judges to reassure the public that their reasoning in native title disputes had its basis in law, rather than in "unstable" historical scholarship. In the following landmark native title case to reach the High Court, *Wik Peoples v. Queensland*, one judge, Justice Gummow, self-consciously admitted that the Court lacked "any established taxonomy to regulate the uses of history" in forming legal principles (*Wik Peoples v. Queensland* 1996, 182), although another judge, Justice Kirby, cited Reynolds four times in his judgment (*Wik Peoples v. Queensland* 1996, 207 n 775, 214 n 800, 226 n 843, 230 n 860). These cases marked the last time the Court made substantive reference to Reynolds in its judgments.

One of the few High Court judges with postgraduate qualifications in history, Justice Crennan, made a speech in 2010 which acknowledged that the use of history in judgments was particularly controversial. Justice Crennan suggested that history was in fact more controversial than other fields in which expert evidence was received, because of its inevitable capacity to be taken up in contested, highly partisan political debate (or, as the judge described it, the "culture wars about highly … freighted periods in our history" (Crennan 2010, 2–3)).

It can be observed, from this series of events, that judges are generally confident that they are competent to analyse historical documents where necessary, which obviates the need for these documents to be "interpreted" to them via an expert historian. As suggested at the beginning of this chapter, this may be related to the self-assurance of the judge, but there may be a more pragmatic concern that has arisen in recent decades: that the reference to *historians*, rather than *primary documents*, makes the Court vulnerable to a type of critique, and accusations of subjectivity, that it studiously wishes to avoid.

Conclusion

Historians still make only infrequent appearances in Australian courtrooms and law reports, so it must be acknowledged that there is very limited data on which to base conclusions. In the interim, however, it might be possible to make two observations about the status of historians as cultural experts in the Australian legal system:

- First, historians operate under the same general rules for expert evidence as other expert witnesses. At least in the last decade, judges have appeared to engage with and adopt historians' reports as part of the evidence submitted in trials.
- Second, the aforementioned situation can be contrasted with the practice of judges using secondary sources (i.e. works of history, authored by historians) in their judgments. It is highly likely that the fallout after the *Mabo v. Queensland (No 2)* case has led to superior court judges being less willing to refer to generalist works of Australian history, particularly when those works touch on issues that are subject to partisan debate.

In addition, judges in Australia have still not established a framework as to how to conduct independent research in this area, how to critically assess the works of historians that they propose to cite or how to establish a rubric that explains the extent to which historical work should and can be used to buttress the formulation of legal principle. This situation is unlikely to change in the immediate future, given the general reluctance to cite historical scholarship more generally.

Further Reading

Curthoys, Ann, Ann Genovese, and Alexander Reilly. 2008. *Rights and Redemption: History, Law and Indigenous People*. Sydney: University of NSW Press.

This book provides an extended discussion of the disciplinary and practical tensions that emerge when questions of history arise in the courtroom, particularly in relation to litigation involving Indigenous Australian peoples.

Irving, Helen. 2013. "Constitutional Interpretation, the High Court, and the Discipline of History." *Federal Law Review* 41, no. 1: 95–126.

This is a provocative article that provides an elegant summary of the basic conventions of historical methodology, and also critiques the ability of Australian judges to "do" historical analysis in the courtroom.

Josev, Tanya. 2020. "Australian Historians and Historiography in the Courtroom." *Melbourne University Law Review* 43, no. 3: 1069–99.
This article examines current trends in the engagement of historians as witnesses in Australian courtrooms, examining how the "history wars" have stymied the citation of historical works in the High Court of Australia.

McCalman, Iain, and Ann McGrath, eds. 2003. *Proof & Truth: The Humanist as Expert*. Canberra: The Australian Academy of the Humanities.
This book brings together prominent scholars from the humanities disciplines who have an interest in or have had a direct role in litigation to discuss the differences between matters of "proof" as they are found in their disciplines and in the law.

Q&A

1. Why are historians as expert witnesses rarely involved in trials in Australia?

Key: Procedural obstacles, for instance, the statute of limitations on litigating events that happened decades ago, appear to rule out a large-scale role for historians in courtrooms. Native title cases are one of the few areas in which historians are regularly engaged. Questions about the interpretation of the Australian Constitution may involve historical questions, but these are usually resolved by judges and litigating parties without recourse to historians.

2. Can judges act as effective historians?

Key: The real question is how the task of a judge and a historian might differ. A judge may need to answer an isolated question about the implications or understandings of a long-past event. Using constitutional interpretation case law as an example, can this simply be done by looking at select "documents" or available archival evidence? Does training in history assist? Does broader knowledge of the time period assist?

3. What might be some of the problems associated with a judge conducting their own research into historical questions, without the assistance of the litigating parties?

Key: There may be implications for the litigating parties if they are not consulted during this process. There is also a lack of transparency as to how rigorously the research has been conducted. There is also the possibility that, if the topic of research falls under the umbrella of the ongoing partisan debate in the "history wars", the judge will unwillingly (and unwittingly) become a target in political campaigns.

References

Carter, Anne. 2008. "The Definition and Discovery of Facts in Native Title: The Historian's Contribution." *Federal Law Review* 36, no. 3: 301–32.
Crennan, Susan. 2010. "Varieties of History and the Law." Speech at the Honourable Society of Lincoln's Inn, London, January 31,2010.

Curthoys, Ann, Ann Genovese, and Alexander Reilly. 2008. *Rights and Redemption: History, Law and Indigenous People*. Sydney: University of NSW Press.

Davidson, Graeme. 2003. "History on the Witness Stand: Interrogating the Past". In *Proof and Truth: The Humanist as Expert*, edited by Ian McCalman and Ann McGrath, 53–70. Canberra: Australian Academy of the Humanities.

Donaghue, Stephen, and Thomas Wood. 2020. "The Evolving Role of History in Constitutional Interpretation." *Public Law Review* 31, no. 3: 248–63.

Heydon, John Dyson. 2020. *Cross on Evidence*, 12th ed. Chatswood, NSW: LexisNexis Butterworths.

Hope, Deborah. 2006. "Smokescreen Nullius." *The Weekend Australian*, February 25,2006.

Irving, Helen. 2013. "Constitutional Interpretation, the High Court, and the Discipline of History." *Federal Law Review* 41, no. 1: 95–126.

———. 2015. "Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning." *Fordham Law Review* 84, no. 3: 957–67.

Josev, Tanya. 2017. *The Campaign against the Courts: A History of the Judicial Activism Debate*. Annandale, NSW: The Federation Press.

———. 2020. "Australian Historians and Historiography in the Courtroom." *Melbourne University Law Review* 43, no. 3: 1069–99.

Luker, Trish. 2016. "Reading the Archive: Historians as Expert Witnesses." *Flinders Law Journal* 18, no. 2: 241–67.

McKenna, Mark. 2009. "Silence Shattered with a Whisper to the Heart." *The Australian Literary Review* 4, no. 2: 14–16.

Quick, John, and Robert Garran. 1901. *The Annotated Constitution of the Australian Commonwealth*. Sidney: Angus & Robertson; Melbourne: Melville & Mullen; London: Australian Book Co.

Selway, Bradley. 2001. "The Use of History and Other Facts in the Reasoning of the High Court of Australia." *University of Tasmania Law Review* 20, no. 2: 129–58.

Cases Cited

Australian Communist Party v. Commonwealth. 83 CLR 1 (High Court of Australia 1951).

Cole v. Whitfield. 165 CLR 360 (High Court of Australia 1988).

Mabo v. Queensland (No 2). 175 CLR 1 (High Court of Australia 1992).

Wik Peoples v. Queensland. 187 CLR 1 (High Court of Australia 1996).

23

CULTURAL EXPERTISE IN SOUTH AFRICA

Christa Rautenbach

LEARNING OBJECTIVES

This chapter focuses on the role of cultural expertise in navigating litigation in South Africa. It is a multicultural society in which various legal systems are observed: state law includes common law and African customary law (mostly unwritten laws of traditional communities). After reading this chapter, you will better understand the role of cultural expertise in multicultural litigation in South African courts. Two case studies are used to illustrate some of the complexities: (1) ascertaining customary law with the aid of cultural experts; and (2) the role of cultural experts in resolving the conflict between customary law and human rights.

Introduction

A striking feature of South Africa is its multicultural society, where cultural communities or groups live according to norms and values that are generally different from those of the law of general application – the common law (Rautenbach 2021, 5). The common law is a mix of transplanted Western rules consisting of Roman-Dutch law and English law, adapted to suit local needs. The common law was displaced as the dominant legal system of South Africa when the country adopted its first democratic Constitution (Interim Constitution of the Republic of South Africa 1993, s. 181), which recognised the laws of traditional communities, all of which come within the umbrella term of customary law. The final Constitution cemented customary law firmly in the legal order by confirming its

DOI: 10.4324/9781003167075-28

status as an official law source three years later (Constitution of the Republic of South Africa 1996, s. 211).

CUSTOMARY LAW BEFORE AND AFTER 1994

Before April 1994, common law was the superior normative order in South Africa. Customary law enjoyed a subordinate status, and its application hinged on "choice of law" rules, legislation and repugnancy provisions. In 1927, the controversial Black Administration Act 38 of 1927 provided the uniform application of customary law throughout South African courts in a limited way. Also, the Law of Evidence Amendment Act 45 of 1988 allowed the courts to take judicial notice of customary law so subject to public policy and natural justice.

The situation changed considerably with the first constitutional recognition of customary law in 1994 (Constitution of the Republic of South Africa 1996, s. 181). The 1996 Constitution followed suit (s 211(3)). It elevated customary law to the same position as common law; they are equal, both subject to the Constitution, and both can be amended by legislation. However, common law remains the law of general application, while customary law applies when it is applicable in terms of "choice of law" rules (Rautenbach 2017, 6).

The Constitutional Court has affirmed on several occasions that both common and customary law are part of the amalgam of South African law, on an equal footing, and accountable only to the Constitution (*Alexkor* 2003 para. 51; *Bhe* 2005, para. 41; *MM* 2013, para. 23).

Theory and Concepts

Two main scenarios are relevant for cultural expertise in South Africa. The first one concerns proof of the existence of a rule of customary law in a court of law, which usually is an unrecorded social practice known only to the community. The inherent adaptive flexibility and indeterminate nature of social practices present a challenge where the existence and content of customary law must be ascertained so that a matter may be adjudicated before a court (Rautenbach 2017, 1). A court has the responsibility to determine the content of a rule in a case that involves customary law issues. It must evaluate the social practice to ascertain the relevant rule (*MM* 2013, para. 48). During this process, the assistance of cultural experts is crucial. They are generally equipped to place facts before a court which, in turn, must ascertain the content of the relevant rule from these facts.

The law does not prescribe who qualifies as an expert or when their testimony is needed. South Africa follows an accusatorial (adversarial) procedure, which means litigants need to adduce evidence, including calling witnesses, to prove their case. If a case involves customary law rules, the tendency is to present the opinions of individuals knowledgeable about those rules (Rautenbach 2019b, 161). They may be anthropologists, members of traditional communities, academics, or almost anyone else who can convince the judge that they have specialist knowledge of cultural norms. Being a cultural expert in a South African court opens one to the prospect of being cross-examined by the other side and being questioned by a court, which could be an uncomfortable position, especially as one's neutrality is often doubted (Zenker 2016, 294).

The second scenario deals with the apparent incompatibility of customary law and human rights. An ongoing debate in South Africa is whether the right to participate in one's culture and thus one's legal system can be reconciled with the human rights provisions in the Constitution (Spies 2016, 249). The Bill of Rights applies to all law, including customary law, and the courts have the power to develop customary law to promote human rights and values (Constitution of the Republic of South Africa 1996, ss. 8(1) and 39(2)). As explained in the *Bhe* case (2005, para. 40), "customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right".

The conflict between customary law and human rights has been the subject of several decisions. The patriarchal nature of customary law was, for example, considered in the case of *Bhe* (2005). The Court found that the customary law rule excluding women from inheritance was "in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination" (*Bhe* 2005, para. 78). It held that such exclusion boiled down to unfair discrimination, which was unconstitutional. This case had far-reaching consequences for the customary rules of inheritance, which were replaced mainly by common law rules of inheritance (Rautenbach 2008, 119).

Case Studies

Ascertaining Customary Law Utilising Cultural Expertise

Ascertaining customary law in litigation is a challenge in South Africa. The essentially oral character of customary law creates difficulties for at least two reasons. Firstly, the relationship between living and official customary law is exceedingly problematic. Official customary law includes legislation, precedent, authoritative textbooks and reports, whilst living customary law manifests traditional communities' present-day customs and practices. Courts take judicial notice of official customary law in the same way they take note of common law. Living customary law, however, is a whole different ball game. It is sourced in

the community and has challenged the judiciary numerous times (Rautenbach 2019a). The only way a general court could determine a custom's content is to hear evidence from someone qualified to testify about it. A court cannot take judicial notice of living customary law because it is an unrecorded social practice known only to the community. Expertise in cultural law theory and practice becomes crucial during this process (Rautenbach 2017, 3).

CULTURAL EXPERTISE IN SOUTH AFRICA

There is no fixed class of cultural experts in South Africa, and cultural experts do not require specific qualifications. Depending on a particular case's facts, an expert can be anyone with specialised knowledge, such as an anthropologist, academic, traditional leader or respected member of a traditional community. Still, experts need to convince the judge that they have specialist knowledge that could help them reach a decision where culture is relevant. However, the ultimate decision lies solely with a court. Cultural experts' opinions may be used during all the different phases of both criminal and civil cases. The responsibility to present cultural experts' opinions usually rests on the parties. The law prescribes specific procedures to be followed to call experts, and their evidence is always subject to cross-examination. Cultural experts can also be used as assessors in criminal and civil matters. A court would usually appoint assessors, where it is foreseen that the facts might fall beyond the scope of its expertise. Another area where cultural experts could be relevant is as *amicus curiae* ("friends of the court"; see Burdziej, Chapter 11 in this volume), especially in public litigation cases dealing with cultural issues. The law allows for the participation of interested parties in proceedings under certain circumstances. Public interest groups have utilised this option to advance the rights of cultural minorities on numerous occasions. For more information on cultural expertise in South Africa (see Rautenbach 2019b).

The *Mabuza* case (2003) illustrates the situation where two cultural experts were called by the parties to prove the requirements of a Swati customary marriage. In this case, the wife (the plaintiff) instituted an action for divorce against her husband (the defendant). She also claimed maintenance for their minor child. The husband denied that a valid marriage existed between them because – according to him – they were never validly married in terms of customary law. The plaintiff testified that a Swati marriage would be valid if three requirements had been met. First is the agreement to pay *lobolo* (bride price paid to the bride's family). Second is the bride's formal integration into the bridegroom's family (*ukumekeza*) and third is the formal handing over of the bride to the bridegroom's family. The plaintiff insisted that non-compliance with the *ukumekeza* requirement did not affect their marriage's validity because they had agreed that there was no

need for integration. The plaintiff called an anthropologist, Prof de Villiers, who had 37 years of experience as an academic at various South African universities, to prove her case. He conceded during cross-examination that he was not an expert in Swati customary law but had done a "bit of reading" on it. Based on his knowledge of customary law, he believed that it was unthinkable that the requirement of handing over the bride "was so vital that it could not be dispensed with by agreement between the parties" (*Mabuza* 2003, para. 15).

The defendant testified that the plaintiff had never been integrated into his family as required by Swati custom. Therefore, he argued, the marriage was not valid even though his family accepted her as his wife. He called Mr Shongwe, an expert and chief advisor to the Matsamo Tribal Authority Council. He had been practising Swati customary law for 22 years and served as an advisor on Swati law to one of the magistrates' courts in the province. He contradicted the evidence of de Villiers and contended that Swati customary law was immutable and that the parties could not dispense with the requirement of the handing over of the bride (*Mabuza* 2003, para. 21). The Court was not impressed with either of the witnesses. Concerning Prof de Villiers, Judge President Hlophe commented (*Mabuza* 2003, para. 16):

> Professor de Villiers was not a bad witness. His evidence, however, was not particularly helpful to the Court. It could be gleaned from a mere perusal of any basic textbook on African customary law. I got a firm impression that Professor de Villiers was called for the convenience of the legal representatives more than for the convenience of the Court.

The judge said (*Mabuza* 2003, para. 25):

> I got a firm impression that Mr Shongwe was not being truthful to the Court insofar as he attempted to elevate *ukumekeza* into something so indispensable that without it there could be no valid siSwati marriage. It is my view that his evidence in that regard cannot be safely relied upon. As Professor de Villiers testified, it is inconceivable that *ukumekeza* has not evolved and that it cannot be waived by agreement between the parties and/or their families in appropriate cases.

Interestingly, the Court indicated that Prof de Villiers' testimony was not of much value but then seemed to accept his contention that Swati law had developed to allow the waiver of *ukumukeza*. The judge also found confirmation for the viewpoint that Swati law had evolved in the textbook of another academic, Bennett. The latter's scholarly writing on African customary law is well known in South Africa (*Mabuza* 2003, para. 26). Finally, in the light of the plaintiff's testimony that she and the defendant regarded themselves as married despite the absence of *ukumukeza* and the other evidence (testimony of de Villiers and Bennett's book), the Court concluded that the custom of *ukumukeza* had evolved and that the marriage was valid.

Bakker (2018, 8–11) points out that *Mabuza* has been wrongly cited by case law as authority for the contention that the integration of the bride can be waived by agreement between the couple's respective families. He argues that the differentiation between "integration" (*ukumukeza*) and "handing over" is artificial. *Ukumukeza* is just one of the rituals to be performed during handing over, together with other rituals, and it cannot be regarded as an essential requirement. In *Mabuza*, only one part of the integration process, the *ukumukeza*, did not take place. According to the Court (*Mabuza* 2003, para. 25), the absence of this ritual did not render the marriage invalid because the custom has "evolved so much that it is probably practised differently than it was centuries ago".

The Court's reasoning on the relationship between customary law and human rights, which ties in with the discussion in the next section, is also noteworthy. As clarified by the judge in *Mabuza* (2003, para. 31), the approach whereby customary law is only recognised when it does not conflict with human rights leads to injustice. The courts have a constitutional duty to develop customary law following the Bill of Rights' spirit, purport and objects. Ascertaining customary law is thus only the first hurdle to get over. The next step will be a human rights exercise to assess the customary rules' constitutionality as soon as the customary law has been determined.

The Role of Cultural Experts in Resolving the Conflict between Customary Law and Human Rights

The role of cultural experts is usually prominent during the trial stage, when evidence is presented, as explained in the previous case study. However, in the *MM* (2013) case, cultural expertise was used in the appeal court. In this case, the first wife (Ms M, the applicant) became aware of a second wife (Ms N, the respondent) when her husband died in 2009. Both claimed that they had been married to the deceased under Tsonga customary law. Ms M had married the deceased in 1984 and Ms N in 2008. Ms M disputed the second marriage's validity to Ms N, which marked the beginning of a lengthy litigation process. Firstly, she obtained an order in the High Court that confirmed her marriage's validity and the invalidity of the second one to Ms N (*MM* 2010). Ms N appealed the decision, and the Supreme Court of Appeal held that both marriages were valid (*MN* 2012). Ms M, in turn, appealed to the Constitutional Court (*MM* 2013), which deviated considerably from the approach taken by the two courts from which the appeal had been taken.

Two questions were considered by the Constitutional Court, namely whether the consent of the existing wife was necessary for the validity of the husband's subsequent marriage; and whether the Court could develop customary law in a manner that gives effect to the Bill of Rights (*MM* 2013, para. 1). To answer the first question, the Court considered that it did not have enough evidence on record to determine the issue and that the parties should present further

information to the Court. The Court's request opened the floodgates. Both the parties and the *amici curiae* (consisting of the Women's Legal Centre Trust, the Commission for Gender Equality and the Rural Women's Movement) used the opportunity to file additional affidavits. The Court received other opinions from cultural experts, including individuals involved in customary polygynous marriages, traditional leaders, advisors and legal anthropologists. What followed was a diversity of views on what Tsonga customary law prescribed in the situation where a husband wanted to marry a further wife. However, the Court was not unnerved by the plethora of new evidence placed on record, as it said (*MM* 2013, para. 60):

> We do not think this [diverse] picture of Xitsonga [Tsonga] customary law that the further evidence has given us should be viewed as presenting a difficulty in deciding the case before us. It is a necessary process that courts must go through to give customary law its proper place.

In the judge's words, cultural expertise presented different nuances and perspectives on whether the permission of the first wife was imperative to validate the second marriage. Despite the contradictory evidence before it, the Court concluded that the first wife's consent was necessary to validate a further marriage because the constitutional demand for equality and human dignity required it. As said (*MM* 2013, para. 69):

> It is in the light of these constitutional guarantees that we must determine whether the Constitution demands that the consent of the first wife be given before a subsequent customary marriage can validly be entered into.

This comment brings us to the second question. The Court chose an interpretation of the customary rule compatible with human rights and values. In answering the question of whether a first wife's rights to equality and human dignity would be infringed if her husband were allowed to marry a second time without her permission, the Court answered in the affirmative (*MM* 2013, para. 71).

> The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that "even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children". While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution.

The Court put forward several reasons why equality and human dignity would require the collaboration of a first wife to allow a husband to conclude

a subsequent valid marriage. For one, a further marriage might deny her the opportunity to make an informed decision on her personal and reproductive health or the proprietary consequences of a subsequent marriage (*MM* 2013, para. 72). Also, she effectively loses autonomy over her family life when a second wife steps into the marriage (*MM* 2013, para. 73). She has to tolerate an outsider's intrusion in her marriage's privacy (*MM* 2013, para. 74). In conclusion, the judge found that (*MM* 2013, para. 75):

> Xitsonga [Tsonga] customary law must be developed, to the extent that it does not yet do so, to include a requirement that the consent of the first wife is necessary for the validity of a subsequent customary marriage. This conclusion is in accordance with the demands of human dignity and equality.

The *MM* case demonstrates that human rights will always trump customary practices that infringe on the rights of vulnerable members of society. Therefore, one can conclude that cultural expertise plays an essential role in highlighting litigants' cultural backgrounds before a court, especially those falling outside a court's knowledge. However, the final decision to apply that knowledge is always a court's prerogative, which will only use the custom if it can withstand constitutional scrutiny.

Further Reading

Rautenbach, Christa. 2017. "Oral Law in Litigation in South Africa: An Evidential Nightmare?" *Potchefstroom Electronic Law Journal* 20, no. 2: 1–25.

The article discusses the challenges one is faced with to prove the content of living customary law in a court system that applies western rules of evidence.

Rautenbach, Christa. 2019. "Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?" *Potchefstroom Electronic Law Journal* 22, no. 1: 1–20.

The article considers whether a judgment from a mainstream court dealing with customary law can be regarded as an authority and thus as a record of a customary rule or rules.

Rautenbach, Christa. 2019. "Cultural Expertise in Litigation in South Africa: Can the Western World Learn Anything from a Mixed, Pluralistic Legal System?" In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 157–78. Bingley: Emerald.

This article investigates the diverse approaches of the South African courts regarding the admissibility of expert evidence in cases where culture (both custom and religion, in both state and non-state law) is relevant.

Q&A

1. What is the role of cultural expertise in determining the content of customary law in litigation?

Key: Customary law is an oral tradition, and its content can often be accessed only through the evidence of cultural experts. There are no formal rules for the

use of cultural experts in litigation. You need to reflect on a court's approach when it needs to make a decision based on "living" customary law.

2. What can a court do if conflicting evidence from cultural experts is presented before it?

Key: South Africa follows an accusatorial (adversarial) procedure, which means that litigants need to adduce evidence, including the calling of witnesses, to prove their case.You need to reflect on the courts' approach when they are presented with conflicting evidence on the existence of a customary law rule.

3. What is the courts' approach when a customary law rule infringes the human rights of one or more litigants?

Key: It is essential to know that the South African Constitution is supreme and that all law is subject to it.The Constitution contains a Bill of Rights that applies to both the common and the customary law. Section 39 of the Constitution explains what courts must do when interpreting the Bill of Rights.

4. What is the role of cultural expertise when a court must determine whether a living customary rule infringes litigants' rights under a system of customary law?

Key: This is not an easy question to answer. One must understand that a court decides whether a customary rule infringes on a human right or not. However, a cultural expert can influence the reasoning of a court. It would help to reflect on how this can happen during the litigation process. Also, various courts have not always come to the same conclusion in seemingly identical cases, despite being assisted in the process by cultural experts.

References

Bakker, Pieter. 2018. "Integration of the Bride as a Requirement for a Valid Customary Marriage: Mkabe v Minister of Home Affairs [2016] ZAGPPHC 460." *Potchefstroom Electronic Law Journal* 21, no. 1: 1–15.

Government of South Africa. 1996. *The Constitution of the Republic of South Africa*. Approved on 4 December, 1996.

Rautenbach, Christa. 2008. "South African Common and Customary Law on Intestate Succession: A Question of Harmonisation, Integration or Abolition." *Electronic Journal of Comparative Law* 12, no. 1: 119–32.

———. 2019a. "Case Law as an Authoritative Source of Customary Law: Piecemeal Recording of (Living) Customary Law?" *Potchefstroom Electronic Law Journal* 22, no. 1: 1–20.

———. 2019b. "Cultural Expertise in Litigation in South Africa: Can the Western World Learn Anything from a Mixed, Pluralistic Legal System?" In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 157–78. Bingley: Emerald.

———. 2021. *Introduction to Legal Pluralism in South Africa*, 6th ed. Durban: LexisNexis South Africa.

———. 2017. "Oral Law in Litigation in South Africa: An Evidential Nightmare?" *Potchefstroom Electronic Law Journal* 20, no. 2: 1–26.

South African Government. 1993. *Interim Constitution of the Republic of South Africa, Act 200 of 1993.*

Spies, Amanda. 2016. "The Importance and Relevance of Amicus Curiae Participation in Litigating on the Customary Law of Marriage." *African Human Rights Law Journal* 16, no. 1: 247–64.

Zenker, Olaf. 2016. "Anthropology on Trial: Exploring the Laws of Anthropological Expertise." *International Journal of Law in Context* 12, no. 3: 293–311.

Cases Cited

Alexkor Ltd v. Richtersveld Community. (12) BCLR 1301 (CC) (Constitutional Court of South Africa 2003).

Bhe v Magistrate, *Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v. President of the Republic of South Africa.* (1) SA 580 (CC) (Consitutional Court of South Africa 2005).

Mabuza v. Mbatha. (4) SA 218 (C) (South Africa: Western Cape High Court 2003).

MM v. MN. (4) SA 286 (GNP) (South Africa: North Gauteng High Court 2010).

MM v. MN. (4) SA 415 (CC) (Consitutional Court of South Africa 2013).

MN v. MM. (4) SA 527 (SCA) (South Africa Supreme Court of Appeal 2012).

24

CULTURAL EXPERTISE AND INDIGENOUS ECOLOGIES

Aurélien Bouayad

LEARNING OBJECTIVES

This chapter focuses on the role of cultural expertise in ecological controversies related to the legal status of ecological traditions and practices of Indigenous communities. It questions the cultural and historical biases embedded in Eurocentric legal systems and the complexities and tensions that characterize the involvement of cultural experts in these conflicts. This chapter analyses three case studies: the legal debates over the ceremonial use of peyote by Native American communities; the protection of the rights of Indigenous communities to their ancestral lands in Latin America in the *Awas Tingni* case before the Inter-American Court of Human Rights; and the efforts of the Makah Tribe to obtain a quota in order to resume traditional whaling. After reading this chapter you will have learnt about the intermediation of anthropologists, religious scholars and historians in order to assist legal institutions to understand Indigenous ecologies, which often lie at the heart of the material and cultural life of these communities.

Introduction

Ground-breaking research in the field of environmental anthropology and philosophy has resulted in the radical questioning of some of the most fundamental concepts of Western epistemology, including the supposedly universal concept of nature. The dualistic model of a *Grand Partage* (a Great Divide) between nature and culture as a predetermined standpoint being called into question, the study

DOI: 10.4324/9781003167075-29

of the specific ideas, histories, values and beliefs involved in the relationships and interactions that link humans and non-humans in any particular community has proven a crucial contribution of these academic fields (Latour 1993; Descola 2014; Viveiros de Castro 2015). The notion of ecologies in its plural form hence highlights that, within each society, a broad diversity of practical and symbolic relationships with the environment coexist and can produce conflictual situations.

Alongside the concerns provoked by the global climate crisis, the decline of biodiversity and the threats to ecosystems as a consequence of human activities, recent decades have witnessed an increasing awareness of the importance of ecological practices and traditions for many of the world's Indigenous communities, whose material and cultural survival is often inextricably tied to their traditional land and natural resources (Martínez-Alier 2002; Schlosberg 2005). Socio-historical perspectives, however, reveal that the significance of Indigenous ecologies has long been, and still largely remains, unrecognized by modern legal systems, which have tended to silence or even criminalize ecological traditions that are seen as conflicting with legal regulations (see Srinivasan, Chapter 3 in this volume).

Theory and Concepts

ECOLOGICAL CONTROVERSIES

The notion of ecological controversies relates to a large variety of legal conflicts that result from the confrontation of non-dominant (in this chapter, Indigenous) ecological practices with mainstream laws and policies. These controversies include cases over subsistence or ritual hunting practices involving endangered species, ceremonial or medicinal uses of psychoactive plants, lack of legal protection for sacred natural sites, traditions of animal slaughtering or sacrifice, patenting of sacred natural resources or eviction from, and denial of access to, protected areas.

Called upon to arbitrate in these conflicts, legal institutions (courts, legislative bodies, regulatory agencies) often rely upon cultural experts in order to elucidate the historical, cultural and/or religious context which constitutes the background of Indigenous communities' ecological claims. The modalities of the intervention of these experts (which originate from a variety of fields of social sciences, although predominantly anthropology) take a plurality of forms that can all fall under the integrated definition of cultural expertise by Holden (2011). Various types of cultural expertise include but are not limited to the production

of written testimonies and cultural affidavits for judicial purposes, participation in hearings by committees and the preparation of reports for administrative application processes (Grillo 2016; Holden 2011; Holden 2019; Rodriguez 2018).

The case studies explored in this chapter will provide illustrations of the multifaceted role played by cultural experts in the legal perception and eventual arbitration of Indigenous ecological claims. Particular attention will be given to the role of cultural expertise in the mediation and legitimization of these claims, and the extent to which these operations are circumscribed within dominant legal argumentative frameworks. The discussion will additionally underscore the risks associated with the implicit encouragement of producing overly-stereotyped representations of Indigenous identities (Povinelli 2002; Engle 2010), as well as the ethical and deontological dilemmas often experienced by cultural experts, torn between expectations of impartiality and suspicion of bias towards Indigenous communities (Hale 2006; Low and Merry 2010).

Case Studies

The Peyote Controversy

Since the earliest recognition of its use on Native American reservations in the late 1880s, peyote has lain at the heart of a series of legal battles over religious rights and Indigenous self-determination in the United States. Yet, in spite of the persistent assaults aiming at outlawing the medicinal and sacramental uses of peyote by Indigenous communities, this ecological practice

FIGURE 24.1 "Peyote Ceremony" by James Mooney, 1893 (Courtesy of the National Anthropological Archives, Smithsonian Institution; gelatin glass negative BAE GN 01778a 06305400).

has been able to survive both the Prohibition era and the war on drugs era and eventually become a reference point in the legal debate over non-recreational use of psychoactive substances (Maroukis 2012; Dawson 2018).

INDIGENOUS USES OF PEYOTE

Peyote (*Lophophora williamsii*) is a small, spineless cactus with psychoactive properties, which grows in a limited area situated at the junction of southern Texas and northern Mexico. Recent archaeological studies suggest that for thousands of years before the "discovery" of America, populations living in the area of peyote growth were familiar with the plant and its psychoactive properties (Dawson 2018; Terry et al. 2006). When the Spanish encountered peyote a couple of decades after their conquest of the Aztecs, they vigorously opposed this ecological practice: the Inquisition in New Spain issued an edict of faith banning the use of peyote in June 1620 (Chuchiak 2012).

Although its medicinal and sacramental uses had been historically limited to Indigenous peoples located in the territory of Mexico, the dynamics of colonial expansion in North America have resulted in the progressive diffusion of these practices outside their traditional territory, all the way from Western Central Mexico to Canada – to such an extent that Peyotism eventually became the first pan-tribal religion in the United States, claiming today over 300,000 members (Anderson 1996; Stewart 1993).

In several respects, the ecological controversy over the use of peyote provides an eloquent illustration of the multifaceted roles that cultural experts can play in such situations. From the late 19th century to the end of the 20th century, two generations of anthropologists have proven to be strategic allies for Native American Peyotists. The analysis reveals in particular that the historical evolution of the conflict, which first played out in the legislative arena before migrating to judicial settings, imposed a transformation and a diversification of the ways these experts were involved.

The first generation was led by James Mooney, who provided the first ethnographic description of a peyote ceremony in the late 19th century (Mooney 1892; see Figure 24.1). Together with Francis La Flesche, Truman Michelson and Alfred Kroeber, he testified in legislative hearings on several occasions to counterbalance the arguments of prohibitionists lobbying for a national ban. These academics played a pivotal role during the extensive Congressional hearings on a federal prohibition bill that took place in the spring of 1918; contributing at length, they provided scientific legitimation for the claims brought forward by the ten Native American representatives who tried to convince the subcommittee of the innocuousness and religious sincerity of their use of peyote. Although

the bill passed the House in October 1919, it was eventually rejected in the Senate (US Congress 1918; Bouayad 2019).

Following this episode, Mooney encouraged the movement's leaders to organize an established church during the summer of 1918. His involvement in the incorporation of the Native American Church (NAC), assisting the leaders of the movement in their strategic adaptation to, and recapture of, legal rationality, certainly constitutes a unique example of anthropologists' involvement in such legal controversies: by helping to consolidate the religious character of the movement, he significantly complicated the legal crusade of anti-Peyotists, who were, from now on, forced to quarrel with the stringent constitutional protections afforded to religious freedom in the American legal tradition (Ahdar and Leigh 2005; Nussbaum 2010). For this reason, Mooney subsequently suffered from institutional retaliation, as he was recalled by the Bureau of American Ethnology and never again allowed to return to Oklahoma to continue his study (Moses 1978).

The reconfiguration of the controversy in the decades following the Second World War, which led the NAC to challenge the constitutionality of state prohibition laws before the courts, similarly saw the active involvement of a second generation of dedicated anthropologists (Omer Stewart, Weston La Barre, James Slotkin, Richard Schultes and Vincenzo Petrullo). Stewart was appointed as an expert witness in eight court cases from 1960 to 1982, providing detailed historical and ethnographic evidence supporting the religious claims brought forward by Native American Peyotists (e.g. *People v. Woody* and *People v. Mana Pardeahtan*).

Although the precise impact of the anthropologists' mediation role in the judicial successes secured by the NAC is difficult to assess, their recurrent presence undoubtedly constituted a unique and remarkable feature of the NAC legal strategy (Bouayad 2019). Yet this case also illustrates the enduring and problematic dual position experienced by anthropologists involved in this type of controversy, navigating between a supposedly impartial position as expert witnesses and an arguably biased involvement as advocates for Native American religious rights – a tension that had dire professional consequences for James Mooney. Furthermore, the central and critical role played by cultural expertise arguably reveals how enduring the prejudices against Native American rights claims are, as Peyotists seem to have constantly felt the need to have a "legitimate" intermediary (at least in the eyes of the legal institutions, as demonstrated by the 1918 hearings) to give weight to the authenticity of their claims for exemption (see Higgins, Chapter 18 in this volume).

The Awas Tingni Case

The issue of the recognition and effective legal protection of the right of Indigenous peoples to the lands they have traditionally occupied has long been and remains a pivotal issue as a consequence of the crucial relationship that many of these communities entertain with their territories, reflecting a cultural identity often inextricably linked to an extended history of engagement with particular places and landscapes (Black 2010; Johnson 2016). Historically undermined

by a variety of legal instruments that have accompanied colonization processes, Indigenous modes and conceptions of land tenure associated with alternative systems of ecological uses of territories have been largely overlooked by legal institutions and superseded by the regimes of private property and commodification. Yet, starting in the 1990s, increasing awareness of Indigenous issues paved the way for progressive advancements in the recognition of land rights throughout the world, often as a result of hard-fought legal battles (Medina 2016; see also Trigger, Chapter 21 in this volume).

In this respect, since the turn of the century, the Inter-American Court of Human Rights (IACHR) has initiated significant steps towards better legal recognition of Indigenous rights to ancestral lands. In a series of decisions concerning Nicaragua, Ecuador, Paraguay and Suriname (e.g. *Yakye Axa Indigenous Community v. Paraguay* and *Saramaka People v. Suriname*), the Court has developed an innovative and progressive canon of legal interpretation for the adjudication of these Indigenous ecological claims. Integrating a rich body of ethnographic testimonies and evidence, and extensively analysing spiritual and cultural arguments, the IACHR has acknowledged the role of ancestral lands as a fundamental element of Indigenous identities (Tramontana 2010; see also Arajärvi, Chapter 17 in this volume).

The IACHR landmark decision was *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), which both marked the first occasion on which an international tribunal with legally binding authority found a government in violation of the collective land rights of an Indigenous people and played a fundamental role in the establishment of anthropological testimonies as common procedural practice within Inter-American court hearings pertaining to Indigenous rights (Anaya and Grossman 2002).

THE AWAS TINGNI STRUGGLE TO RECLAIM THEIR TERRITORY

The Awas Tingni is an Indigenous Mayagna community of approximately 2,400 members which has occupied land rich in timber and other natural resources on the Atlantic coast of Nicaragua for generations. Since the 1950s, the community has requested that the Nicaraguan government demarcate their territory. Yet in 1996 Nicaragua granted a 30-year timber-cutting license to a Korean company, permitting the exploitation of nearly 160,000 acres of tropical forest belonging to the Awas Tingni.

The community, which was not consulted prior to the negotiation of the timber contract, vehemently opposed the intervention in their land. Having unsuccessfully attempted to solve the problem through direct negotiation with the government, the Awas Tingni resorted to the national judiciary. After a series of unfavourable decisions there, the case was taken to the Inter-American Commission on Human Rights before reaching the IACHR (Anaya and Crider 1996).

Besides the testimonies of members of Indigenous communities, conservation and rural titling experts and local attorneys, the Court relied upon the expert opinion and testimony of four anthropologists to conclude that Nicaragua had violated the right to property and judicial protection of the Awas Tingni community by failing to demarcate communal land and by attempting to grant concessions to third parties for commercial development. Discussing the community's connections with the sacred hills and the areas dedicated to specific funeral and hunting rituals, the concurring opinion in *Awas Tingni*, for instance, relied on the testimony of Harvard anthropologist Theodore McDonald Jr to affirm:

> [This communal conception] has a cosmovision of its own, and an important intertemporal dimension, in bringing to the fore the bonds of human solidarity that link those who are alive with their dead and with the ones who are still to come.

Following this decision, the development of anthropological testimony as a usual evidentiary resource in cases related to Indigenous rights to territories within the Inter-American system has prompted critical reactions from within the anthropological field in relation to the ethical, deontological and epistemological tensions that emerge from this mode of engagement (Hale 2006). Noting that rights have become contingent on notions of an "authentic" cultural subject, which must be verified and included as evidence in Court, anthropologist Christopher Loperena (who was involved as an expert witness in *Garífuna Punta Piedra Community v. Honduras*) lays stress on the epistemological tensions and discursive strategies that characterize the transformation of anthropological conceptualizations of culture into the legalistic framing of culture in order for expert evidence to be heard in courts of law (Loperena 2020). Specializing in Australian Indigenous struggles for territorial rights, anthropologist Elizabeth Povinelli further questions the necessity for Indigenous peoples to articulate their legal claims on the basis of cultural difference and an intrinsic relationship to the land, highlighting the risks inherent in a mode of recognition that encourages members of these communities to silence internal conflict, deny the dynamic nature of cultural and ecological practices and identify with essentialized representations of identity in order to attain rights (Povinelli 2002).

The Makah Whaling Controversy

The international regulation of whaling has proven a contentious issue for more than a century as a consequence of the dramatic depletion of whale populations caused by commercial whaling and of the complex symbolism associated with one of the largest and most emblematic animal species on Earth. However, since the early efforts of international conservation in the 1930s, the recognition that the impact of subsistence whaling was substantially different from commercial impacts and that the groups engaged in these practices had a certain right to

these resources, which took precedence over other rights to access, allowed for Indigenous whaling activities to be accommodated differently from large-scale commercial whaling operations. Established in 1946, the International Whaling Commission (IWC) introduced a system of "aboriginal subsistence whaling" quotas determined by an assessment of the cultural and nutritional factors associated with Indigenous communities' whaling practices (Gambell 1993; Harrop 2003).

Amongst the many debates generated by this exemption system, an intense ecological controversy was triggered in the United States, opposing fervent conservationists to Indigenous rights advocates when, in 1995, the Makah Tribe announced its wish to restart its traditional whaling activities. Following the removal of the Eastern Pacific stock of grey whales from the List of Endangered and Threatened Wildlife, this Native American community located in the area of Neah Bay in the Olympic Peninsula (Washington State) began preparations to apply for a quota before the IWC, in consultation with the National Marine Fisheries Service (NMFS).

THE MAKAH WHALING TRADITION

The Makah have inhabited the area of Neah Bay in the Olympic Peninsula (Washington State) for more than 3,000 years, acquiring much of their food from the ocean. Reflecting the importance of whaling and sealing in its cultural and economic practices, the Makah Tribe is the only Indigenous group in the United States with a treaty that specifically reserves the right to hunt whales (Reid 2015).

Although the Makah were forced to discontinue whale hunting in the 1920s in response to the devastating effects of European and American commercial whaling operations, many cultural attributes associated with whaling, such as songs and dances, traditional stories, jewellery and art, training practices and spiritual values remained active, while whale meat and oil from other sources was still consumed by some families on the Neah Bay reservation through at least the 1940s (Sepez 2008).

As the tribe's request for up to five grey whales per year was estimated to have no measurable impact on the population growth (National Marine Fisheries Service 1997), much of the debate focused on whether the Makah had a legitimate cultural and nutritional claim to resume whale hunting. The arguments in favour of the tribe's request were assembled in the Needs Statement that was produced by the United States to the IWC in 1997. The document (of particular interest to our discussion, as it investigates and translates into legally acceptable terms the ecological significance of Makah whaling traditions) was prepared by Ann

Renker, an anthropologist who has been conducting research on the community's culture and language for more than 30 years and has been living on the reservation since 1986 (Renker 1997).

The Needs Statement describes the tribe's whaling history, the cultural significance of whaling, the role of the whale for food and ceremonial purposes, and the means of whale harvesting and distribution. In order to demonstrate that "[the] Makah whale hunt is essential to meet the continuing subsistence and cultural needs of the Makah community", the document relies on an eclectic set of data, including oral history produced by tribe members, anthropological research, archaeological reports, sociological surveys and "nutrigenomic" studies. But because the Makah had to stop their whaling activities in the 1920s, there had been no direct observation of Makah whaling practices on which Renker could rely. Therefore, she had to put a particular emphasis on the only "existing" and "visible" evidence of the historic reliance of the Makah on whaling, namely archaeological records.

The IWC eventually granted the Makah a quota in 1997. Although no hunt took place in 1998, after several unsuccessful tries, a Makah whaling crew eventually struck a grey whale on 17 May 1999. However, the hunt occurred amid great controversy and intense media coverage; convinced of the unsustainability and illegitimacy of the quota, several animal rights and environmental organizations consequently prepared to challenge the legality of the hunt. In a series of contentious decisions (*Metcalf v. Daley*, *Anderson v. Evans*), American courts concluded that the environmental assessment produced by federal regulatory agencies did not adequately address the impact of whaling on the local ecosystem, thereby requiring more thorough environmental evaluation (Tomlinson 2003; Roberts 2010). Despite continuing efforts by the Makah and the NMFS to secure the necessary waivers and the requested assessments, it remains unclear as of today whether the Makahs will be authorized to re-establish their long-customary and treaty-reserved practice of whaling (Stevens 2017). It consequently appears that, by favouring the application of the radical conservation rationale promoted by animal rights organizations (which, in this case, found little or no support within the scientific community) over the recognition of tribal sovereignty and cultural identity, American courts have so far tended to ignore the wealth of evidence provided by Ann Renker in her cultural expert witness report; the Needs Statement, which insisted in particular on the devastating consequences that the absence of whaling would have on the whole community, was indeed only cited once in the two judicial proceedings that followed the successful hunt of 1999.

Conclusion

These three case studies demonstrate the central and multifaceted role of cultural expertise in ecological controversies. As the vast diversity and critical importance of the ways in which human communities relate to and interact with their environment have only recently emerged in academic discussions, thanks to the advent of

comparative inquiries into Indigenous and other non-Eurocentric ecological traditions, the need for intermediaries able to translate into legally receivable terms the claims of Indigenous communities has proven critical. Far from limiting themselves to acting as expert witnesses in judicial settings, anthropologists and other cultural experts have become strategic allies for Indigenous communities engaged in the defence of their ecological practices, providing testimonies before legislative and intergovernmental bodies, and even counselling them in their interactions with national, regional and international legal systems. Yet, as revealed by the analysis of the three case studies, the intervention of cultural experts in ecological practices is not devoid of limits and tensions. Despite their detailed and convincing nature, these types of evidence may sometimes be insufficient to help Indigenous claims supersede other competing interests (as in the case of Makah whaling) or may confront anthropologists and other scientists with problematic deontological, ethical or epistemological challenges.

Further Reading

Cruikshank, Julie. 1992. "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in Delgamuukw v. B.C." *BC Studies – A Quarterly Journal of the Humanities and Social Sciences* 95: 25–42.

The article examines the judicial treatment of anthropological expertise in the context of the landmark *Delgamuukw* decision over the protection of ancestral lands in Canada, analysing the arguments put forward by the Supreme Court of British Columbia to question the scientificity and legitimacy of the expert testimonies produced by anthropologists about aboriginal oral tradition in the context of the case.

Burke, Paul. 2011. *Law's Anthropology: From Ethnography to Expert Testimony in Native Title*. Canberra: ANU Press.

The book explores the construction and judicial reception of anthropological expertise in Native title claims in Australia; examining four cases in detail, the author reflects in particular upon the role played by legal rationality in the reconstruction of ethnographic data for judicial purposes and questions the increasing scepticism displayed by judges when confronted to expert evidence.

Bouayad, Aurelien. 2020. "Wild Rice Protectors: An Ojibwe Odyssey." *Environmental Law Review* 22, no. 1: 25–42.

The article discusses the long-standing legal struggle that the Ojibwe community had to endure in the defence of its ecology, exploring in particular the involvement of historians and anthropologists in court cases over off-reservation usufructuary rights and the role of advocacy groups in the elaboration of innovative legal strategies aiming at furthering the legal protection of wild rice in the United States.

Q&A

1. What are the reasons behind the involvement of cultural experts in legal controversies over the protection of Indigenous ecologies?

Key: Students should reflect on legal institutions' demand for specialized knowledge in order to locate and translate into legally acceptable terms

the cultural facts that are relevant for the adequate understanding of ecological claims and, eventually, for decision-making. The sources of and potential issues associated with the reliance of law-makers, judges and lawyers upon scientific rationality could also be examined.

2. What are the principal challenges associated with the increasing involvement of anthropologists as cultural experts in the mediation of Indigenous communities' ecological claims?

Key: Students should discuss the ethical and deontological issues faced by anthropologists, the difficulties of adapting to the special environment of legal discussion and argument, and the occasional suspicion towards the expert evidence they produce (in particular because of their alleged biases towards Indigenous communities).

3. What are the main obstacles to the inclusion of Indigenous ecologies into legal systems?

Key: Students should reflect on how the historical patterns of discrimination suffered by Indigenous communities, as well as the law's striving for uniformity, have tended to produce a lack of legal inclusion of Indigenous ecologies. By way of contrast, the possibilities of such inclusion should be examined, using the cases discussed in the chapter.

References

Ahdar, Rex, and Ian Leigh. 2005. *Religious Freedom in the Liberal State*. Oxford: Oxford University Press.

Anaya, S. James, and Claudio Grossman. 2002. "The Case of *Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples." *Arizona Journal of International and Comparative Law* 19, no. 1: 1–15.

Anaya, S. James, and S. Todd Crider. 1996. "Indigenous Peoples, the Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua." *Human Rights Quarterly* 18, no. 2: 345–67.

Anderson, Edward F. 1996. *Peyote: The Divine Cactus*. Tucson, AZ: University of Arizona Press.

Black, C. F. 2010. *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence*. London: Routledge.

Bouayad, Aurelien. 2019. "The Cactus and the Anthropologist: The Evolution of Cultural Expertise on the Entheogenic Use of Peyote in the United States." *Laws* 8, no. 2: 12.

Chuchiak, John F. 2012. *The Inquisition in New Spain, 1536–1820: A Documentary History*. Baltimore, MD: Johns Hopkins University Press.

Dawson, Alexander S. 2018. *The Peyote Effect: From the Inquisition to the War on Drugs*. Berkeley, CA: University of California Press.

Descola, Philippe. 2014. *Beyond Nature and Culture*. Chicago, IL: University of Chicago Press.

Engle, Karen. 2010. *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*. Durham, NC: Duke University Press.

Gambell, Ray. 1993. "International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling." *Arctic* 46, no. 2: 97–107.

Grillo, Ralph. 2016. "Anthropologists Engaged with the Law (and Lawyers)." *Antropologia Pubblica* 2, no. 2: 3–24.

Hale, Charles R. 2006. "Activist Research v. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology." *Cultural Anthropology* 21, no. 1: 96–120.

Harrop, Stuart R. 2003. "From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission." *Journal of International Wildlife Law and Policy* 6, no. 1–2: 79–104.

Holden, Livia, ed. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.

———. 2019. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

Johnson, Miranda C. L. 2016. *The Land Is Our History: Indigeneity, Law, and the Settler State*. New York: Oxford University Press.

Latour, Bruno 1993. *We Have Never Been Modern*. Cambridge, MA: Harvard University Press.

Loperena, Christopher A. 2020. "Adjudicating Indigeneity: Anthropological Testimony in the Inter-American Court of Human Rights." *American Anthropologist* 122, no. 3: 595–605.

Low, Setha M., and Sally Engle Merry. 2010. "Engaged Anthropology: Diversity and Dilemmas." *Current Anthropology* 51, no. S2: 203–26.

Maroukis, Thomas C. 2012. *The Peyote Road: Religious Freedom and the Native American Church*. Norman, OK: University of Oklahoma Press.

Martínez-Alier, Joan 2002. *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation*. Cheltenham, UK; Northampton, MA: Edward Elgar.

Medina, Laurie Kroshus. 2016. "The Production of Indigenous Land Rights: Judicial Decisions across National, Regional, and Global Scales." *Political and Legal Anthropology Review* 39, no. 1: 139–153.

Mooney, James. 1892. "A Kiowa Mescal Rattle." *American Anthropologist* 5, no. 1: 64–5.

Moses, L. G. 1978. "James Mooney and the Peyote Controversy." *Chronicles of Oklahoma* 56: 127–44.

National Marine Fisheries Service. 1997. *Environmental Assessment of the Makah Tribe's Harvest of up to Five Gray Whales per Year for Cultural and Subsistence Use*. Silver Spring, MD: United States Department of Commerce.

Nussbaum, Martha Craven. 2010. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. New York: Basic Books.

Povinelli, Elizabeth A. 2002. *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*. Durham, NC: Duke University Press.

Reid, Joshua L. 2015. *The Sea Is My Country: The Maritime World of the Makahs*. New Haven, CT: Yale University Press.

Renker, Ann M. 1997. *Whale Hunting and the Makah Tribe: A Needs Statement*. International Whaling Commission Report 49-AS5 (1997).

Roberts, Christina. 2010. "Treaty Rights Ignored: Neocolonialism and the Makah Whale Hunt." *The Kenyon Review* 32, no. 1: 78–90.

Rodriguez, Leila. 2018. "Introduction: Cultural Expert Testimony in American Legal Proceedings." *Studies in Law, Politics and Society* 74: 1–10.

Schlosberg, David. 2005. *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism*. Oxford: Oxford University Press.

Sepez, Jennifer. 2008. "Historical Ecology of Makah Subsistence Foraging Patterns." *Journal of Ethnobiology* 28, no. 1: 110–33.

Stevens, Jeremy. 2017. "Of Whaling, Judicial Fiats, Treaties and Indians: The Makah Saga Continues." *American Indian Law Journal* 1, no. 1: 99–126.

Stewart, Omer Call. 1993. *Peyote Religion: A History*. Norman, OK: Oklahoma University Press.

Terry, Martin, Karen L. Steelman, Tom Guilderson, Phil Dering, and Marvin W. Rowe. 2006. "Lower Pecos and Coahuila Peyote: New Radiocarbon Dates". *Journal of Archaeological Science* 33: 1017–21.

Tomlinson, Zachary. 2003. "Abrogation or Regulation? How *Anderson v. Evans* Discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity." *Washington Law Review* 78, no. 4: 1101–29.

Tramontana, Enzamaria. 2010. "The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources." *International Journal on Minority and Group Rights* 17, no. 2: 241–63.

U.S. Congress, House, and Committee on Indian Affairs. 1918. *Peyote: Hearings on H.R. 2614, 67th Cong., 2nd sess*. Washington, DC: Government Printing Office.

Viveiros de Castro, Eduardo. 2015. *Cannibal Metaphysics*. Minneapolis, MN: Univocal.

Cases Cited

Anderson v. Evans, 314 F. 3d 1006 (9th Cir. 2002).

Garífuna Punta Piedra Community v. Honduras, IACHR Series C No. 304 (Inter-American Commission of Human Rights 2015).

Mayagna (Sumo) Awas Tingni Community v. Nicaragua, IACHR Series C No. 79 (Inter-American Commission of Human Rights 2001).

Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000).

People v. Mana Pardeahtan, Criminal Cause No. 9454, County Court, Country of Denver (June 27, 1967).

People v. Woody, 61 Cal.2d 716 (1964).

Saramaka People v. Suriname, IACHR Series C No. 172 (Inter-American Commission of Human Rights 2007).

Yakye Axa Indigenous Community v. Paraguay, IACHR Series C No. 125 (Inter-American Commission of Human Rights 2005).

25

CULTURAL EXPERTISE IN THE UNITED STATES

ChorSwang Ngin

LEARNING OBJECTIVES

After reading this chapter on four asylum seekers from Asia in the United States, you will understand the people who have claimed rights; the reasons for their claims; the relationship between the victims of brutal and inhumane treatment and their government; policy implications for a more just society; and an understanding of the plurality of peoples, cultures and religions in Asia. The cases include: (1) a Korean Chinese practitioner of Falun Gong who delayed applying for asylum because of her love for her parents, (2) a homosexual man from China who refused the unacceptable existence expected by his culture and state, (3) a Tamil Indian woman from Malaysia whose insufficient dowry led to domestic abuse and an escape to save her own life and her daughter's life and (4) a young Indonesian man from a Muslim family whose only way to follow his heart was by becoming an apostate from Islam.

Introduction

During the past two decades, Asia has become the centre of the world's economy. While Asia's economic ascendency suggests an emerging new international order of networks and flows, an undeclared fact, representing Asia's underbelly, is that Asia is home to the largest undocumented movements of people in the world (Asylum Insight 2015). According to the Migration Policy Institute, migration to the Americas by people from India, South Korea and China represents some

DOI: 10.4324/9781003167075-30

of the fastest growth rates, outpacing Mexican migration to the United States (Phippen 2015; Yates 2019).

Among those who have entered the United States are individuals who asked lawyers to help them request asylum. What experiences in their homeland drove them to seek asylum? What conceptual and methodological approaches should we employ in their claims of persecution when requesting asylum protection? This chapter employs cultural expertise as a framework for ethnographic interviews to tell the stories of four asylum seekers and to examine their claims of rights and their requests for protection (see Figure 25.1).

The four stories are drawn from my research as an anthropological expert witness in federal courts in the United States (Ngin 2018). The asylum seekers told their stories after they arrived in the United States, as we prepared their cases for the courts. In this chapter, we meet them through their stories and learn about their claims and their relationship with their culture, society and government to account for their decisions to leave home.

The cases were selected to cover a wide region so as to highlight Asia's extreme plurality of cultures, ethnicities, government systems and religions. The homelands of these asylum seekers form an arc from China's northeast through Shanghai, to Malaysia and to Indonesia in the Malay Archipelago on the western shore of the Pacific.

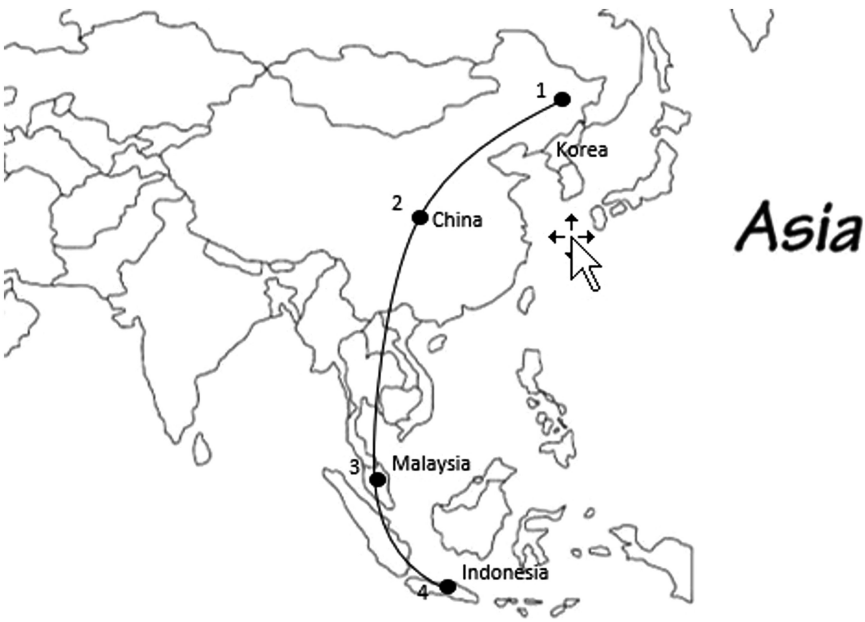


FIGURE 25.1 Map showing national origin of the four asylum seekers to the United States.

Theory and Concepts

The 1951 UN Convention on Refugees and the 1967 Protocol states that an individual applying for asylum protection must provide evidence of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, be outside the country of their nationality and be unable or, owing to such fear, unwilling to avail themselves of the protection of that country.

They must also apply within a year after their arrival. These grounds for asylum claims form the theoretical socio-legal framework for examining and isolating the necessary components of cultural expertise for each case.

Cultural expertise is defined as any use of cultural knowledge, broadly defined, for in-court and out-of-court litigation to appraise facts in contexts with which the decision-making authorities are not familiar (Holden 2011, 2019).

Ethnographic interviews are a methodological approach to understanding people in their cultural context by taking into account their actions and relationships with others, their language and symbols and their shared meanings to produce a coherent narrative account of that particular culture. These ethnographic accounts are submitted to the courts as a part of the asylum seekers' petition.

Case Studies

A Dutiful Korean Chinese Daughter and Falun Gong Follower

Ms Li is an ethnically Korean Chinese woman from China's northeast. Li and her husband were model citizens at a provincial government enterprise. Her husband went abroad to make a living after their daughter was born. Li learned about the health benefits of Falun Gong (FLG) exercises from her parents. She performed the exercises with fellow FLG followers at a public park. Falun Gong's official website describes it as a Chinese practice that combines meditation with qigong exercise and has a moral philosophy centred on the tenets of truthfulness, compassion and forbearance (真、善、忍). However, on 22 July 1999, the Chinese government announced that Falun Gong was an evil cult (*xie jiao*) and said that its principles were lies and that its goals were to topple the Chinese government, bring harm to society and poison the heart of the Chinese people (Madsen 2000). Li felt that this was contrary to her experience of FLG's health benefits.

In late July 1999, the police arrested Li and others while they were practising FLG as usual. At the detention centre, the police questioned Li regarding every detail of her involvement with FLG activities. She enthusiastically shared information on her improved health and said that she was not anti-government as everyone could see for themselves when she exercised openly at the park. The police challenged her "twisted logic": "If Falun Gong was so great why are there hospitals and patients?" They told her the charismatic founder of Falun Gong, Li Hong Zhi, was trying to topple the Chinese government and fool its believers. When Li disagreed with them, they beat her up, blamed her for lying and

committing a crime and argued that the arrest was justification for the crime. Li was incredulous that the police accused her of getting herself arrested instead of the government for arresting her. After the interrogation, the police sent Li to re-education classes where she barely had enough food or water to survive. She developed a fever and asked for a doctor, but the police ignored her. After Li's release four days later, she went to the hospital for the fever and the injury from the beating.

After Li returned home, members of the Neighbourhood Association visited her. At first, she thought they were concerned (*quan xin*) about her welfare. When the visits continued, she felt that she was under their surveillance. The Neighbourhood Association visitors told her they were surprised at her claims of beating and detention; they told her she must have injured herself. They searched her home for FLG tapes and books and interrogated her again about FLG. At work, the management dismissed Li for giving the company a bad reputation due to her crime of disobeying a government policy.

Unable to withstand the constant surveillance, Li escaped by joining a business group visiting the United States. She settled in Koreatown in Los Angeles, California. She was hoping the Chinese government would change its policy, so she could return home to be with her daughter and her ageing parents. From Li's contacts, she learned about asylum protection, but she did not apply because she had learned that the Chinese government was arresting relatives of those who applied for asylum in the US. As a dutiful daughter, she could not jeopardize her parents' safety to benefit her own wellbeing. When Li was ready to apply for asylum, the lawyers in Koreatown could not help her because they were unfamiliar with FLG as it "was not a Korean issue".

Key Components of Cultural Expertise

What is Falun Gong? FLG is an indigenous religious movement that combines local beliefs with exercises and meditation. It has attracted millions of followers inside and outside of China since its emergence in China in the mid-1990s. When FLG members pressed the Chinese government for official recognition, the government banned it and labelled it as an evil cult, antithetical to the Marxist socialist agenda of the government. The ability of FLG organizations to organise, mobilize and justify collective action was considered a threat to the Chinese government. The government has brutally suppressed the movement and detained its members at various prisons and extra-legal detention centres inside China (Tong 2002).

Socio-cultural context of FLG: Li practised FLG for health reasons. However, by joining a group of practitioners she inadvertently became part of the banned movement and a target of the government's repressive FLG policy. Li escaped China to be free to practice FLG. After Li gained asylum, she immediately arranged to meet her parents and her daughter in South Korea. Without asylum protection, she would never have been able to see them again.

Growing up Gay in China: "I Did Not Do Anything Wrong"

Mr Ang grew up outside Shanghai. He first became aware of his sexuality in high school sex education classes. Ang kept his homosexuality a secret because of a profound social constraint on sexual matters in China (Ruan and Tsai 1988). His high school taught that gays spread AIDS and that gays were morally corrupt. Perceptions about same-sex intimacy between girls and boys are different. Chinese girls can be close without arousing suspicion. However, when two boys show affection to each other, they are punished and are seen as *quaiwu* – weirdos. Given China's one-child policy, parents expect their only child to marry and bring them grandchildren. Being an only child, his parents would never accept his homosexuality and would send him to a hospital if they discovered his sexual orientation (Mathew 2000). During his final year in high school, Ang had a secret relationship with a schoolmate. They dated by telephone and saw each other only during holidays when they visited public parks together. After high school, Ang's parents sent him to France to study hospitality ahead of the Summer Olympics in China in 2008.

Studying and Being Gay in France

Ang did not fully grasp the extent of how unfree he was until he was in France. He was shocked by the ordinariness of being gay amongst his classmates and professors. During his second year, he fell in love with an Italian classmate. Upon completion of his studies, Ang applied for a J-1 visa to the United States for practical training in hotel management. During the summer break before his training, Ang brought his friend, Luca, to meet his parents because he said they loved each other and wanted to be together.

Persecution of a Gay Person in China

Perhaps he had been in France for too long; Ang said he did not consciously think about being gay until his neighbours stared at him suspiciously and the Neighbourhood Association visited him regarding his "homosexual activity". Even though China lacks explicit public policies relating to lesbian, gay, bisexual and transgender people, its culture regards homosexuality as a violation of traditional morality. The Neighbourhood Association gave Ang an ultimatum: send his gay friend away, or they would report them to the police. Before long, the police arrested both Ang and Luca. At the detention centre, they told Ang that being gay causes AIDS and sets a bad example for others. Ang protested and the police beat him up brutally. The police threatened to send him to the much-feared "labour re-education camp". They locked him up in a dirty cell without any water or food and released him 24 hours later after his parents had paid a fine. After his release, Ang learned that the police had also beaten up, fined and deported Luca, without even giving him a chance to say goodbye. After Ang's

release, he had to report to the police monthly. The police also ordered his parents to place their son under surveillance "to prevent him from engaging in homosexual behaviour again". Recognizing the troubles ahead, Ang immediately left for the United States. After he learned about asylum and the necessary procedures, he contacted a lawyer for help.

Key Components of Cultural Expertise

Homosexuality in China: This case illustrates the tension between an individual's desire to live and love freely as a gay person and his government and culture's homophobia. In China, even though homosexuality is not criminalized, the country lacks policies or laws that would recognize sexual and gender minorities or protect them from discrimination and unfair treatment (UNDP 2016). In fact, the government has declared that the People's Republic of China would remain firm in its limitation of marriage to a man and a woman (Mendos 2019). Homosexuals whose sexual preference is revealed may face job loss and removal from education. Victims usually have no legal recourse against discrimination. Even in relatively "open" Shanghai, police harassment was commonplace (Wickerham 2007).

Social and cultural context of homosexuality in China: Much of the public discussion on sexual orientation in China is driven by the threat of AIDS (UNDP 2016). Cultural norms discourage open acknowledgement of sexual orientation. Many gays feel social pressure to marry and have a child to continue the family name, and they do not want to disappoint their families (Jeffreys 2018). Family pressure and rejection can have more serious consequences, with some LGBTI people being forced into psychotherapy and sometimes even "conversion therapy" (UNDP 2016). The stigmatization of homosexuals in Chinese culture and society by its deep-rooted cultural homophobia, and by the Chinese government through lack of policy, legislation and positive endorsement (Miles-Johnson and Wang 2018), often leads to subsequent abuse by the police who are able to arrest homosexuals even though the government does not specifically criminalize homosexual acts.

An Asian Indian Woman Victim of Domestic Violence: "I Did It for My Daughter"

Rani is a third-generation Malaysian-born Indian woman. She was promised in marriage to Raju, a fellow Malaysian of Indian origin, who had studied in the United States and was considered a good catch. At first, Rani was considered a good match because of her two-year college degree.

Rani's family had promised a dowry but before they could fully pay up, Raju left for work in the United States. After Raju's departure, his parents demanded that Rani cook and clean for them. They beat her when the work was not done properly, told her she was of a different caste, not worthy of their son, and that

he could have married better because they had invested a lot of money in him. To avoid shame to the family, Rani's parents could not withdraw from the engagement. Rani said that it was a terribly unhappy situation. She was only 21, scared, and did not know what to do. The only thing she could do was obey them.

A year later, Raju went home to marry Rani. After that, they returned to the United States. A daughter was born there.

After completing his work abroad, Raju and his family moved back to Malaysia. In their own home, Raju too started to abuse Rani. He humiliated and beat her in front of her daughter, her parents, his parents and her brother. He created opportunities to blame Rani as a "bad" woman by making her cook for the men he brought to the house while he was away. Rani suspected her husband was making money by "selling her" to the strangers, which meant hoping they would have sex with her or rape her, so he could justify killing her.

Rani was hurting emotionally and physically from the cruelty inflicted. Rani's mother blamed Rani for her "bad karma" or the fate she was born with and refused to help. Her brother told her to report matters to the police. When Rani reported to the police, the woman police chief, who was a Malay and a Muslim, refused to help. She told her to remain with her husband, "Otherwise, your husband will start drinking". "Men have power; you must let men be themselves. If a husband has another woman, you can't ask about it, because that is how it is in the Muslim culture. Women must obey and let the husband do whatever he wants … You are so lucky; your husband has only one wife. My husband can have up to four wives". Rani thought: "I am not a Malay and a Muslim. I am an Indian and a Hindu. The police were applying Muslim standards on me as a Hindu woman".

To survive, Rani escaped to the United States. She applied for asylum at the National Immigrant Justice Center in Chicago. Seyfarth Shaw, a major law firm in Chicago, took it as a *pro bono* case. In Rani's arduous process to seek help, she said she did it for her daughter.

Key Components of Cultural Expertise

Evidentiary proof of persecution: Rani's problem of insufficient dowry turned into a horrific domestic abuse case. From scars on her body and doctors' reports, Rani presented clear evidence of persecution based on her gender or her "membership of a particular social group" but the police did not help her when she requested a restraining order on her husband.

Gender, colour and culture: Articulating Rani's case reveals deeper layers of dispute founded in both India's and Malaysia's history and culture. It includes their contemporary development and differences based on a combination of ethnic origin, culture, caste, education and colour, including a comparison between Rani's parents' darker Southern Indian Tamil origin and Raju's Central Eastern Telegu origin as a basis for demeaning Rani.

Bumiputera affirmative action policy: The insufficient dowry led to an attempt to extract extra free labour from Rani to compensate for Raju's greater "worth/cost" given his parents' investment in his education in the United States. Both Raju's family and Rani herself are resentful of Malaysia's *bumiputera* affirmative action policy that gives preferential treatment to Malays in scholarships and hiring. They figured that Raju would "cost" less and Rani would be "worth" more if they had the same scholarship opportunities.

Sharia Law in the Adjudication of a Hindu Woman in a Case of Domestic Abuse

Malaysia is multi-ethnic and multi-religious. Malays are Muslim by legal definition. Malays are the majority, followed by Chinese and Indian populations. Sharia law is not imposed on non-Muslims. Given Malaysia's Malay supremacy based on the "Malay race" (*bangsa Melayu*) and Islam (Leow 2016), Islamic values have come to dominate Malaysian culture and civil society and seep into the civil service/police service to affect Rani, as a Hindu woman whose domestic marital life was being viewed by Muslim officers with Islamic values.

An Apostate from Islam in Indonesia: "I Want a Religion That Speaks to My Heart"

Situ Tanjung was born into a prominent political Muslim family in Sumatra. During the family's two-decade stay in California, his parents practised Islam through observations such as praying, fasting and following strict dietary practices. However, they did not teach Situ Tanjung the customs and culture of being a Muslim or an Indonesian. Their plan to return to Indonesia was a dilemma for Situ Tanjung. How would he fit into the expectations of a Muslim culture he barely knew?

While growing up in California, he never learned Arabic or read the Koran. During Ramadan, he did not observe fasting because his parents wanted him to focus on his work as a coach for a school sports team. As a young teen attending California public school, his parents did not tell him what food to avoid at the school cafeteria. When his parents celebrated Idul Fitri to break the fast, Situ Tanjung knew it only as a cultural holiday and an Indonesian New Year.

Through sports, his friends came from a multi-ethnic group of people in Southern California. He drank an occasional beer with his friends, even though Islam forbids alcohol. Through his Catholic Vietnamese and Filipina girlfriends, Situ Tanjung attended youth activities and other observances at the churches in Los Angeles. Over the years, Situ Tanjung said, "When it came to a matter of spiritual issues, I tend to draw on the Church for inspiration".

In time, with the support of his Filipino friend, Situ Tanjung converted to Catholicism. He said he was not rebelling against his family or his religion. Instead, he explained,

> I converted for myself. It was a religion I could relate to … I needed a faith I could understand. My girlfriends were all Catholic and my current girlfriend is a Filipina and a Catholic. I feel connected to the religion.

Allowing one's children to marry across religions would be considered normal practice in California, but according to Islamic culture, when a daughter marries, a father is supposed to "give his daughter" to another Muslim man only. When a son marries a woman, the woman is supposed to convert to Islam before she can marry the son. When Situ Tanjung's older sister decided to marry out of her faith, her father did not forbid her, but he kept the wedding and the reception a secret from all their Indonesian colleagues, family and friends "to protect themselves from people who would blame them for not bringing up good Muslim children".

Key Components of Cultural Expertise

The law: Apostasy in Islam refers to desertion from the community. Apostasy is not in the penal code of many Islamic countries, but many Islamic jurists follow their own interpretation of the Koran. Conversion out of Islam in Indonesia is a very sensitive issue. It is not discussed publicly, and the outcome is uncertain (Garces 2010). Explicit examples of what happens to an apostate are provided by the cases of Abdul Rahman in Afghanistan and Lina Joy in Malaysia. In the case of Abdul Rahman, a global outcry against the death sentence led to the Pope's request for his pardon. With no escape for Lina Joy after conversion, her lawyer recommended that she apply for asylum abroad. In Indonesia, according to Sidney Jones, the director of the Institute for Policy Analysis of Conflict (IPAC), several hardline Islamic groups have emerged to create a more conservative and intolerant atmosphere, with the backing of the military and police, creating vigilante-style violence (Mackey and Dolven, 2018).

Socio-cultural contexts of faith and religious freedom: In the United States, religious freedom is taken for granted. Faith is a personal matter. Within the same family, husband and wife and parents and children need not share the same religion. In the relaxed secular atmosphere of Southern California, Situ Tanjung's parents did not bring him up as a "proper" Muslim or a "proper" Indonesian, if there is such a thing. Situ Tanjung shares more in terms of class and culture with other middle-class Americans of all origins than with a group of Indonesian students at his university in Los Angeles. Growing up in California, he became a "cool Californian dude", or an "Angeleno" who plays sports, drinks and socializes across all multi-ethnicities of Southern California.

Clearly, Situ Tanjung was not fighting against his parents or his former religion. He merely fell in love with a few Asian girls and their Catholic religion: his heart was swayed by both the women and their faith. Given Indonesia's persecution of "deviants", Situ Tanjung was afraid to return home.

In short, the cultural expertise perspective of this case must take into account the tension between an increasingly conservative and intolerant Islamic society

supported by the military and the police in Indonesia and more liberal and modern interpretations of Islam embraced by Situ Tanjung's family. The latter position represents a "modern" western discourse of human rights that defends the rights of the individual's choice of marriage partner and religion (Kortteinen 2008).

Conclusion

In the stories of these four asylum seekers' claims of rights, poverty did not drive them to seek asylum protection. They lead economically secure lives that reflect Asia's relative economic security resulting from global commerce, diplomacy, international travel and education. Using the concept of culture and cultural expertise in the analysis of these cases, we have observed how the state, civil society, community and family affect the lives of four individuals.

On a daily basis, Ms Li and Mr Ang and those in China who live outside the "norms" of the FLG ban and heterosexual normativity must endure the brute force of an authoritarian state. The state deployed traditional culture to justify its suppression when it was not able to have absolute control over FLG organizations and those who are openly gay.

In multi-ethnic and multi-religious Malaysia, restrictions on members of a minority such as Ms Rani must take into account the cultural practice of dowry, belief in karma and discrimination based on colour; and, more importantly, the imposition of the majority Malay Muslim cultural values through the police's normal, everyday administration of the affairs of a diverse citizenry. The domestic abuse resulting from insufficient dowry was compounded by resentment towards the government's *bumiputera* affirmative action policy and missed opportunities. In Indonesia, given the dominance of civil society by an increasingly conservative Islam, all other variants of religious practices are considered deviant (Wisnu 2009).

Despite the persecution and the constraints, the asylum seekers of our case studies were their own agents who sought to control their own destiny. Their attraction to the West was not based on abstract ideas of freedom and democracy, but on their individual desires to live, to believe, and to love freely, which were hindered by their countries' policies and social mores, whether explicitly or implicitly.

The judges on the cases were evidently moved by their unflinching sincerity and granted them asylum protection. As a factor in the judges' positive decisions, one must also take into account the special value of the socio-legal scholar's cultural expertise, which includes presenting to the legal system relevant facts necessary for upholding the rights of the asylum seekers by locating the relevant cultural attributes and the social conditions that brought about the persecution in their homeland in the first place.

Given the closing of borders to migrants and asylum seekers everywhere in the world, there are fewer options for migrants, and the problems of their daily life yield

no answers. The ordinary asylum seekers' search for rights to live and to love shows us, on the one hand, the survival of hope in the extraordinary underbelly of Asia and, on the other hand, the increasing need for cultural expertise with its capacity to explain the cultural background of facts and people for successful claims for rights in diverse societies. By incorporating the analytical value of cultural expertise in the understanding of the rights of asylum seekers, this special knowledge enables socio-legal scholars to locate and describe relevant facts necessary for upholding the rights of asylum seekers.

Further Reading

Hathaway, James C. 2018. "The Global Cop-Out on Refugees." *International Journal of Refugee Law* 30, no. 4: 591–604.

This important article discusses the challenges and possible alternatives to refugee protection.

Heinz, Carolyn Brown and Jeremy A. Murray. 2018. *Asian Cultural Traditions*. 2nd ed. Long Grove, IL: Waveland Press.

This volume provides the cultural, historical and political contexts of the extraordinary diversity that exists in the lives of the peoples of South Asia, East Asia and Southeast Asia.

Human Rights Watch. 2019. *World Report 2019. Events of 2018: China*. HRW, 135–150.

This report provides a comprehensive update on the events related to human rights issues in China and provides a background on the reasons for people seeking asylum.

Q&A

1. What was Ms Li's view on Falun Gong exercise compared to the view of the Chinese government?

Key: Li practised FLG for health reasons. The Chinese government regarded FLG as an evil cult.

2. What were the cultural arguments presented by Ms Li for her delay in applying for asylum?

Key: Filial piety; FLG is a Chinese issue unfamiliar to lawyers in LA's Koreatown.

3. What is the contemporary Chinese view of homosexuals?

Key: China regards homosexuality as morally corrupt behaviour.

4. What was Ang's view toward his homosexuality compared to China's views on him?

Key: Ang felt he did not do anything wrong as a homosexual; he only wanted to be with the man he loved, but Chinese society regards it as morally corrupting.

5. What was the basis for Rani's claim for rights?
   Key: Right of protection by the police.

6. Why were Rani's rights and protection denied?
   Key: Rani was a Hindu woman being judged by Malay Muslim cultural standards. Her right to protection was also denied based on the idea that she should return to her husband and the idea of karma.

7. What is Islam's policy on apostasy?
   Key: According to Islamic jurisprudence, apostasy is the same as desertion, and the punishment is death, even though it is rarely carried out.

8. Why did Situ Tanjung convert to Catholicism?
   Key: He followed his heart and the Catholic girlfriends he dated.

9. *Exercise*: After reading the chapter, ask students in the class to list and role-play all the possible roles based on culture, ethnicity, nationality, sexual orientation, education, colour and religion and examine how each affects their rights.

References

Asylum Insight. 2015. "Asylum Today: The Asia-Pacific Context." *Asylum Insight: Fact & Analysis*. https://www.asyluminsight.com/asylum-today-asia-pacific

Garces, Nicholas. 2010. "Islam, Till Death Do You Part? Rethinking Apostasy Laws Under Islamic Law and International Legal Obligations." *Southwestern Journal of International Law* 16, no. 1: 229.

Holden, Livia, ed. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.

———, ed. 2019. *Cultural Expertise and Socio-Legal Studies*. Bingley: Emerald.

Jeffreys, Elaine. (2018). "Public Policy and LGBT People and Activism in Mainland China." In *Routledge Handbook of the Chinese Communist Party*, edited by Willy Wo-Lap Lam, 283–96. Abingdon: Routledge.

Kortteinen, Timo. 2008. "Islamic Resurgence and the Ethnicization of the Malaysian State: The Case of Lina Joy." *Sojourn: Journal of Social Issues in Southeast Asia* 23, no. 2: 216–33.

Leow, Rachel. 2016. *Taming Babel: Language in the Making of Malaysia*. Cambridge: Cambridge University Press.

Mackey, Wil, and Ben Dolven. 2018. *Religious Intolerance in Indonesia*. Congressional Research Services, October 10, 2018.

Madsen, Richard. 2000. "Understanding Falun Gong." *Current History* 99, no. 638: 243–7.

Mathew, Penelope. 2000. "Conformity or Persecution: China's One Child Policy and Refugee Status." *University of New South Wales Law Journal* 23, no. 3: 103–34.

Mendos, Lucas Ramón. 2019. *State-Sponsored Homophobia 2019*. Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World).

Miles-Johnson, Toby, and Yurong Wang. 2018. "'Hidden Identities': Perceptions of Sexual Identity in Beijing." *The British Journal of Sociology* 69, no. 2: 323–51.

Ngin, ChorSwang. 2018. *Identities on Trial in the United States: Asylum Seekers from Asia*. Lanham, MD: Rowman & Littlefield.

Phippen, J. Weston. 2015. "Asians Now Outpace Mexicans in Terms of Undocumented Growth." *The Atlantic*, August 20, 2015.

Ruan, Fang-fu, and Yung-mei Tsai. 1988. "Male Homosexuality in Contemporary Mainland China." *Archives of Sexual Behavior* 17, no. 2: 189–99.

Tong, James. 2002. "An Organizational Analysis of the Falun Gong: Structure, Communications, Financing." *The China Quarterly* 171: 636–60.

UNDP. 2016. *Being LGBTI in China – A National Survey on Social Attitudes towards Sexual Orientation, Gender Identity and Gender Expression*. Beijing: United Nations Development Programme.

Wickerham, Joshua. 2007. "The Silent Death of Shanghai's First Gay Hotline." *The Gay & Lesbian Review Worldwide* 14, no. 6: 46.

Wisnu, Andra. 2009. "Lia Eden Sentenced to Prison, Again." *The Jakarta Post*, June 3, 2009. https://www.thejakartapost.com/news/2009/06/03/lia-eden-sentenced-prison-again.html

Yates, Caitlyn. 2019. "As More Migrants from Africa and Asia Arrive in Latin America, Governments Seek Orderly and Controlled Pathways." *MPI – Migration Policy Institute*, October 22, 2019.

26

CULTURAL EXPERTISE IN CHILE

Roberto Álvarez San Martín

LEARNING OBJECTIVES

This chapter focuses on the use of cultural expertise in the form of cultural defence in criminal proceedings in Chile. It describes how cultural expertise is used by defence lawyers and how it is received by judges in judicial decision-making. The following cases are analysed: an Aymara shepherdess convicted of abandonment of a child resulting in death; the exoneration from criminal responsibility on cultural grounds in a homicide offence in a Pewenche community; and an application of Indigenous customs in a burglary in a Mapuche community. After reading this chapter you will appreciate the strengths and weaknesses of cultural expertise and cultural defence in criminal matters and understand its role in conflict resolution in Chile.

Introduction

Cultural expertise is understood as a formal opinion from an expert on a particular culture, concerning aspects of that culture that are relevant to legal proceedings involving one or more individuals who are members of a given social group (Marroquín 2006; Holden 2019). This definition contains two fundamental elements: understanding that cultural expertise contributes to the construction of legal truth (Holden 2019; Sánchez 2015); and allowing an approach to the socio-legal and cultural context of a crime.

DOI: 10.4324/9781003167075-31

In the construction of legal truth, cultural expertise is an umbrella term for various socio-legal tools: using cultural reasoning to achieve conflict resolution (Holden 2020); and ascribing value to customs, cultural belonging (Berho, Castro, and Le Bonniec 2016) and social and territorial rootedness (Álvarez 2014). Likewise, cultural expertise is an interpretation of cultural realities (Sánchez 2010), which identifies and describes facts and provides evidence of the context in which a crime occurred (Le Bonniec 2018) so that the court has the necessary knowledge to decide the case. Cultural expertise has been applied in litigation over the territorial rights of Indigenous peoples and in the application of the customs of Indigenous peoples, development studies, international human rights advocacy, migrant rights and gender rights. Cultural expertise can be used in any legal discipline (Herrera 2010).

Theory and Concepts

In Latin America, the use of cultural expertise as evidence in criminal courts dates back to 1975 in Colombia, the 1990s in Mexico, Peru and Argentina, and the beginning of the 21st century in Chile and Costa Rica. In Mexico, Guatemala and Chile, the use of cultural expertise is based on the Indigenous and Tribal Peoples Convention 1989 (ILO 2019) and its main utility is in the criminal defence of Indigenous peoples, seeking exoneration or mitigation of criminal liability.

In Chile, Indigenous custom as an exonerating or attenuating circumstance of criminal responsibility has been part of national legislation since 1993, but its use was only formalised with the reform of the country's criminal procedure in 2000. Indigenous custom as an argument for cultural defence was reaffirmed in 2008 with the ratification of the Indigenous and Tribal Peoples Convention 1989 (ILO 2019). Defence lawyers in criminal courts have used cultural expertise as a defence argument in the prosecutions of culturally motivated crimes (Faundes-Peñafiel 2019), taking into consideration the cultural background of the crime (Álvarez 2014; Couso 2012). According to Faundes-Peñafiel (2019), this would represent an advance in the recognition of the right to cultural identity. In the south of Chile, since 2011 defence lawyers are increasingly incorporating anthropological expertise as judicial evidence (Berho, Castro, and Le Bonniec 2016). However, the openness of criminal courts to admitting anthropological expertise and cultural defences depends on the political attitudes of the individual judge. There are judges who argue that it is the duty of defence lawyers to incorporate cultural diversity in the trial, and others who state that Indigenous customs are not valid as evidence unless so specified in the criminal code (Álvarez 2017). Thus, the customary law of Indigenous peoples continues to be applicable only insofar as permitted by national law.

In two decades of cultural expertise and the admission of cultural evidence to the courts of justice, the experience in conflict resolution in criminal courts is highly diverse, ranging from recognising and applying Indigenous customs to disregarding them.

Case Studies

Aymara Shepherdess

In July 2007, Gabriela Blas, an Aymara woman, was shepherding in the Altiplano, accompanied by her three-year-old son. At a certain point, she went in search of two llamas leaving the boy in a seemingly safe and sheltered place; when she returned, the boy had disappeared. The woman thought that the boy had returned home alone. However, she did not find him at home. She looked for the boy the whole day and the day after. Not finding her son, she reported him to the police as missing, and as a result, she was illegally detained for six days, accused of the crime of abandonment of a minor in a solitary place, resulting in his death, and was remanded in custody for five months in solitary confinement (Valenzuela 2014). In 2009, the boy's body was found on the slopes of the Tacora volcano, 14 kilometres from the place where he was last seen by his mother. In the first trial, she was sentenced to ten years and one day in prison. After a second trial, she was sentenced to 12 years. After serving five years in prison, she was pardoned by the President of the Republic. In 2013, the case was taken to the Inter-American Court of Human Rights, where a mediated settlement was reached, whereby the State of Chile would implement a series of corrective measures and make a public apology to the Aymara shepherdess.

Cultural expertise was submitted by an expert in Aymara culture, who gave evidence to the Oral Trial Court about the socio-cultural context of the accused as an Indigenous woman. However, the prosecution and judges constructed a profile of the accused based on Western ethnocentric gender stereotypes: an abnormal mother, erratic and negligent, suggestible and a liar, lacking in empathy, cold and cautious, of questionable morality and sexuality (Chávez 2018). This was the outcome of an ethnocentric, patriarchal and colonial vision (Olivares 2019). The court did not consider the cultural specificities of the Andean worldview, the territorial space and Aymara gender conceptions, which include pastoral work as a female activity and the subordination of women to men. The court acknowledged the existence of Indigenous customs but did not reach its judgment in accordance with them.

This case shows that when national law is imposed over customary law, a series of internationally enshrined rights are affected, such as the recognition and protection of social and cultural values and practices, respect for the integrity of the values and practices of Indigenous peoples or, in the case of the application of criminal sanctions, giving preference to sanctions other than imprisonment (Articles 5 and 10 of Indigenous and Tribal Peoples Convention 1989).

Malón de Caiñicu

In July 2002, in Alto Bio Bio, a Pewenche group occupied a piece of land in the Indigenous community of Caiñicu, generating a conflict with another Pewenche group that had acquired the land through procedures established in national legislation. In order to expel the recent occupants, the Pewenche who inhabited the land decided to apply Mapuche justice by carrying out a *malón*, an ancestral

solution to conflicts through the violent eviction of the occupants of a place who do not comply with or respect the community's rules of coexistence. After the new arrivals settled on the land, the previously settled community and its *lonco*, or leader, began to feel psychologically and physically intimidated. Faced with this situation, in accordance with ancestral practices and in loyalty to the *lonco* as the traditional authority (Faundes-Peñafiel 2019), the Pewenche who inhabited the land decided to carry out an eviction to restore order and harmony in the life of the Caiñicu community. An action was carried out on 13 July 2002, which resulted in two deaths and 14 injuries. These events were denounced and criminally investigated before the Santa Bárbara Criminal Court, which ordered the preventive detention of 18 members of the Caiñicu Indigenous community, suspected of having participated in the *malón*. After a year of investigation, in June 2003, the accused were charged.

During the trial, two anthropological experts were instructed to set the historical, social and cultural context of the facts. The judges of the court made an ethnocentric interpretation of the background provided by the experts on the nature and purpose of the *malón*, considering this Indigenous custom as an aggravating circumstance and, therefore, the 15 defendants were convicted, against which the defence appealed the sentence, which was confirmed by the Court of Appeals of Concepción. As a last resort, the defence filed a cassation appeal with the Supreme Court of Justice against the decision of the Concepción Court of Appeals. Applying Article 54 of the Indigenous Law, Articles 5, 6, 8, 9 and 10 of the Indigenous and Tribal Peoples Convention 1989 (ILO 2019), Article 5 of the Political Constitution of the Republic and Articles 26 and 27 of the International Covenant on Civil and Political Rights, the highest Chilean court of justice recognised the value of the custom asserted in the trial, applying it as a mitigating factor which reduced the sentences for all the defendants. The Supreme Court's written judgment states that the *malón* must be interpreted in the context of the application of a mechanism proper to the Az Mapu – a Mapuche normative system that establishes and regulates individual and collective behaviour – as well as the exercise of Mapuche customary law and that the defendants acted as they did because they were loyal to their *lonco*, practising the ancestral uses and customs of that community (José Patricio Maripil Porteño, Miguel A. Porteño Naupa, Sabastián M. Porteño Naupa, Carlos F. Curriao Campos, José S. Porteño Naupa, Juan B. Huenupe Pavian, Mario Queupil Poblete, Félix Gallina Gallina, José H. Maripil Maripil, Jorge Cabezas 2012).

In this case, the Supreme Court took only limited account of the Indigenous culture described by the cultural expertise, because although it recognised the validity of the Indigenous customary law, it resolved the conflict by applying national law.

Burglary of a Dwelling

In 2015, in an Indigenous community of Nueva Imperial, a Mapuche teenager with the initials R.A.C., a member of the said community, stole some work tools

from the home of a Mapuche neighbour, who upon noticing the theft reported the incident, resulting in the formal prosecution of the teenager in August 2015 for the crime of theft in an inhabited place.

Considering the circumstances in which the crime took place and the fact that both the victim (initials J.V.R.C.) and the perpetrator belonged to the same community, the defence attorney requested the Nueva Imperial Guarantee Court to hold a reparation agreement hearing. At the same time, J.V.R.C. and R.A.C. agreed to resolve the conflict by means of Mapuche ancestral custom. This form of resolution between Mapuche corresponds to the application of the Az Mapu, a conflict resolution mechanism in the Indigenous culture, based on the search for community welfare, the maintenance of balance with nature, discussion between the parties and the advice of community elders.

To explain this form of conflict resolution from a Mapuche perspective, an expert anthropologist from the Public Defender's Office prepared an expert report, based on the analysis and systematisation of textbooks, documentary and ethnographic sources, as well as ethnographic interviews with the accused, the victim and members of the Mapuche community, demonstrating the full validity of the Az Mapu, as well as the previous agreement reached between the victim and the accused. To support the validity of this agreement, the approval of the court was required, for which, on 21 September 2015, the hearing was held in the Guarantee Court of Nueva Imperial, where the expert report was presented and the victim accepted a public apology and the commitment of the accused to behave according to the Mapuche community life, all of which was endorsed by the judge.

In accordance with Articles 8 and 9 of the Indigenous and Tribal Peoples Convention 1989 (ILO 2019) that "in applying national legislation to the peoples concerned, due account shall be taken of their customs or customary laws" and that "the authorities and courts called upon to rule on criminal matters shall have regard to the customs of the said peoples", respectively, and the provisions of Article 54 of the Indigenous law that "customs asserted in court between Indigenous people belonging to the same ethnic group shall constitute law", the Nueva Imperial Guarantee Court applied Mapuche customary law and the conflict was resolved with the application of the Az Mapu in the reparation agreement hearing held on September 2015.

This case demonstrates that the recognition and application of the Indigenous customary law can be an effective mechanism for the resolution of conflicts between Indigenous peoples in state courts.

Conclusion

Cultural expertise has an important role to play in conflict resolution involving Indigenous peoples, although it requires the parties involved to accept that cultural diversity is prevalent in the global world and that understanding diversity requires a fair balance between expert knowledge and legal knowledge. A critical look at the Chilean experience allows us to agree with Holden (2019) when

she argues that cultural expertise represents an opportunity for anthropology and social sciences in general to contribute to conflict resolution in diverse contexts. Cultural expertise can help to achieve intercultural understanding (Castro and Vergara 2009) by providing a cultural explanation to assess specific behaviours, attitudes and circumstances (Berho and Martínez 2020).

Further Reading

Carrasco, Morita. 2015. "Diálogos de una antropóloga con el derecho a partir de su experiencia como perito en dos juicios penales." In *El peritaje antropológico: Entre la reflexión y la práctica*, edited by Armando Guevara Gil, Aaron Verona, and Roxana Vergara, 57–70. Lima: Centro de Investigación, Capacitación y Asesoría Jurídica del Departamento Académico de Derecho (CICAJ).

This reading is a first-person account of the experience of an anthropologist, instructed as a cultural expert in court. It argues that the objective of the expertise is to achieve an approximation to the (inter)subjectivity of the subjects in conflict and that the function of the anthropologist is to generate knowledge that allows judges to administer justice that takes account of the culture of the intervening parties.

Holden, Livia. 2019. "Beyond Anthropological Expert Witnessing: Toward an Integrated Definition of Cultural Expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

This reading is an introductory approach to the development and applications of cultural expertise in cross-jurisdictional contexts, its ethical foundations, the relationship between anthropologists and lawyers, its application to Indigenous territorial rights and the challenge of a reconceptualisation of cultural expertise from a decolonising and pragmatic perspective.

Le Bonniec, Fabien. 2015. "La culture mapuche à la barre : Pouvoir et médiation linguistico-culturels des facilitateurs interculturels dans les tribunaux pénaux du sud du Chili." *Autrepart* 73, no. 1: 55–71.

This paper adopts a perspective of linguistic-cultural mediation and focuses on the importance of the interdisciplinary work of cultural experts as well as language experts.

Q&A

1. Why should gender considerations be the subject of cultural expertise?

Key: Regardless of the socio-cultural context, conceptualisations of gender are social, cultural and historical constructs. Hence, cultural expertise is relevant to the understanding of gender in the resolution of judicial and extrajudicial conflicts.

2. Does cultural expertise justify homicide?

Key: Cultural expertise allows us to understand the socio-cultural and historical circumstances of the occurrence of a homicide but does not justify it. Cultural defence is a particular form of cultural expertise aiming to secure mitigating circumstances for the accused.

3. How should cultural diversity be addressed in the application of cultural expertise for the resolution of judicial conflicts?

Key: Lawyers and judges that respect and appreciate cultural diversity should favour dispute resolution based on Indigenous customs when the Indigenous peoples involved in the conflict wish so.

References

Álvarez, Roberto. 2014. "El peritaje antropológico y la defensa penal de imputados indígenas en la Araucanía, 2004–2011". *CUHSO. Cultura–Hombre–Sociedad* 24, no. 1: 81–103.

———. 2017. "Defensa penal de indígenas y diferencia cultural. Etnocentrismo en el discurso de jueces de garantía". In *IX Congreso Chileno de Antropología*, Colegio de Antropólogos de Chile.

Berho, Marcelo, Paulo Castro, and Fabien Le Bonniec. 2016. "La pericia antropológica en La Araucanía de Chile. Entre teorías y prácticas, 2003–2014." *Revista Antropologías del Sur* 3, no. 6: 107–26.

Berho, Marcelo, and Vladimir Martínez. 2020. "Estrategias, argumentos, límites y potencialidades en la defensa penal en la Araucanía Mapuche de Chile." *Chungará: Revista de Antropología Chilena* 52, no. 1: 133–42.

Castro, Milka, and Juan Vergara. 2009. *Jurisprudencia indígena: Cosmovisión y legislación*. Santiago de Chile: Universidad de Chile.

Chávez, Nicolle. 2018. "Nancy Yáñez y el caso de Gabriela Blas." *Anuario de Derechos Humanos* 14: 211–21.

Couso, Jaime. 2013. "Mapuches y derecho penal." *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política)* Paper 111: 1–65.

Faundes-Peñafiel, Juan Jorge. 2019. "Derecho fundamental a la identidad cultural de los pueblos indígenas : Un nuevo paradigma en la defensa penal indígena en Chile frente al Estado de derecho hegemónico." *Izquierdas* 45: 51–78.

Herrera, José Israel. 2010. *Peritaje antropológico. Sus realidades e imaginarios como prueba judicial federal*. Mexico: Indesol – Instituto Nacional de Desarrollo Social.

Holden, Livia. 2019. "Beyond anthropological expert witnessing: Toward an integrated definition of cultural expertise." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 181–204. Bingley: Emerald.

———. 2020. "Cultural Expertise and Law: An Historical Overview." *Law and History Review* 38, no. 1: 29–46.

ILO – International Labour Organisation. 2019. *Indigenous and Tribal Peoples Convention 1989 No 169*.

Le Bonniec, Fabien. 2018. "Interrogantes en torno a la emergencia del peritaje antropológico en las cortes de justicia del sur de Chile." In *El orden cuestionado. Lecturas de antropología jurídica*, 117–130. Buenos Aires: UNSAM Edita.

Marroquín, Otto. 2006. *El peritaje cultural indígena como forma del pluralismo jurídico indígena en Guatemala*. Guatemala: Universidad Rafael Landívar.

Olivares, Bárbara. 2019. "El caso de Gabriela Blas, la pastora aymara condenada y perdonada." *Atenea* 519: 31–47.

Sánchez, Esther. 2010. *El peritaje antropológico. Justicia en clave cultural*. Bogota: GTZ.

———. 2015. "El peritaje antropológico como prueba judicial." In *El peritaje antropológico. Entre la reflexión y la práctica*, edited by Armando Guevara Gil, Aaron Verona, and

Roxana Vergara, 23–56. Lima: Centro de Investigación, Capacitación y Asesoría Jurídica del Departamento Académico de Derecho (CICAJ).

Valenzuela, Mylene. 2014. "Disputa y conflicto cultural en el espacio judicial: El caso de una mujer indígena." *Jurídicas* 11, no. 2: 170–86.

Case Cited

José Patricio Maripil Porteño, Miguel A. Porteño Naupa, Sabastián M. Porteño Naupa, Carlos F. Curriao Campos, José S. Porteño Naupa, Juan B. Huenupe Pavian, Mario Queupil Poblete, Félix Gallina Gallina, José H. Maripil Maripil, Jorge Cabezas. Rol 2683–2010 (Corte Suprema de Chile 2012).

27

CULTURAL EXPERTISE IN SOUTH ASIA

Mary Kavita Dominic

LEARNING OBJECTIVES

This chapter investigates how legal systems in South Asia adopt various forms of cultural expertise to navigate socio-cultural plurality within the larger project of state centralisation. The focus is on India and Pakistan – two nation-states with shared histories, whose social realities and postcolonial politics have yielded different permutations to the relationship between law and culture. After reading this chapter, you will gain an understanding of how multiple legal orders interact and intersect with each other in South Asian jurisdictions while deriving their legitimacy from local cultures and constitutional norms.

Introduction

The current chapter uses cultural expertise as a frame of inquiry to study the role of local communities in confirming and perpetuating diverse sources of law. Although the term has been "designed to account for the specific but complex contributions that anthropology, and by extension social sciences, can provide to the construction of legal truths", it is not merely confined to the actual appointment of an anthropologist or other social science experts in legal proceedings (Holden 2019, 2–3). As articulated by Holden, lawyers and judges can also engage in activity that is defined as cultural expertise when they use socio-legal instruments to assess culture. Going a step further, the present chapter demonstrates how even local groups are important interlocutors between state and non-state

DOI: 10.4324/9781003167075-32

networks. By doing so, it seeks to contribute to the modicum of literature that examines the comparative aspects of legal pluralism in South Asia.

Theory and Concepts

The term "culture" is often used to describe ideas and social behaviour which help human beings to fabricate a world of meaning (Rosen 2008, 4). It is insufficient to study it at the level of nation-states or geographical areas (Cheema 2011, 49), as it can lead to parochial categories like "Western" and "Eastern" cultures. Every region or sub-region, including South Asia, is inhabited by individuals and groups who subscribe to different sociocultural norms, drawing on cross-cutting sources and defying homogenous classifications (Oommen 1999, 11–14).

Such overlapping worlds of normativity produce laws and institutions that are unique to the socio-cultural contexts of these self-determining entities. For instance, there is an extensive body of scholarship that sheds light on the varied nature of customary norms applied by village councils across India (Baxi and Galanter 1979, 343; Jaffe 2015, 103–104; Ananth Pur 2007, 4).

With the onslaught of colonialism, however, the modalities for negotiating these plural identities were upended. Long-standing prejudices against what was perceived to be a "savage" and "uncivilised" culture found political articulation through the Eurocentric enterprise of nation-state building. Law was weaponised as a tool for social engineering (Yilmaz 2005, 1) by bestowing it with the authority of the "State".

This does not imply that customary norms were completely overlooked. In a region where the public life of people was deeply interwoven with socio-cultural variables, to do so would have been an act of political suicide. Acknowledging this, the British occupiers had employed local mediators like *pandits* (Hindu law experts), *qazis* (judges in a Sharia court) and *maulvis* (Islamic scholars) to assist in the interpretation of a multiplicity of normative orders like religious customs (Jaffe 2020, 48). The recognition of such customs as sources of law, however, came at the price of submitting them to the state's overarching authority.

In colonial Bengal, for example, while working with advisory *muftis* (Islamic jurists) in matters of Muslim law, British officials pressed for a more centralised pattern of legal oversight (Nelson 2015, 236). As argued by Sharafi (2014, 11), these *muftis* and other legal professionals were perceived as cultural intermediaries and ethnographic translators, who could reconfigure colonised cultures for common-law use. They were primarily involved in the production of judicially recognised accounts of the history and value systems of colonised peoples.

Traces of this colonial legacy continue to be discernible in postcolonial states. Even in cases where there is a strong acknowledgement of religious, cultural, linguistic and local autonomy, there is a tendency for state structures to supersede these sources of law. The prevalence of such homogenising enterprises, however, should not discourage attempts to unpack community-based legal systems binding different micro-units within South Asia. As pointed out by Marc Galanter

(1981, 1–2), the view that justice "is a product that is produced – or at least distributed – exclusively by the state … is deficient". It is critical to appreciate the legal plurality that exists beyond the state (Griffiths 1986, 1; Merry 1988, 872).

Case Studies

Criminal Law and Indigenous Culture

The first case study pertains to the criminalisation of cannabis in India. Since this psychoactive plant is a customary part of life for several communities (Roychowdhury 2020), it is useful to analyse whether the state or its functionaries have used cultural expertise to accommodate these components, while fulfilling their politico-legal mandate. As will be demonstrated in the following, local communities, police officers and policymakers have often interceded with each other to enrich state law with culturally sensitive exceptions.

In parts of India, the use of cannabis is imbued with socio-cultural value. Traditional scriptures like the Vedas are replete with references to cannabis, which is described as a sacred plant (Singhal and Ahmed 2020). Studies indicate that charas, a substance made from the resin of cannabis plants, was often smoked by Hindu mystics during their prayer ceremonies in the past (Hartsuiker 1993).

Remnants of this tradition have lingered on as customary practices today, especially in holy cities like Varanasi, Pushkar and others, which are associated with the Hindu god Shiva. This is despite the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 which deems the trade and consumption of cannabis to be a criminal offence. This seemingly tense relationship between customary norms and official state law can be traced back in history.

As can be recalled, the British Indian government appointed the Indian Hemp Drugs Commission in 1893 to look into the cultivation of cannabis and criminalise it (Mills 2009). However, a blanket prohibition had failed to materialise then. This changed with the US escalating its fight against opium use in the 1900s. A concerted effort was made by the nation to internationalise its prohibitionist approach to drugs. Eventually, a US-sponsored resolution led to the adoption of the UN Convention on Narcotic Drugs in 1961.

It did not take much time for India to succumb to this international pressure. By 1964, it had ratified the UN Convention and followed it up with domestic NDPS legislation (Singhal and Ahmed 2020). The use of cannabis, which had been culturally approved for thousands of years, was criminalised in one swoop.

Local communities, however, developed forms of resistance to such state norms. A study by Berti and Tarabout (2012, 197–203) in the north-Indian state of Himachal Pradesh shows that despite the enactment of the NDPS Act, the criminalisation of cannabis was not met with widespread local acceptance. The investigating police officers, many of whom maintained ties with local communities, applied their internalised cultural expertise by intentionally committing procedural lapses to avoid prosecution. In some instances, even the local villagers

avoided testifying in the courtroom. By undermining the case of the prosecution in this manner, a low rate of conviction was ensured for cannabis cultivation inside the state.

Of course, this pattern of cannabis consumption was not restricted to the state of Himachal Pradesh alone. Other parts of India, including the eastern and northeastern states of West Bengal, Bihar, Sikkim, Mizoram, Nagaland and Meghalaya have also reported the use of cannabis or charas, as per a report on the *Magnitude of Substance Use in India, 2019* by the Indian government (Ministry of Social Justice and Empowerment 2019, 17). Whether this practice was tacitly supported or wilfully ignored by state functionaries is a matter that needs to be probed more deeply.

Similarly, Indian jurisprudence has tolerated the consumption of cannabis in the form of *bhang*, a drink made out of cannabis leaves, whose use has spiritual connotations. The Hindu god Shiva is acclaimed to be the "God of bhang" and to this day, his devotees partake in its consumption (Bennett 2019). Consolidated precedents have interpreted the NDPS act as only banning the use of cannabis buds and resins, and not leaves. Such legal protection for bhang would not have been possible without an appreciation of the socio-cultural context by policymakers.

Clearly, the transplantation of a prohibitionist socio-political thought prevailing in Britain and America during the 19th and 20th centuries has failed to extinguish the customary practice of cannabis use in India. By making room for culturally aware exemptions under the NDPS Act, there is a normative affirmation of culture, both within and outside the bounds of state law.

Cultural Expertise in Theocracies

As part of the second case study, we examine the functioning of Pakistan's Federal Shariat Court (FSC) through the case of *Saleem Ahmed v. Government of Pakistan*. By unpacking this judgement, one can study the institutionalisation of cultural expertise in countries where Islam is afforded constitutional primacy.

As opposed to the first case study, where the importance of cultural norms is only tacitly recognised, the following example illustrates how cultural expertise is formally embedded within state law. Religious scholars and institutions like the courts often negotiate with each other, drawing on their respective expertise to interpret relevant norms and customs.

Emerging from the throes of a painful partition, an Independent Pakistan had been the site of tempestuous debates regarding its core national identity. While some had perceived it as a Muslim homeland guided by the imperatives of a modern nation-state, others viewed it as a society subject to Islamic laws and injunctions. A distinction was sought to be drawn between Islam as a socio-cultural order and Islam as a religion (Varshney 2008, 6–7).

Eventually, a compromise was struck by declaring the Constitution's fidelity to Islamic norms (Lau 2006, 5–6). The clerical elite agreed to advance their

conservative values within the bounds of a constitutional democracy. The first two decades of Pakistan's existence were, therefore, characterised by an ambivalent relationship between Islamic religiosity and the state (Varshney 2008, 12).

In 1977, General Zia-ul-Haq usurped power and imposed martial law. Looking to prolong his political legitimacy by appeasing the religious orthodoxy, he sought to institute a parallel system of courts, which became a vehicle for Islamising the legal system (Cheema 2012, 878–879). The Federal Shariat Court was constituted, with its principal seat at Islamabad. Comprising eight judges, the court had the mandate to examine the conformity of state laws with Islam (Cheema 2013, 93).

Being well-versed in Islamic law, *ulemas* (Islamic scholars) were included in this adjudicatory body upon the insistence of religious revivalists (Federal Shariat Court (Procedure) Rules, 1981). It was hoped that their presence would rein in the Western ideals of liberalism and secularism that had seeped into Pakistan's institutions (Burki 2013, 44). Akin to the role played by *qazis* or *maulvis* in the colonial period, the *ulema* judges had the authority to interpret Islamic law and its foundational texts. In other words, the FSC sought to derive its legitimacy from the discursive traditions of religious scholars, apart from the legal expertise of judges.

For the purposes of this chapter, the *Saleem Ahmed* judgement (*Saleem Ahmed v. Government of Pakistan* 2014) is particularly significant. Apart from *ulemas*, the court had to grapple with a second stratum of cultural authority in the form of *fatwas* (legal opinions on Islamic law given by a qualified jurist). The impugned legislation was the 1964 West Pakistan Family Courts Act, which had conferred authority on the Family Court to dissolve a marriage on the basis of *khula*, in cases where there was no likelihood of reconciliation between the concerned spouses.

Khula is a remedy that allows Muslim women to seek divorce at their own initiative, but interpretations about its legitimacy vary under different schools of Islamic law (Holden 2012, 142–145). In the *Saleem Ahmed* case (*Saleem Ahmed v. Government of Pakistan* 2014), the petitioners had placed reliance on fatwas from the Hanafi school, which argued that the dissolution of marriage could not be authorised on the basis of *khula* if the husband was unwilling to accept the offer. Given the lack of a central authority in Islam, the FSC was faced with the dilemma of reconciling these conflicting interpretations.

Ultimately, the court held that a *fatwa*'s worth was predicated on its conformity with the Quran and Sunnah. If it was not directly rooted in these primary sources of Islamic law, it did not carry weight. By stating this principle, the judges sought to restrain their own subjectivity while evaluating multiple schools of religious thought. They relied on textual sources and religious doctrines as socio-legal instruments to assess culture while attempting to harmonise the competing interpretations of Sharia law. Similar strategies were employed in cases like *Murtaza v. Federation of Pakistan* to overrule *fatwas* that challenged the right of women to become judges (Holden 2019).

Thus, the FSC has demonstrated the capacity to navigate a wealth of cultural knowledge at its disposal, while defining Pakistan's constitutional relationship with Islam. State and non-state networks, even if sometimes contradictory, have engaged with each other, allowing religious principles to be reframed in legal settings.

Linguistic Traditions and Public Policy

The final case study pertains to the issues surrounding the ascription of "classical" status to regional languages in India. It demonstrates that in matters of public policy, which entail an appreciation of culture and history, the state can defer to experts like linguistic scholars, historians or anthropologists, who locate and describe relevant facts. Unlike the previous example, however, these cultural authorities not only engage with the judiciary but also with the legislative and executive arms of the state.

Discussions on language have always been at the centre stage of political and societal discourse in India. Very often, this manifests as an intellectual tug-of-war between the Aryan school of languages in the north and the Dravidian school in the south, each of which boasts rich linguistic traditions (Venkatachalapathy 2009). This historic rivalry can be traced to the reign of British and European imperialists in India. While philologist William Jones had theorised that all Indian languages were offshoots of Sanskrit, other colonial scholars like Robert Caldwell had contended that there existed a distinct family of Dravidian languages in the south (Trautmann 2006).

This long-standing competition eventually paved the way for modern-day linguistic politics. It is worth remembering that attempts to designate Hindi, a direct descendant of Sanskrit, as India's national language had triggered passionate debates in the first Constituent Assembly after the country's independence. While leaders like R.V. Dhulekar tried to equate Indian identity with the Hindi language, representatives from the southern states strongly pushed back against this idea (Constituent Assembly Debates 1949). Finally, the country's leaders chose not to confer national status on any particular language, owing to the politically fraught nature of this issue. While Hindi and English were deemed official languages, there were 14 other languages (later increased to 22) that were granted a "Scheduled" status. This meant that the government was under a special obligation to support their development.

Over the following years, however, regional political parties started to expand their electoral footprint and with them, the issue of granting classical status to regional languages also gained traction. Awarded to languages with rich heritage and independent literary traditions, the "classical" status was highly coveted in India. Apart from material benefits like financial assistance and state patronage (Roychowdhury 2020), there was immense prestige associated with these languages. The high degree of importance accorded to classical languages like Greek and Latin in the Western world had proven attractive to

linguistic scholars in India, many of whom aspired for the global recognition of their languages.

Thus, when a political party from the state of Tamil Nadu joined the ruling national alliance in 2004, there were vociferous demands to confer the classical status on Tamil (Venkatachalapathy 2009). Eventually, the government agreed to examine this issue. It consulted experts and established a committee for laying down the criteria of a classical language. Based on their recommendations, Tamil was formally approved as a classical language. It was soon followed by Sanskrit and other languages like Telugu, Kannada, Malayalam and Odiya (Ramasubramanian 2016).

To this day, the government relies on a Committee of Linguistic Experts to decide on the granting of classical status. The Committee is required to scrutinise the recorded history of languages, their literary traditions and the antiquity of their early texts (Ministry of Culture 2014), which act as cultural guidance for various communities. For example, when the Malayalam language was placed under scrutiny, experts had to examine edicts that dated back to the third century BC (Press Trust of India 2011).

Clearly, aspects of public policy which touch upon important cultural elements require an informed approach. Although not formally recognised as cultural expertise, the knowledge provided by the Expert Committee has helped to acquaint state functionaries with the particularities of different linguistic communities. This practice is more in line with the socio-legal definition of cultural expertise provided by Holden (2019, 2–3), namely the contribution of social science experts in constructing legal truth.

Conclusion

In this chapter, we have examined how cultural norms are mediated by the legal systems in India and Pakistan, both formally and informally. These jurisdictions have demonstrated a degree of flexibility by allowing local customs, religious principles and linguistic traditions to coexist within the wider spectrum of interlegalities. The functional isolation of legal regimes has been revealed to be a myth, with local interlocutors playing a critical role in bridging the gap between different cultural domains.

The study of cannabis consumption in India indicates how state and non-state networks interact to affirm customary practices, thereby adopting a form of spontaneous cultural expertise. The *Saleem Ahmed* case in Pakistan illustrates a jurisprudential tradition that negotiates competing sources of culture to pursue broader constitutional goals. Finally, the classical language debate in India offers key insights into the role of historians and cultural experts in framing public policy, an area traditionally dominated by legal and scientific experts.

Of course, the selected cases only represent some of the ways in which regional communities navigate their intersubjectivities. They are merely microcosms of the entire South Asian region, which itself is an imagined construct of inquiry.

Further Reading

Berti, Daniela, and Gilles Tarabout. 2012. "Criminal Proceedings in India and the Question of Culture. An Anthropological Perspective." In *Rechtsanalyse als Kulturforschung*, edited by Werner Gephart, 193–206. Frankfurt am Main: Vittorio Klostermann (Käte Hamburger Kollegs "Recht als Kultur" series).

Berti and Tarabout explain the ways in which local communities in Himachal Pradesh negotiate the normativity of criminal laws.

Lau, Martin. 2006. *The Role of Islam in the Legal System of Pakistan*. Leiden; Boston: Martinus Nijhoff.

Lau gives a lucid account of how religious norms were institutionalised within the legal and constitutional structures of Pakistan.

Venkatachalapathy, A. R. 2009. "The 'Classical' Language Issue." *Economic and Political Weekly* 44, no. 2: 13–15.

Venkatachalapathy narrates the controversy surrounding the classical language issue in India and the role of experts in mediating the same.

Q&A

1. How can legal institutions use cultural expertise to address cultural variations in the perception of criminality?

Key: The role played by local interlocutors in reconciling customary norms and state laws can be investigated. The pros and cons of incorporating cultural expertise in criminal jurisprudence can also be contemplated.

2. In jurisdictions with an officially recognised state religion, how does cultural expertise serve as an instrument to navigate between constitutional and cultural norms?

Key: Judicial approaches adopted by the FSC in Pakistan show that cultural expertise allows judges to reconcile progressivist approaches with various schools of Islamic law.

3. To what extent can cultural expertise be useful in making public policy decisions?

Key: The classical language debate in India offers key insights into the role of historians and cultural experts in framing public policy, an area traditionally dominated by legal experts.

References

Ananth Pur, Kripa. 2007. "Rivalry or Synergy? Formal and Informal Local Governance in Rural India." *Development and Change* 38. no. 3: 401–21.

Baxi, Upendra, and Marc Galanter. 1979. "Panchayat Justice: An Indian Experiment in Legal Access." In *Access to Justice: Vol. III: Emerging Issues and Perspectives*, edited by Mauro Cappelletti and Bryant Garth, 341–86. Milan: Giuffrè; Alphen aan den Rijn: Sijthoff and Noordhorff.

Bennett, Chris. 2019. "The Ganja Culture of India." *Cannabis Culture* (blog), December 9.

Berti, Daniela, and Gilles Tarabout. 2012. "Criminal Proceedings in India and the Question of Culture: An Anthropological Perspective." In *Rechtsanalyse als Kulturforschung*, edited by Werner Gephart, 193–206, 193–206. Frankfurt am Main: Vittorio Klostermann.

Burki, Shireen K. 2013. *The Politics of State Intervention: Gender Politics in Pakistan, Afghanistan and Iran*. Lanham, MD: Lexington Books.

Cheema, Iqtidar Karamat. 2011. "Sociocultural Stratification of India." *Policy Perspectives* 8, no. 1: 49–63.

Cheema, Moeen H. 2012. "Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law." *The American Journal of Comparative Law* 60, no. 4: 875–918.

Cheema, Shahbaz Ahmad. 2013. "The Federal Shariat Court's Role to Determine the Scope of 'Injunctions of Islam' and Its Implications." *Journal of Islamic State Practices in International Law* 9, no. 2: 92–111.

Constituent Assembly of India. 1949. *Constituent Assembly Debates (Proceedings) – Volume IX*. August 4, 1949.

Galanter, Marc. 1981. "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law." *Journal of Legal Pluralism and Unofficial Law* 13, no. 19: 1–47.

Griffiths, John.1986. "What Is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law* 18, no. 24: 1–55.

Hartsuiker, Dolf. 1993. *Sadhus: Holy Men of India*. Rochester, Vermont: Inner Traditions.

Holden, Livia. 2012. "Divorce at the Woman's Initiative in South Asia and in the Diasporas." In *Interpreting Divorce Law in Islam*, edited by Rubya Mehdi, Werner Menski, and Jorgen S. Nielsen, 142–57. Copenhagen: DJØF.

———. 2019. "Cultural Expertise and Socio-Legal Studies: Introduction." In *Cultural Expertise and Socio-Legal Studies*, edited by Livia Holden, 1–9. Bingley: Emerald.

Jaffe, James. 2015. *Ironies of Colonial Governance: Law, Custom and Justice in Colonial India*. Cambridge: Cambridge University Press.

———. 2020. "The Indian Panchayat, Access to Knowledge and Criminal Prosecutions in Colonial Bombay, 1827–61." *Law and History Review* 38, no. 1: 47–74.

Lau, Martin. 2006. *The Role of Islam in the Legal System of Pakistan*. Leiden; Boston, MA: Martinus Nijhoff.

Merry, Sally Engle. 2006. "Legal Pluralism". *Law and Society Review* 22, no. 5: 869–96.

Mills, James. 2009. "Cannabis and the Cultures of Colonialism: Government, Medicine, Ritual and Pleasures in the History of an Asian Drug (c. 1800–c. 1895)." *Zeitenblicke* 9, no. 3: 1–13.

Minister of Culture. 2014. *Criteria for Declaring Classical Language*. Government of India.

Ministry of Social Justice and Empowerment, Government of India. 2019. *Magnitude of Substance Use in India*. New Delhi: National Drug Dependence Treatment Centre (NDDTC), All India Institute of Medical Sciences (AIIMS).

Nelson, Matthew J. 2015. "Islamic Law in an Islamic Republic: What Role for Parliament?" In *Constitutio Writing, Religion, and Democracy*, edited by Asli Ü. Bâli and Hanna Lerner, 235–64. Cambridge: Cambridge University Press.

Oommen, T. K. 1999. "Conceptualising Nation and Nationality in South Asia." *Sociological Bulletin* 48, no. 1–2: 1–18.

Press Trust of India. 2011. "Kerala Demands Classical Status for Malayalam." *ndtv.com*, January 14, 2011. https://www.ndtv.com/thiruvananthapuram-news/kerala-demands-classical-language-status-for-malayalam-445004

Ramasubramanian in Chennai. 2016 "Madras High Court Bats for Classical Languages." *IndiaLegal* (blog), September 7, 2016.

Rosen, Lawrence. 2008. *Law as Culture: An Invitation*. Princeton, NJ; Oxford: Princeton University Press.

Roychowdhury, Adrija. 2020. "Cannabis in India: A Rather Long Story, with its Highs and Lows." *The Indian Express*, September 12, 2020. https://indianexpress.com/article/research/cannabis-in-india-a-rather-long-story-with-its-highs-and-lows-6592020/

Sharafi, Mitra. 2014. *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947*. Cambridge: Cambridge University Press.

Singhal, Neha, and Naveed Mehmood Ahmad. 2020. *A Case for De-Criminalization of Cannabis Use in India*. New Delhi: VIDHI Centre for Legal Policy.

Trautmann, Thomas R. 2006. *Languages and Nations: The Dravidian Proof in Colonial Madras*. Berkeley, CA: University of California Press.

United Nations. 1975. *Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961*. Entered into Force on 8 August 1975. Treaty Series Vol. 976 No. 14152.

Varshney, Ashuthosh. 2008. "The Idea of Pakistan." *India International Centre Quarterly* 35, no. 3/4: 2–21.

Venkatachalapathy, R. 2009. "The 'Classical' Language Issue." *Economic and Political Weekly* 44, no. 2: 13–15.

Yilmaz, İhsan. 2005. *Muslim Laws, Politics and Society in Modern nation States: Dynamic Legal Pluralisms in England, Turkey, and Pakistan*. Aldershot: Ashgate Publishing Limited.

Cases and Law Cited

Federal Shariat Court (Procedure) Rules, 1981.

Murtaza v. Federation of Pakistan and others. PLD 2011 FSC 117 (Pakistani Federal Shariat Court 2010).

Saleem Ahmed v. Govt of Pakistan. PLD 2014 FSC 43 (Pakistani Federal Shariat Court 2014).

28

CULTURAL EXPERTISE IN THE ARAB MIDDLE EAST

Dina Haddad

LEARNING OBJECTIVES

This chapter focuses on the conceptualization of cultural expertise within the legal systems in the Middle East with the help of three main cases: cannabis cultivation in Lebanon; the normative development of women's rights in Syria; and the recent criminalization of honour killing in the UAE. After reading this chapter you will have learnt about cultural expertise vis-à-vis law-making and become more familiarized with the challenges of cultural expertise in the legal systems of the Middle East.

Introduction

The Arab Middle East is a region constantly seeking transformative legal changes, and justice brings up multifaceted questions of redistribution of power and claim of rights in the domain of law. This regional context remains dominated by transition, interventionism and a constant pursuit to decolonize and localize sources and legacies. This chapter reads cultural expertise as the special knowledge that locates relevance and helps with the formulation of rights and obligations within a legal framework that integrates culture and law at the legislative level (Holden 2011). It highlights how normative changes directly influence judicial and subsequent court proceedings in terms of the use of evidence.

DOI: 10.4324/9781003167075-33

Theory and Concepts

Historically, the Arab world is often characterized as highly heterogeneous because it represents a diversity that encompasses a complex system of vertical loyalties and communal differentiations (ethnic, linguistic, sectarian, tribal, local, regional and the like) (Khoury and Kostiner 1990). While Islam is often assumed to be a major factor in the unity of Arab culture, there are deep differences in the way it is understood and practised.

The legacy of the rule of law in the region has been perceived as legitimizing a structure characterized by sustained inequality (Brown 2012). The first postcolonial secular states were keen on a homogeneous national identity. As such, homogeneous rhetoric and orientation were translated into most constitutions of Middle Eastern postcolonial states.

LAYERS OF THE SOCIO-LEGAL CONTEXT IN THE MIDDLE EAST

Understanding the multiple layers of socio-legal contexts which have continued to feature in the legal systems of Middle Eastern countries remained the underlying prerequisite to gauge and engage with the region, especially so in an area that has inherited a multilayered social fabric of social, ethnic and religious backgrounds. This, however, produced fragmented aspects of cultural and social practices, while discontinuity in rationale and legal values were also some of the main contributors to a sustained risk to fairness and equality.

Against the backdrop of this shared reality across the region, both the history of colonialization with its tendency to create nations that are forcefully brushed with one colour and the consequent socio-legal aspects within which contemporary legal institutions (legislative and judicial) make it heuristic to articulate the need for cultural expertise in terms of availability, representation and adjustment to each distinct nation within the area.

The history of sources of law in the Middle East provides a mélange varying from the pre-Islamic (527–628), Islamic social governance (622–750), the Ottoman legacy and transformation (1517–1918), the colonial era (1918–1960s) and postcolonial reality. These phases each, in turn, provide an insight into the "legal" as produced by the then "social". I regard cultural expertise in the Middle East as the special knowledge that locates relevance and helps the formation and transcending of rights and obligations from, on one side, the cultural to the legal sphere and, on the other side, the national to the international. Seeking cultural expertise in such legal practice and development requires reading change and transformations in the area within their immediate contexts. Crisis within the legal practice can hardly be understood as a product of an isolated regional practice that exists in a vacuum. Rather it should be seen as an outcome of an

encounter between the Middle East and the world in its current globalized and post-globalized outlook.

By the end of the 1960s, most Arab states had gained their independence from their colonizers. Thereafter, the legal reforms that were implemented during the colonial era were essential in the postcolonial social and political battles which remain ongoing. The Arab world became dichotomized between the push towards secularization from above and the resistance to the privatization of religious practice from below, creating a polarized society that struggled to maintain a coherent legacy. Prior to independence from colonial powers and in an effort to retain an idealized perception of statehood, resistance movements sprung forth in a number of Arab states, most of which were driven by the ideal of a pan-Arab Islamic state. However, with the formation of secular states, the masses struggled to accept the rapidly changing reality, and some groups clung to remnants of traditional ethnoreligious practices (Salame 1987). The long-standing issue of an unrealized rule of law affords substantial value to the role and impact of cultural expertise in realizing the legitimacy of available legal frameworks. While the practice remains invisible and less acknowledged in courts due to the rigid and formalistic approach to expert witnessing in cultural issues, normative and legislative developments throughout the region reveal a rich terrain of engagement with different representations of cultural expertise. These representations repeatedly call for the need to gain and use cultural information that in turn can have an undeniable impact on the greater need for cultural expertise. The cases selected in the following provide examples from three different countries in the Middle East: Lebanon, Syria and the United Arab Emirates. While Syria and Lebanon have both been affected by constant conflict and economic fragility, the UAE is considered one of the richest countries in the region. This diversity of political and economic conditions has informed the need to conceptualize cultural expertise and identify experts in practices that are historically and culturally connected while sharing similar challenges to the rule of law and a state of fragility.

Law Beyond the State: Legalizing Cannabis Cultivation in Lebanon

Cannabis cultivation for medical and industrial purposes has been legalized in Lebanon since April 2020. After years of debating the issue on several social and official levels, a draft law was submitted to the designated parliamentary committees in February 2020 to be ultimately approved in April of the same year. This makes Lebanon the only country in the Middle East to legalize the cultivation of cannabis. It is essential to highlight that the Lebanese legal system is one of the most responsive in the Middle East to social and religious diversity. This reality reflects a legal pluralism that was welcomed yet enshrined within a system of corrupt legacies of kinship and restricted loyalties. This specific case highlights the relevance of the cultural practices of the Boqaa Valley which are

distinct from those found in the country's traditional social or religious range. The Boqaa Valley has been known for some decades for its high reliance on cannabis cultivation (Afsahi and Darwich 2016). For years the legal day-to-day practice witnessed a constant struggle between state authorities and locals. Tens of thousands of people were repeatedly arrested for their involvement in different forms of production and trade, yet the practice never ceased (UNODC 2019). Despite moral and legal arguments, as time went by an informal acceptance of the de facto cultivation of cannabis started to build due to the reliance of farmers and their families on these crops for sustainable living. The need to accommodate such local dependency became part of a constant social rhetoric arguing the cultural and social consequences that could be endured if the denial of legalization persisted. Furthermore, the availability of unofficial net beneficiaries that facilitate and sustain the life of the farmers in the area made the practice inextricable from the social and economic fabric of the region and beyond. Meanwhile, the government struggled to offer alternatives in the dire economic and political circumstances that had been ongoing for decades since the end of the country's civil war. While the state was negotiating the situation with local and religious leaders, it became clear that the criminalization of cannabis cultivation was more taxing in terms of social implications and the overall economy. All of these social and political aspects made the stigma of criminalizing such institutionalized practice less conducive in terms of deterrence. Moreover, the government had accommodated cannabis cultivation informally since before the civil war as it brought a significant contribution to the country's economy.

This case has important implications for the relationship between local culture, law-making and the functioning of legal-related mechanisms. It shows that the efficacy of some established laws depends largely on their ability to accommodate local cultures and economic dependencies. In the context of law-making, cultural expertise then becomes a method and a technical tool of interpretation used by the court. By interpretation, I mean much more than simply dismantling cultural differences but also the ability to comprehend and evaluate potential legal solutions and approaches that are anthropologically empowered to set the context of the facts and the specific socio-legal elements related individually to each case. Should the diversity in terms of familiar social practices, customs and de facto and de jure practices *not* be explored, the whole pursuit of criminal justice will be questioned as it will inevitably collide with the understanding of the legal maxim of *mens rea* and the overall drive and *actus reus* produced within specific social and cultural contexts.

Minority within Minorities: Normative Development of Women's Rights in Syria

Syria has long been a country of significant ethnic, religious and linguistic heterogeneity. The state has held an official secular stance that aims to eradicate differences between various religious and ethnic groups, although not successfully.

The former Syrian Constitution of 1973 which stood for over 40 years until the conflict broke out in 2011 shows French and Belgium influences. It provided for a set of rights and principles that promoted equality including full political and legal rights for women and offered protection to the personal rights of citizens with no reference to gender (Article 25). While there is no specific legislation that prohibits gender-based discrimination, Article 45 of the same constitution stated that women are guaranteed "all the opportunities that enable them to participate fully and effectively in political, social, cultural, and economic life". Nonetheless, major voids and areas of contention remain evident in family law, the law of nationality, the penal code and elements of labour law with regard to indemnity and compensation for women compared to male workers.

On the other hand, despite the internal conflict since 2011 and the toll it has had particularly on women, legal changes remain ongoing. Against the backdrop of increased sexual violence, child marriage and rape that has been used repeatedly as an instrument of war, a number of changes to family and criminal law were subsequently introduced in 2019 and 2021 (changes to personal status law by Law no. 4, 2019 and Law no. 13, 2021). This included, in March 2020, abolishing honour killing (Legislative Decree 22 for 2014 abolishing honour killing and its amendment in Law no. 2 2020). This case looks at two practices to highlight the role of cultural expertise within the legislative process regarding women's rights. The first consideration is afforded to a case concerning a rejected amendment to family law or the law of personal status in 2009. The second consideration relates to the multiple changes that resisted the demand for the legal rights of women regarding marriage, divorce and criminal law and legal proceedings.

In a declared secular state by constitution, the national social agenda of the government has been, from the outset, supportive of women's constitutional rights and keen to include them as an essential and valuable element of their political movement to ensure more mobility and popularity. The legal system, however, fell short of the set standards (UNDP 2018). This was mainly due to the influence of conservative religious communities that met with the constant readiness of the state to negotiate its legacy and compromise over legal domains that are traditionally governed by sharia such as family law.

Family law in Syria has been codified since 1953 by Legislative Decree no. 59. This law has witnessed few amendments since its first application. In 2009, a draft was proposed containing clear influence from conservative religious figures and nongovernmental institutions with religious orientations. The draft had legal implications on matters that have dominated women's groups in terms of curtailing women's rights, limiting their ability to seek further rights in marriage and inheritance and financial rights upon divorce. The language in the draft was unconventional since it used degrading terms for women as being subject to men's desires such as "*al Mar'a al Matu'a*" or "the owned/foot-held". The draft was published to consult different social segments and seek opinions from nongovernmental institutions. Women's rights activists were the first to be alerted and argued that the choice of language for legal purposes and the frame

of rights cannot disregard changing historical and cultural contexts. Campaigns opposed the draft argued for the obligation to frame the legal language of women's rights within a contemporary context. This was motivated by the fear that courts would abide by mere legal formalism which would reinstate discrimination against women. The campaigns were driven by the vision that women have the right to normative development of rights that reflect their realities and their ambition to seek advancement rather than being subject to the views of a patriarchal minority. Under mounting social and parliamentary criticism, the parliament decided against the proposed draft and rejected the amendments suggested in terms of legal applications or use of language.

On the other hand, the current constitution of 2012, although reflective naturally of a time of crisis and focusing on eliminating the major controversial articles in the constitution of 1973, lost focus on the rights of women. Despite this dire reality of conflict and the hold it can have over women in particular, legal changes remain ongoing, such as abolishing "honour" killing and updating laws related to marriage and divorce.

These cases are highly significant both separately and in tandem. They reveal a link between the cultural and social dynamics within a country that has been characterized by multiplicity since its inception (Al Gharaibeh 2016). They also call for the role of cultural expertise as a method of interpretation and as a tool to better understand legal developments in the law-making process. The rejected draft provides a contextual example of the resilience of specific cultural practice and the ability of women as a minority within all minorities of society to provide a constructed and coherent legal frame to their socio-legal needs. Furthermore, they envisage their engagement with a society and a state that is male-dominated with the purpose of sustaining their legal expertise at both legislative and judiciary levels. Women activists with professional, legal and direct social attachment provided cultural expertise directly. This is so since they were the main mediators to translate, dismantle and consequently resent such an archaic interpretation of religious meanings that proved to be detached from the immediate familiar social practice or expectation.

Changes after the conflict in turn present another episode in a continuous journey of cultural and legal relevance. Such an episode, although produced within a crisis of high-scale violence and exceptional threats to the state and its social coherence, nonetheless still focused on resenting the compromise that is historically granted by the state as the conventional centre of law-making to negotiate identity and internal settlement with religious minorities.

WOMEN AND THE LEGAL PROCESS

This dynamic between women at the centre of specific legal processes and the state as the generator of legal development reveals a clear negotiation space earned by the mediators/social experts, namely women in legal practice, who

represent the expert in this normative legal equation. It is also significant to identify what "culture" is for women outside of the official or orthodox reading of culture, custom and the applicability of legal practice. The same dynamic reveals an indicative lacuna and perhaps the taboo role of woman judges in family cases within a social structure that historically assigned only male judges to family courts and all consequences resulting from such lack of female representation in the court.

State, Identity and Law: Eradicating Honour Killing in the United Arab Emirates

In November 2020, the United Arab Emirates issued a governmental decree (Decree on Federal Law no. 15 of 2020 amending provisions in the Penal Code, Federal Law no. 3 of 1987) that addressed major legal changes in several legal contexts including changes directly relevant to Islamic personal status by allowing cohabitation without marriage and in criminal law by the criminalization of honour killing. This move must be read as part of the UAE's efforts to consolidate the country's profile as a significant tourist and business destination (UAE Gender Balance Council n.d.). Against this specific backdrop, the criminalization of honour killing challenges the tribal and social practice that has garnered significant criticism at both local and global levels.

This ultimately brings forth a set of altered approaches in the interpretation of law and applications within the courts regarding the use of evidence, and its social and religious relevance. It promotes a wider margin through which to argue for the role of cultural expertise and practice, especially in a society that contains vast forms of differences along the social spectrum, i.e., religious, linguistic and ethnic. This particular case illustrates the role of cultural expertise not only within specific cultural and social practices that preserved cultural rights held closely to some widely criticized practices at the global level but also the relevance of what may be called the "international/global influence" that has made the former much harder to sustain within the current economic and ideological structure of the state. The case, however, remains a standing example of how the frequency and scale of divergence of what a lawmaker may consider cultural and relevant enough to call for protection may lead to considerations that could jeopardize justice and open a platform for potential discrimination. This is especially so when such practice seeks and offers tools and interpretations that justify acts otherwise globally criminalized and which would hardly cross the threshold of cultural rights. This evolution was made necessary by the nature of the judicial interpretation of cultural relevance and significance all within the context of a state that is seeking further its regional and global recognition at such a pace.

Conclusion

The three discussed cases provide examples of legal systems where judges are less inclined to resort to cultural experts.

The study of legal texts in terms of both legislation and court decisions reveals aspects of cultural expertise although they are never overtly acknowledged or characterized as such. This makes the integration of cultural expertise as a theoretical framework that allows for instruments of cultural expert witnessing particularly pressing. Ethnographic evidence provides also that even experts themselves, when available and recognized in these spheres, are less inclined to be officially involved and would prefer to leave these issues expressed in legal language and by legal personnel to avoid direct involvement or responsibility. These tendencies and potential patterns of expertise are also a direct outcome of a lack of trust in the court system or the hold the political regime has over the three authorities under review. The case of the UAE is indicative especially when discussed in light of the other two cases. Cultural multiplicities are a new phenomenon and, acknowledged in the UAE, conceptualize the need to encompass tools based on the rationale of the country's widening range of cultural identities. While this diversity is an already common feature of societies in Lebanon and Syria, the normative change in a country that has been described as traditional in its blueprint laws provides a standing contemporary example of societies in our times living through an ever-connected range of cultural identities, making it almost impossible to avoid the essential impact of cultural experts within legislative and judicial processes. Reading the development of legal texts in terms of the laws discussed in the three cases reveals direct cultural talks and local relevance to legal development. Shifting cultural expertise to the courts would be the most efficient next step in a region that needs to shake away its colonial legacies and face up to identity transformations in a rights-based, post-globalized world. Yet it is a step that would carry a set of challenges including identifying and training experts in addition to ensuring a safe environment for their practice.

Further Reading

Hammoudi, Abdellah. 1997. *Master and Disciple: The Cultural Foundations of Moroccan Authoritarianism*. Chicago; London: University of Chicago Press.

Hammoudi offers insights into state/citizen relations in regions beyond the book's geographical focus. It provides historical and sociological explanations of the legitimacy sought by society through the figure of a leader who would on many occasions be the *Hakam* of their conflict and the judge of their grievances.

Abu-Lughod, Lila. 1989. "Zones of Theory in the Anthropology of the Arab World." *Annual Review of Anthropology* 18, no. 1: 267–306.

Abu Lughod offers some first-hand knowledge of cultural practices in the region. Both pieces offer social dimensions of customary and legal practices and challenges in the region.

Kozma, Liat, Cyrus Schayegh, and Avner Wishnitzer, eds. 2014. *A Global Middle East: Mobility, Materiality and Culture in the Modern Age, 1880–1940*. London: I.B. Tauris.
This volume offers a rich collection of different aspects of cultural and anthropological studies in the area. It has an interdisciplinary multi-focus that highlights some gaps in the anthropological research done in the region.

Q&A

1. To what extent can cultural expertise be explored in the case of cannabis cultivation in Lebanon?

Key: Reflect on the socio-legal and economic reality that gave birth to a de facto customary practice in the case of cannabis cultivation in Lebanon.

2. How can cultural expertise in the litigation process in Lebanon be insightful for better understanding relevant sources of law in the case of cannabis cultivation prior to the recent law?

Key: Reflect on the relevance of history and dependency when considering the shift from de facto to de jure cultural or local practice, noting the shift in the role of cultural expertise from the legislative to the judiciary.

3. In a court structure that centralizes the judge and limits expertise beyond technical knowledge, what are the main challenges facing the judiciary to address unjust applications of law and the protection of women's rights in Syria?

Key: Reflect on the role of women as cultural experts in Syria considering the social multiplicity of the country and how they envisage their engagement with society and the state to sustain their legal expertise.

4. What particular transformations does the legal system require in order to establish a conducive engagement with the role of cultural expertise?

Key: Reflect on the ability of judges to contextualize illegality beyond the blueprint of law. This includes socio-legal and political aspects of the legal culture and the need to identify women as cultural experts.

References

Afsahi, Kenza, and Salem Darwich. 2016."Hashish in Morocco and Lebanon: A Comparative Study." *International Journal of Drug Policy* 31: 190–8.

Al Gharaibeh, Fakir M. 2016. "Debating the Role of Custom, Religion and Law in 'Honour' Crimes: Implications for Social Work." *Ethics and Social Welfare* 10, no. 2: 122–39.

Brown, Nathan J. 2012. *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*. Albany: Suny Press.

Holden, Livia, ed. 2011. *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives*. Abingdon: Routledge.

Khoury, Philip Shukry, and Joseph Kostiner, eds. 1990. *Tribes and State Formation in the Middle East*. Berkeley, CA: University of California Press.

Salame, Ghasan, ed. 1987. *The Foundation of the Arab State*. Abingdon: Routledge.

UAE Gender Balance Council. n.d. *Our Initiative*. Government of the United Arab Emirates.

UNDP. 2018. *Syria Gender Justice & The Law*. New York: United Nations Development Programme.

UNODC. 2019. *Booklet 5: Cannabis and Hallucinogens*. Vienna: Division for Policy Analysis and Public Affairs, United Nations Office on Drugs and Crime.

Legislation Cited

Legislative decree no. 22 [2014] amending the Syrian Penal Code issued by Legislative decree no. 148 of 1949.

Legislative decree no. 4 [2019] amending the Syrian Personal Status Law no. 59 of 1953.

Legislative decree no. 2 [2020] amending the Syrian Penal Code issued by Legislative decree no. 148 of 1949.

Legislative decree no. 13 [2021] amending the Syrian Personal Status Law no. 59 of 1953.

The Syrian Constitution 1973.

UAE Federal Decree Law no. 15 [2020] amending some provisions of the Penal Code Federal Law no. 3 of 1987.

29

CULTURAL EXPERTISE IN ISLAMIC COURTS IN INDONESIA

Euis Nurlaelawati and Witriani

LEARNING OBJECTIVES

The chapter focuses on the integration of local practices in the process of gender sensitization of the Islamic courts in Indonesia, with the help of three cases concerning polygamy, matrimonial reconciliation and divorce settlement. After reading this chapter you will have learnt that whenever the strict application of Muslim state law disadvantages women in Indonesia, Islamic courts have the potential to take account of women's rights within a pluralist framework that recognizes customary practices as an instrument to accommodate both international human rights and Islamic law.

Introduction

In Indonesia, local practices have been recognized by Muslim state law for their capacity to provide effective guidelines for social control since they cut across diverse social groups. Hence, Indonesian state law, besides following Islamic legal doctrines, also acknowledges the legal validity of local practices (Nurlaelawati 2013). From a conventional perspective of international women's rights, local practices have often been considered a challenge to the implementation of gender justice. However, if we explore local practices in more depth, we find that some specific traditions do value gender equality.

This chapter focuses on the cultural expertise displayed by some judges in Islamic courts who interpret local cultural practices in light of gender rights.

DOI: 10.4324/9781003167075-34

It outlines some key concepts of Muslim family law, lists the international covenants and explains the principle according to which local practices can be integrated into state law in Indonesia. It surveys selected family cases in which judges in Islamic courts have applied cultural expertise in adopting local practices which were interpreted in the light of women's rights.

Theory and Concepts

Islamic Law

In Indonesia, Islamic law was adopted in the 14th century following widespread conversion to Islam. The first institution of the Islamic judiciary, the court called Peradilan Surambi, was established in 1613. It further developed from the Sultanate period to the Dutch colonial period into a more formal institution called Priesterraad, in 1882 (Lev 1972).

After Independence in 1945 and the establishment of the Ministry of Religious Affairs in 1946, the following legislation strengthened the authority of Islamic courts to hear family law cases: the Law on Registration of Marriage, Divorce and Reconciliation in 1946 for Java, 1954 for outer Java, the Law of Marriage in 1974, the Islamic Judicature Act 1989 and the Kompilasi Hukum Islam in 1991 (Nurlaelawati 2010). Although female judges have been appointed to the Islamic courts since the 1950s, their appointments acquired legal legitimacy only with the Islamic Judicature Act 1989, of which Article 49 states that any law graduate can become a judge in the Islamic courts. The 1974 Law of Marriage and the 1991 Kompilasi Hukum Islam improved women's access to the legal system and addressed fair and equitable treatment regarding matrimonial remedies (Cammack 1997; Bowen 2003; Nurlaelawati 2010). As a result, *talak* or unilateral divorce initiated by men was mitigated with the requirement of court proceedings by the husband and *khul'*, i.e. judicial divorce initiated by wives, was given legal recognition.

In 2009 several programmes were adopted to provide better justice for litigants, women litigants in particular, which include programmes of legal aid and *prodeo* (courts for the poor, or fee waiver). The programmes are regulated by Law No. 48 of 2009 on Judicial Authority, Arts. 56 and 57; Law No. 49 of 2009 on Amendment of Law No. 2 of 1986 on the General Courts (Art. 68); and Law No. 50 of 2009 on Amendment of Law No. 7 of 1989 on the Religious Courts (Art. 60). According to these laws, all tribunals, including the Islamic courts, are required to facilitate access to the courts for the poor and the marginalized by establishing legal aid posts inside court buildings across the country.

International Human Rights

Indonesia has ratified the following international covenants that protect women's rights: the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1984 and the International Covenant on Civil and

Political Rights (ICCPR) in 2006. Article 2 of CEDAW requires all state signatories to eliminate discrimination based on gender in both the public and the private spheres. Article 3 of ICCPR stresses that men and women should enjoy equal access to all civil and political rights, and it requires the guarantee of legal certainty for any legal action.

The ratification of CEDAW was followed by the adoption of the Law on the Elimination of Domestic Violence against Women/UU Penghapusan Kekerasan dalam Rumah Tangga in 2004, identified as Law No. 23/2004, which defines domestic violence and lists four types of domestic violence, i.e. physical, mental, sexual and financial. Both Law No. 7/1984 on the Ratification of the Covenant on Elimination of all the Forms of Discrimination against Women and Law No. 23/ 2004 on the Elimination of Domestic Violence reiterated the general principle of procedural law in Indonesia according to which all the judges of Indonesia's Islamic courts are required to work for gender equality and justice. Supreme Court Regulation No. 3/2017 on the Guidelines for the Protection of Women Facing Legal Cases confirmed the duty of all judges to decide according to gender equality.

Local Practices

While adherence to legal formalism and the supposed incompatibility of gender equality with Islamic teaching are entrenched in the traditionalist wings of Islamic courts, many judges in Islamic courts have also developed skills of gender sensitivity to empower and benefit women (Holden and Nurlaelawati 2019). According to Art. 229 of the Kompilasi Hukum Islam 1991 judges must consider the local "living law" (*hukum yang hidup*) to provide justice within society (see Haddad, Chapter 28 in this volume) whenever they find that state Muslim laws are not applicable or do not bring justice to the parties (Warman, Isra, and Tegnan 2018). As a result, some local practices have been imported into national case law (see Dominic, Chapter 27 in this volume), with a move that some scholarship has qualified as women's empowerment (Lukito 1997; Syah 1984; Cammack and Feener 2008), examples of which will be given in the case studies.

Case Studies

The following case studies show that cultural expertise, as the contextual and combined reading of both local practices and legislation in support of women's rights, offers the potential to innovate and secure better justice for women in the Islamic courts. The first case concerning polygamy and revocation of divorce (*ruju'*) is an attempt at a radical challenge to patriarchy through the recognition of the validity of the local practice of *ruju'*. The second case highlights procedural pluralism in Islamic courts through a mix of Islamic reconciliation and a local mechanism of mediation in divorce proceedings. The third case illustrates the capacity of Islamic courts to appraise the impact of social change on local practices.

Polygamy and Revocation of Divorce in the Islamic Court of Bima

This case of polygamy displays the potential for a radical type of cultural expertise because the judges of the Islamic court set aside state laws and decided to recognize the local practice of *ruju'*, divorce revocation, for the protection of the woman plaintiff. The case, registered in Bima Islamic Court (NTB) as case number 1750/Pdt.G/2016/PA.Bm and dated 21 November 2016, involves the first wife as plaintiff and her husband as defendant with his second wife. The first wife, with three children, was unilaterally divorced by her husband through *talak*, which is legally recognized by Muslim law in Indonesia. *Talak* was then revoked informally according to *ruju'*, a divorce revocation pronounced before the community's elders (see Hirsch and Moore, Chapter 19 in this volume). Hence, the wife returned to live with her husband. According to the Kompilasi (Arts. 163–167), the revocation of divorce must be registered by the marriage registrar at the Office of Religious Affairs, but the husband did not proceed to the registration of the revocation. After this informal revocation, the wife learned that her husband had married another woman. According to Muslim state law, as set out in Kompilasi (Arts. 57–58), although polygamy is allowed, the first wife needs to consent to her husband's taking a second wife. Since the first wife was not consulted, she challenged the validity of her husband's remarriage, but her husband argued that she had been divorced through *talak* and was no longer his legal wife. The wife filed a claim to annul the remarriage of her husband and argued that the divorce had been customarily revoked; hence her husband's remarriage was conditional on her approval. The judges accepted her claim, accepted the legitimacy of the *talak*'s revocation and declared that the formal marriage of the husband with the second wife was null and void. In so doing, the judges also stressed the observance and legitimacy of the revocation ceremony observed in Bima society and attended by local and religious leaders (Wahyudi and Rohmaniyah 2019).

From a technical perspective, it might not be immediately clear why this case is ground-breaking. At first sight, the judges did nothing but uphold the decision of the council of elders, which protected the rights of the first wife but disregarded the rights of the second wife. However, a closer analysis of the Indonesian context reveals layered legal reasoning which aims to legitimize women's rights. By upholding the decision of the customary council of elders, the judges of Bima Islamic Court moved away from the widespread disregard of most Islamic court judges for the precondition of approval by the first wife for their husband's remarriage. Such a radical innovation was only possible thanks to their cultural expertise which allowed an innovative reading of custom through the lens of women's rights. Regrettably, the Appellate Court reversed the decision of the lower court and disregarded the first wife's right to refuse her husband's remarriage (Nurmila 2008; Nurlaelawati 2020), thereby reinstating the patriarchal framework of rights through the primacy of state law.

Traditional Mediation at Minangkabau Islamic Court

This case concerns the integration of the traditional mediation process into formal mediation at Minangkabau Islamic Court (Decision No. 153/Pdt.G/2013/PA.PP). This case involves a wife and a husband who had frequent fights from which the husband reported deep scars. The husband had decided to leave home and had not returned for more than three months, a practice that is commonly referred to as *baganyi* in Minangkabau. During this period, the husband filed for divorce at the Islamic court, which surprised the wife, who wanted to maintain the matrimonial relationship. According to Muslim state law, divorcing couples must go through a reconciliation procedure. Law No. 1/2016 on Procedure of Mediation, Art. 6, says that mediation is adequately completed if it is attended by both spouses or, in the absence of one of them, by his or her representative. Although the success of reconciliation sessions is usually very low, the mediators are trained to make serious efforts and deploy various strategies to avoid divorce. Hence, in this case, the Minangkabau couple was expected to attend a reconciliation session in the presence of the mediator.

However, according to customary provisions in Minangkabau, if the couple disagrees and one of them leaves the marital house for more than three months, reconciliation can only be sought through the involvement of the extended family and following the mediation system called *babiliak gadang* and *babiliak ketek*. These are mechanisms for resolving disputes with the help of extended family, consisting of *mamak-nini* (elder relatives) who sit and deliberate in a *gadang* house (a house which belongs to several families or relatives (a *babiliak gadang*)) and/or *babiliak ketek*, when certain family members from both families of the husband and wife discuss and deliberate (see Rautenbach, Chapter 23 in this volume).

The judge in this case was trained in mediation according to state law but was also familiar with the traditional system of mediation that governs the involvement of the extended families of both spouses. To anticipate the conflict and disagreement about the reconciliation, the mediator decided to invite all the representatives from the extended families of both wife and husband to the court (Noor and Sodik 2019). From this process of mediation, the couple decided to reconcile, and reconciliation was agreed upon by all the parties who promised to protect the woman from injustice and prevent any unfair treatment by the husband in the future.

The success of mediation can be seen not only in the couple's reconciliation but also in the couple's agreement on child custody, the division of joint property and all other consequences of divorce, so as to bring about what is called a "peaceful divorce" in Indonesia (Pranawati 2017, 41–42). This case shows that the integration of local concepts of mediation into the formal judicial mediation within Islamic courts was necessary in order to bring the couple to reconcile and remain in their marriage and also to avoid further conflict about the validity of the outcome.

Joint Property and Share of Working Wife at the Islamic court of Bantul, Yogyakarta

The third case, decided in Bantul as judgement No. 354/Pdt.G/2018/PA.Btl, concerns joint property and illustrates how judges interpret the local practice of *kesalingan* or "partnership" which recognizes equal rights for the wife and the husband. This case involved a couple, both of whom had a job outside the matrimonial home. The wife worked as a saleswoman and the husband worked at a factory. The wife also ran the household but with no equal assistance and help from her husband. After several years of marriage, the husband petitioned for divorce, and the property gained during the marriage was disputed among them. The wife did not agree with the husband's request to divide the property into equal shares. Arguing that she worked harder than the husband both at home and outside the home and that the partnership should not be considered to be equal, the wife demanded a bigger share. She also argued that the children would be in her custody and that the financial resources of her husband were poor, hence she could not expect him to contribute on a regular basis.

The judges in this case, as in others, acknowledged the local practice of *kesalingan* or "partnership" whereby men and women or husbands and wives have equal roles and rights in the family, which is now popularly known as *mubaadalah* (Kodir 2019). The concept of *mubaadalah* recognizes that wives have played a role in the creation of marital property even though they did not work outside the home, and this was integrated into the Law of Marriage (Art. 35) and Kompilasi (Art. 85) to provide for equal distribution to both spouses (Cammack 2007). The judges in this case thought that the wife's double role inside and outside the home was not contemplated by the 1974 Law of Marriage. Here, they proposed instead an innovative interpretation which combined the local concept of *kesalingan* or partnership with the rule in the 1974 Law of Marriage and the Kompilasi on marital joint property, thereby stressing that the concept of *mubaadalah* and the relevant provisions of the law, such as the 1974 Law of Marriage (Arts. 35–36) and the Kompilasi (Arts. 85–97), are relevant only when the husband works outside the matrimonial home and the wife runs the household. Accordingly, they agreed with the wife's strongly argued case that a wife who has worked both at home and outside the home deserves a bigger share (Setyawati and Qibtiyah 2019).

Conclusion

In Islamic courts in Indonesia, some judges have engaged with judicial activism by using cultural expertise to integrate traditional practices into their judgements (see Holden, Chapter 1 in this volume) to uphold women's rights, thereby developing remarkable flexibility in the interpretation of Islamic law. By doing so, the judges have reinterpreted local practices such as the revocation of divorce, traditional mediation and *kesalingan* or partnership, where state law is silent or where, if applied, it would disadvantage women. As a result, judges in Islamic courts, through the innovative

reading of local practices, have been able to empower women and accommodate international human rights principles within the principles of Islamic law.

In the case of polygamy, the judges of Bima protected the family by stressing the legitimacy and dignity of the first wife whom the local community recognized as the legitimate wife following the customary revocation of divorce. Islamic courts have so far accepted any reason presented by husbands for recognizing a polygamous marriage on the basis of an extended interpretation of the grounds for polygamy as listed in the Law of Marriage and Kompilasi. This case is ground-breaking because it overcomes the Islamic courts' permissive approach towards polygamous marriage contracted without the first wife's consent.

In the case of family reconciliation before Minangkabau Islamic Court, the judges deployed the local concept of mediation whereby reconciliation can be sought only through the involvement of the extended family when the divorce involved the act of one spouse leaving the matrimonial home. They anticipated the conflict and disagreement about the reconciliation and provided cultural protection for the wife against her husband's bad treatment in the future.

In the case of joint property before Bantul Islamic Court, the judges utilized the concept of *kesalingan* in a more progressive manner and valued the wife's double burden as grounds to depart from the established rule that both wife and husband have an equal right to joint property. The gist of this decision is that the initial concept of *kesalingan* incorporated into the law is meant to equate the domestic role of the wife with the breadwinning role of the husband and that when the partnership is not equal, the rule of equal share of the property may be set aside.

In these three cases, the judges referred to local practices and demonstrated their own cultural expertise in understanding "living law" and its relevance to the international principles of protection of women's rights. The capacity of the judges to use their cultural expertise reflects both the provisions of the law, which allows the application of local practices wherever state law is silent or might cause unfairness in the specific case (see Holden, Chapter 20 in this volume), and the initiative of specific judges who are setting a trend of judicial activism in Islamic courts in Indonesia. The significance of cultural expertise in the cases mentioned in this chapter is potentially far-reaching because judges often run into conflicting rights and conflicting sources of law. Training sessions on the accommodation of local practices in the light of women's rights, held by centres for women's studies and institutions including the centre for women's studies of State Islamic University (see Haddad, Chapter 28 in this volume), foster an innovative reading of Islamic law which is compatible with international human rights (Dzuhayatin and Sodik 2018).

Further Reading

Holden, Livia, and Euis Nurlaelawati. 2019. *Nilai-Nilai Budaya dan Keadilan bagi Perempuan di Pengadilan Agama Indonesia: Praktik Terbaik*. Jogjakarta: Suka Press.

This volume collects the best cases that demonstrate the Islamic courts' judges' expertise in incorporating local standards beneficial for women into their rulings in cases of Muslim families in Indonesia.

Nurlaelawati, Euis. 2020. "Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia." *Hawwa: Journal of Women in the Middle East and the Islamic World* 18, no. 2–3: 295–324.

This paper discusses the interpretation by Muslim judges of the legal rules of polygamy and the reasons for their permissive approach towards Islamic polygamous marriages in Indonesia.

Q&A

1. How do Islamic courts use cultural expertise?

Key: Judges in Islamic courts are trained in Islamic law but many of them also know local practices based on first-hand experience or long-term observation. Hence, some Islamic courts have adopted a specific form of judicial activism that incorporates local practices to the benefit of women's rights in many fields of law but especially in property, mediation in marital disputes and matrimonial remedies.

2. To what extent have judges incorporated women's rights to benefit women?

Key: On the basis of sec. 299 of the Kompilasi, some judges have started to challenge state law when they find that strict adherence to it would disadvantage women, as in cases of formal second marriage/polygamy and unregistered revocation of divorce.

3. How can judges in Islamic courts use cultural expertise and recognize local practices?

Key: Some judges argue that Islamic law aims at creating *maslahah* or common law according to the changing situation and times and that Islamic law can be developed so as to establish and achieve its goals. They also consider that, while Islamic law is substantially universal, it also varies, is conditional and is changeable according to the growing needs of societies, as shown by the various schools of Islamic law since the period of classical *'ulama* onwards.

References

Bowen, John R. 2003. *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning*. Cambridge: Cambridge University Press.

Cammack, Mark E. 1997. "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" *Indonesia* 63: 143–68.

———. 2007. "Marital Property in California and Indonesia: Community Property and Harta Bersama." *Washington and Lee Law Review* 64, no. 4: 1417–60.

Cammack, Mark E., and R. Michael Feener. 2008. "Joint Marital Property in Indonesian Customary, Islamic, and National Law." In *The Law Applied: Contextualizing the Islamic Shari'a*, edited by Peri Bearman, Wolfhart Heinrichs, and Bernard G. Weiss, 92–115. London; New York: IB Tauris.

Dzuhayatin, Siti Ruhaini, and Mochamad Sodik. 2018. *Pedoman Modeling Institusionalisasi Proses Peradilan Responsif Gender, Hak Perempuan, dan Hak Anak di Pengadilan Agama*, 1–5. Yogyakarta: Kalijaga Institute for Justice (KIJ).

Holden, Livia, and Euis Nurlaelawati. 2019. *Nilai-Nilai Budaya dan Keadilan bagi Perempuan di Pengadilan Agama Indonesia: Praktik Terbaik*. Yogyakarta: Suka Press in cooperation with Pusat Pengarusutamaan Gender dan Hak Anak (PPGHA/PSW) UIN Sunan Kalijaga and GCRF – Oxford University.

Kodir, Faqihuddin Abdul. 2019. *Qira'ah Mubadalah*. Depok: IRCiSoD.

Lev, Daniel S. 1972. *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*. Berkeley, CA; London: University of California Press.

Lukito, Ratno. 1997. "Islamic and Adat Encounter: The Experience of Indonesia." PhD diss., MA Thesis, McGill University.

Noor, Mohammad, and Mochamad Sodik. 2019. "Mediasi Perceraian Berbasis Kearifan Lokal dalam Praktek Pengadilan Agama di Sumatera Barat." In *Nilai-nilai Budaya dan Keadilan bagi Perempuan: Praktik Terbaik*, edited by Livia Holden and Euis Nurlaelawati, 119–48. Yogyakarta: Suka Press in cooperation with Pusat Pengarusutamaan Gender dan Hak Anak (PPGHA/PSW) UIN Sunan Kalijaga and GCRF – Oxford University.

Nurlaelawati, Euis. 2010. *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*. Amsterdam: Amsterdam University Press.

———. 2013. "Managing Familial Issues: Unique Features of Islamic Legal Reform in Indonesia." In *Islam in Indonesia: Contrasting Images and Interpretation*, edited by Jajat Burhanudin and Kees van Dijk, 123–38. Amsterdam: Amsterdam University Press.

———. 2020. "'Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia." *Hawwa: Journal of Women in the Middle East and the Islamic World* 18, no. 2–3: 295–324.

Nurmila, Nina. 2008. "Negotiating Polygamy in Indonesia: Between Islamic Discourse and Women's Lived Experiences." In *Indonesian Islam in A New Era: How Women Negotiate their Muslim Identities*, edited by Susan Blackburn, Bianca J. Smith, and Siti Syamsiyatun, 23–45. Victoria: Monash University Press.

Pranawati, Rita. 2017. "Changes in Muslim Divorce Mediation in Indonesia: A Case Study of the Yogyakarta Religious Court." *International Journal of Indonesian Studies* 4: 31–52.

Setyawati, Latifah, and Alimatul Qibtiyah. 2019. "Nilai Budaya Egaliter Jawa dalam Pembagian Harta Bersama di Pengadilan Agama Bantul, Yogyakarta." In *Nilai-nilai Budaya dan Keadilan bagi Perempuan: Praktik Terbaik*, edited by Livia Holden and Euis Nurlaelawati, 11–38. Yogyakarta: Suka Press in cooperation with Pusat Pengarusutamaan Gender dan Hak Anak (PPGHA/PSW) UIN Sunan Kalijaga and GCRF – Oxford University.

Syah, Ismail Muhammad. 1984. "Pencaharian Bersama Suami Istri di Aceh Ditinjau dari Sudut UU Perkawinan Tahun 1974 dan Hukum Islam." PhD Diss., Universitas Sumatera Utara.

Wahyudi, Isna, and Inayah Rohmaniyah. 2019. "Interpretasi Berkeadilan dan Local Wisdom dalam Kasus Pembatalan Nikah: Dilema Kasus Rujuk Bawah Tangan di Bima." In *Nilai-nilai Budaya dan Keadilan bagi Perempuan: Praktik Terbaik*, edited by Livia Holden and Euis Nurlaelawati, 93–118. Yogyakarta: Suka Press in cooperation with Pusat Pengarusutamaan Gender dan Hak Anak (PPGHA/PSW) UIN Sunan Kalijaga and GCRF – Oxford University.

Warman, Kurnia, Saldi Isra, and Hilaire Tegnan. 2018. "Enhancing Legal Pluralism: The Role of Adat and Islamic Laws Within the Indonesian Legal System." *Journal of Legal, Ethical and Regulatory Issues* 21, no. 3: 1–9.

Legislation/Regulations Cited

Law of Marriage No. 1/1974 (Indonesia).

Law No. 7/1984 on the Ratification of the Covenant on Elimination of all the Forms of Discrimination against Women (Indonesia).

Law No. 23/2004 on the Elimination of Domestic Violence against Women/UU Penghapusan Kekerasan dalam Rumah Tangga (Indonesia).

Law No. 48 of 2009 on Judicial Authority (Indonesia).

Law No. 49 of 2009 on Amendment of Law No. 2 of 1986 on the General Courts (Indonesia).

Law No. 50 of 2009 on Amendment of Law No. 7 of 1989 on the Religious Courts (Indonesia).

Law No. 1/2016 on Procedure of Mediation (Indonesia).

Presidential Instruction No.1/1991 on *Kompilasi Hukum Islam* (Indonesia).

Supreme Court Regulation No. 3/2017 on the Guidelines for the Protection of Women Facing Legal Cases (Indonesia).

United National General Assembly. 1976. *International Covenant on Civil and Political Rights*. New York, 16 December 1966. United Nations, *Treaty Series* vol. 999 p. 171 and vol. 1057 p. 407.

United National General Assembly. 1979. *Convention on the Elimination of all Forms of Discrimination against Women*. New York, 18 December 1979. United Nations, *Treaty Series* vol. 1249 p. 13.

Cases Cited

Case number 153/Pdt.G/2013/PA.PP (Minangkabau Islamic Court 2013).

Case number 1750/Pdt.G/2016/PA.Bm (Islamic Court of Bima 2016).

Case number 354/Pdt.G/2018/PA.Btl (Islamic court of Bantul 2018).

30

AFTERWORD

Cultural Expertise Within – and Beyond – the Boundaries of Law

Mark Goodale

This remarkable and comprehensive volume uses the concept of "cultural expertise" to crystallize a range of pressing dilemmas for social scientists, legal scholars, lawyers and others, and to offer – collectively – a series of ethically grounded, but also practical, responses to these dilemmas that reframe the basis for expert participation in legal, political and social life, while at the same time revealing expansive interpretations of the meaning of expertise itself. In this brief afterword, I want to highlight what appear to me to be the most far-reaching implications of the volume, beyond the exhaustive manner in which the conceptual, regional and ethical nuances of cultural expertise are drawn out across the book's 29 chapters.

To begin, the volume is structured around the acknowledgement of an important and inescapable fact: that "cultural expertise" brings together two distinct categories, both of which have proven to be historically problematic both within – and beyond – the boundaries of law. First, the idea of cultural expertise assumes the capacity to delineate usefully the borders and content of "culture", both as a legally and anthropologically coherent domain (its meta-dimension) and as the thing itself, meaning, usually, a set of readily identifiable beliefs and practices that can be the basis for conflict or consensus and everything in between. In the absence of a long discussion here about the history of debates over "culture" (in these two senses), it is enough to simply recognize that the formulation of "cultural expertise" requires an obvious attachment to the pervasiveness of culture in its meta-dimension, while leaving questions about specific cultures open and subject to legal and social scientific contestation.

And if "culture" is one particularly fraught component of cultural expertise, so too – in different but related ways – is "expertise". Again, like culture, expertise must be understood on two levels. On the first level, there is the problem of carving out a sphere of knowledge – conceptually – and designating it as

DOI: 10.4324/9781003167075-35

"expertise", a form of exclusion that applies equally to the guardians of specialist knowledge, that is, experts. Interestingly, broadly speaking, anthropology and law have approached the question of expertise and experts from radically different directions, which explains part of the reason that "cultural expertise" remains such an important yet disputed category for courts and legal doctrine. Although anthropologists would tend to view expertise as the carving out of specialist knowledge for different religious, political or even ethical reasons, legal systems and procedures – despite their wide diversity – are entirely circumscribed by expertise. From legal training to adherence to legal rules during hearings to the application of legal sanctions, the field of law is by definition a field of specialist knowledge. These differences between anthropology and law mean that "expertise" itself comes with different implications: for anthropologists, it is a social question, one, moreover, that is often treated critically (given its association with power and inequality), while for legal practitioners, it is both a logic through which the rule of law is preserved and advanced and an epistemological justification for this logic.

But at a second level, expertise likewise requires determinations about the *content* of specialized knowledge – cultural or legal – and it is here where the particular difficulties with "cultural expertise" become much clearer. From an anthropological (or, more broadly, social scientific) perspective, expertise would usually be associated with specialized domains of knowledge *within* a cultural system, and these domains are almost limitless since specialization occurs at almost all levels: religion, trades and professions, art, sport, medicine, and so on. In this sense, plumbing is as much a domain of specialized knowledge as brain surgery. But cultural expertise is not specialized knowledge in this sense, that is, specialized knowledge to be found within a culture's boundless division of intellectual, practical or social labour; rather, cultural expertise is meant to suggest specialized knowledge of a culture itself, a sort of all-encompassing and holistic knowledge about a distinct system of beliefs and practices that, taken together, distinguishes it from all others.

In light of this rather unique context, the emergence of cultural experts has often been entirely instrumental and linked to specific functions, such as the need to be able to introduce evidence in court proceedings that supports arguments for mitigation. A "cultural expert", in legal terms, is someone who presumably possesses specialist knowledge about a particular culture, but, even more relevant, is someone who – for a variety of reasons – has been qualified by a court as such. In other words, with the rapidly growing interest in diversifying the bases for legal judgments – including the bases for mitigation – "cultural expertise" has emerged as yet another specialized domain of knowledge, one normally associated with legal procedures (both national and international) but also more widely. As chapters in this volume demonstrate, generalized cultural expertise is increasingly in demand in the media, within public debates, in setting government policy (around immigration, for example) and within arts and educational institutions, among others.

Even more, the *ways* in which cultural expertise is in demand vary widely, even if the category itself – "cultural expert" – is one that shares a number of characteristics in common across national boundaries, something that reflects the globalizing force of ideas like multiculturalism and diversity, especially as these ideas get translated into legal categories. As the grouping of chapters in the volume's final part reveal, despite these commonalities, the *practice* of cultural expertise – both within courts and beyond – is shaped by any number of historical, linguistic, legal and political differences. In other words, both the form and content of cultural expertise themselves are structured by the kinds of cultural differences that cultural expertise is supposed to encompass.

These are the kinds of complexities that this landmark contribution explores. Yet critically, despite the fact that the volume gives ample scope to the dilemmas that have marked what Livia Holden, the editor, describes in her introduction as the "everlasting exercise" of cultural expertise, it also seeks to go beyond these dilemmas in making a broader argument for the potential of cultural expertise as an instrument of heretofore unacknowledged transformative power. This argument is obviously made on the basis of an idealized construction of cultural expertise, but it offers a compelling glimpse into how a deeper institutional appreciation for cultural diversity might become a vector for wider social and legal change.

Looking across the breadth of the volume's chapters, this broader argument addresses two key problems, again, as these problems primarily affect the course of legal proceedings both in different countries and within international law, but also beyond the boundaries of law. First, the emphasis on the ways in which cultural expertise can serve as a conduit for the radical diversification of procedures and policies points to the enduring and necessary distinction between formal and substantive equality. This distinction, which has proven to be so crucial for understanding both the potential and limitations of rights-based legal frameworks, reminds us that formal legal or political equality – whether articulated in legal codes, national constitutions or international legal documents – often obscures as much as it ratifies. To say that people "enjoy" legal or political equality – as important, and often rare, as this can be – is not enough, especially since powerful actors have proven adept at using the fact of formal equality to distract attention from the realities of actually existing inequality – social, political, economic. Moreover, apropos of cultural diversity, formal legal and political equality often encodes narrow visions of justice, while at the same time eliding histories of discrimination that these narrow visions claim to address.

The argument for cultural expertise, as this volume suggests, is an argument for linking cultural diversity to *substantive* equality, or, rather, for making cultural diversity a necessary precondition for a vision of justice that goes far beyond the terms of "equality before the law". In giving force and voice to the full range of cultural perspectives and histories, cultural expertise becomes an instrument in the development of more plural approaches to law and society, more open and dynamic frameworks for mediating the terms of conflicts and their afterlives.

And second, the ways in which the volume reframes and expands the category of cultural expertise has implications for the relationship between institutional – or, more broadly, systemic – legitimacy and participation in sociopolitical life. In order to appreciate the argument that cultural expertise can bolster institutional legitimacy, it is important to consider how institutions – including legal institutions – often embody wider forms of exclusion, including cultural forms. Within legal systems, the exclusionary nature of institutions can threaten the viability of the rule of law itself, a danger that becomes even more acute in the highly fragmented field of international law, in which systemic *exclusivity* confronts a vast landscape of historical, social and political variation.

But as the chapters in the volume demonstrate, the vigorous defence of "cultural expertise" is, in fact, by extension, a vigorous defence of something more consequential: systemic *inclusivity*. If legal institutions are by nature hostile to cultural diversity because of the need to assure predictability, or, more critically, because of the need to protect cultural and socioeconomic privilege, then the inclusion of the full spectrum of available cultural values and perspectives – via cultural expertise – is actually an implicitly revolutionary act, a form of decolonial unmaking and remaking and a vital development in the creation of more sustainable and democratic societies.

INDEX

Page numbers in *italics* denote Figures.

Aboriginal 101–102, 137, 249, 252, 282; community 25, 103; groups 25, 248, 251; heritage 24; land 249; land rights 25, 249; land titles 16; languages 101–102; oral tradition 284; *see also* non-Aboriginal; Traditional Aboriginal Owners
Aboriginal Australian 25, 101
Aboriginal Canadians 103
Aboriginal languages *see* Aboriginal
Aboriginal people 25, 102–103, 250
Aborigines 13, 99, 101–102, 106
abuse 88, 152, 293–294, 297; domestic 288, 294–295
academia 22, 24, 28, 30, 36, 40, 111
academic 3, 5, 22, 24, 26–27, 29, 41, 67, 71, 102, 115, 127, 233, 237–238, 245, 248, 254, 260–261, 268–269, 276, 283
academic experts 93–94
academics 40, 87, 178, 223, 233, 237, 267, 278
accountability 21, 120, 219, 222
Acholi 223; academics 223; belief 180; cosmology 180; ethnic group 223; leaders 223; perspectives 223; spiritualism 179–181; worldview 185
activism 47, 58; judicial 334–336
activist organisations 90
activists 36, 40, 58, 67, 120, 323–324; language 102, 104; Sikh 89, 94
administrative law 83
adoptions: of children 14, 63, 149, 235
Afghanistan 16, 23, 27–28, 215–216, 221, 296
Africa xv, 4, 15, 125, 148; Horn of 144; North 67; South 38–39, 41, 135, 265–269, 273; West 182; *see also* Central African Republic (CAR); South Africa
African 6, 28, 33, 50, 93, 127, 207; American 50, 54–56; courts 265; customary law 265, 269; men 75; people 34; priest-diviners 128; Union 190; women 75, 81; *see also* South African
African Americans 47–52, 54–58
Africans 49, 51, 128
age 64, 79, 120, 152, 155, 182, 235, 247, 252
Ainu 100, 104
Al Qaeda 152, 155
albinism 125–126, 128
albino 126; community 125
albinos 126, 129
Algeria 16, 66–67, 155
Algerian: insurgents 16; intelligence services 155
Altiplano 303
America 5, 12, 14, 50, 106, 278, 312; Latin 6, 275, 302; North xv, 16, 33, 179, 278; South xv, 33
American 5, 48–49, 52, 56, 58, 105, 167, 190, 194, 279, 282; courts 283

Americans 49, 221, 296; *see also* African Americans; Asian Americans; Japanese Americans; Latinx Americans; Native Americans; Vietnamese Americans
Americas 4, 56, 288
American Anthropological Association (AAA) 16, 22, 28, 51, 221
"Americanization" 167
amicus curiae 136–137, 191, 194–196, 268; *see also amici curiae*
amici curiae 233
ancestral land *see* land
ancestral language *see* languages
ancestry 89, 234
anglophone: regions 126–127
animal slaughtering 276
anonymity 21
anthropologist 3, 5–6, 11, 14–18, 20–30, 40, 48, 51–54, 86–89, 93–95, 106, 127, 142–143, 149, 152–153, 162, 178–179, 185, 195, 218, 221–223, 225, 238, 240–241, 244–254, 267–269, 271, 275, 278–279, 281, 283–285, 305–306, 309, 314, 340
anthropology 3, 5–6, 13–15, 17, 20–21, 24–25, 27–29, 47–49, 115, 156, 191, 196–197, 225, 245, 247–248, 253, 276, 306, 309, 340; applied 5, 22, 29, 36, 245, 250, 254; environmental 275; "militarization of" 221; social 142
anti-Asian 48, 50, 57
anti-bias 56
anti-Black racism 40
anti-Blackness 49
anti-Chinese 52
anti-colonial 33
anti-Communist 54
anti-discrimination 169
anti-discriminatory 106
anti-Euro/American 33
anti-government 290
anti-immigration 220, 241–242
anti-LGBTQIA+ 63
anti-Peyotists 279
anti-racism 217
anti-semitic 118
anti-Western 33
anti-white 33
apartheid 223
apostasy 296, 299
apostate 288, 295–296
Arab: culture 320; population 16; states 321; world 320–321; *see also* pan-Arab; United Arab Emirates
Arab Middle East 319
arbitration 166–174, 277; agreement 168–171; international 167, 169, 172; procedure 166–167, 171–172; *see also* commercial arbitration
arbitrator 166–174
Argentina 302
Armed Forces Revolutionary Council (AFRC) 181
army 15–17, 181, 221; *see also* Lord's Resistance Army
Aryan 314
Asia xv, 4, 6, 288, 298; East 298; South 4, 298, 309–310; Southeast 54, 57, 298
Asian 53–56, 296; community 54; countries 33, 53; discrimination 50; group 50; immigrants 50; origin 53; race category 53; South 309, 315; *see also* anti-Asian; Asian American community; Asian Americans; Asian Indians
Asian American community 54
Asian Americans 51–52, 55, 58
Asian Indians 50, 293
Asians 48, 50, 53; Southeast 50
assistance 22, 177, 223, 240, 263, 266, 334; financial 314; legal 117, 239; technical 239
asylum 14, 18, 23, 47–48, 52, 66, 80, 88, 142–149, 237–238, 240, 242, 288–289, 291, 294, 296; adjudicators 52–53, 56, 59; appeal 145; applicants 141–143, 145, 147–148; application 52, 298; courts 5, 47; lawyers 236; petitioners 59; political 5; procedure 142, 148, 242; proceedings 143, 149, 238; protection 52, 289–291, 297; regulations 74; *see also* asylum claims; asylum law; asylum seekers
asylum claims 70, 80, 142, 148, 290
asylum laws 3, 5, 14, 66, 142–143, 235
asylum seekers 6, 23, 52–53, 56–57, 59, 73, 80–81, 141–143, 147–149, 240, 288–290, 297–298
Atlanta 48
attorney 6, 52, 115, 160, 167, 195, 281, 305; general 25, 145
Australasia xv
Australia 4–5, 14, 16, 25, 34, 38, 99, 106, 136, 208, 244–245, 248, 250, 253, 256–263, 284; northeast 250; northern 249; southern 102; Western 26; *see also* Indigenous Australia
Australian 24–25, 101, 245–246, 261–263; Constitution 258–259, 263; courts 251, 256–257, 260, 262–263;

historians 256–257; history 262; judges 262; jurisdictions 137; legal system 262; people 262; political rights 261; state 208, 257; *see also* Aboriginal; Indigenous Australians; non-Aboriginal Australians
Australian Aboriginal *see* Aboriginal
Austria 233
authentic: cultural subject 281; knowledge 249; trial 161
authenticity 223, 235, 279
awareness 2, 17, 25, 88, 99, 120, 153, 162, 173, 185, 220, 240–241, 250, 276, 280
Awas Tingni 195–196, 275, 279–281
Aymara 301, 303
Aztecs 278

babiliak gadang 333
babiliak ketek 333
baganyi 333
banking law 14
Bantul 334–335
Barngarla 102
Bathurst 251
behaviour 12, 16, 20, 75, 79, 104, 112, 119, 125, 127, 151, 153, 157, 178, 235, 247, 252, 293, 298, 304, 306, 310
Belgium 40, 193, 196–197, 233
belief 35, 52, 67–68, 75, 86–88, 90–93, 96, 102, 124–129, 168, 180–181, 221, 247, 252, 276, 291, 297, 339–340; cultural 88, 90, 245, 254; philosophical 67–68; religious 87, 90–91, 94; traditional 123; *see also* Acholi; *see also* Sikh
belonging 57, 168–170, 174, 190, 234, 280, 302, 305
beneficiaries 236, 322; of cultural expertise 4, 12, 14, 186, 236, 240
"best practice" 62, 70, 218, 259
beth din 171
bhang 312
bias 11, 13, 18, 37, 56, 127, 153, 159–161, 168, 172, 174, 275, 277, 285
Bima 332, 335
biodiversity 208, 276
biological 48, 51; features 51, 57; group 49; myth 51; race 48, 52; scientists 52; sex 67–68
bisexual 67, 292
Black 55, 266; churches 55; "Codes" 49; man 47, 54; peoples 54; racism 40
Black Lives Matter (BLM) 39–40, 47–48, 56, 58
Black Students Union 58
Bondo 74
Boqaa Valley 321–322
boundaries 111, 235, 249, 341; cultural 245; of cultural expertise 1–3; of law 339, 341; national 27, 204; of privacy 111
Brazil 135
British colonial government 41
British colonies 38
British colonization 248
British Columbia 103, 284
British East Africa Protectorate 15
Brunei 38
bumiputera 295, 297
burqa 94, 197
business 14, 24, 53, 63, 79, 88, 111, 118, 120, 166–167, 173, 219, 261, 291, 325
businessmen 126, 168

Caiñicu 303–304
California 50, 52–53, 55, 58, 171, 291, 295–296; Southern 47, 52–56, 295–296
Cambodia 202
Cameroon 123, 126–129
Cameroonian: Criminal Law 127; legislation 127; society 128
Canada 38, 41, 88, 92, 96, 99, 102–103, 136, 141–142, 146–148, 240, 242, 278, 284
Canadian population 102–103; *see also* Canadian Aborigines
Canadian Aborigines 102–103; *see also* non-Aboriginal Canadians
cannabis 311–312, 315, 319, 321–322, 327
Cape Town 39
caste 293–294
categories 35, 48–49, 52–54, 64, 74, 82, 206, 239, 248–249, 310, 339–342
Catholic: church 223; religion 296; *see also* Roman Catholic church
Catholicism 295, 299
Catholics 63, 89, 295–296, 299
cen 180
Central African Republic (CAR) 123–126, 128–129
ceremonial 91, 275–276, 283
ceremony 135, 311, 332; *see also* Peyote
Chicago 294
Chicanos 58
chiefs 128; local 127–128
child 63, 69, 77–78, 80, 154, 190, 268, 292–293, 301; marriage 323; protection 73; soldiers 180, 185, 223; *see also* one-child policy; *see also* custody of children

children 69, 76–79, 87, 102, 105, 115, 125–126, 154–155, 185, 189–190, 220, 235, 238, 271, 296, 332, 334; *see also* adoptions; *see also* custody of children
Chile 4, 194, 301–303
Chilean 16, 304–305
China 54, 135–136, 288–289, 291–293, 297–298; Southeast 53
Chinese 50–54, 57, 290–293, 295, 298; *see also* anti-Chinese; *see also* Malaysian Chinese
Chinese Indonesians 53
Chinese Korean 288, 290
Chinese Vietnamese 54
Christian 87, 219
Christianity 87, 185
circumcision 76; female 73, 79; male 76–77; non-therapeutic 76–77
citizenship 14, 50, 57, 144, 235
civil law 14, 88, 127, 167, 179, 234
civil rights 36, 54, 64, 190, 304, 330–331
civil society 216, 219, 239, 241, 295, 297
civil war 179, 181–182, 322
civilizations 35
claimants 7, 26, 68, 80, 88, 90–91, 94, 147, 149, 178, 249, 258
colonial 15, 32–34, 36, 38, 40–41, 49, 53, 136, 303, 310, 313–314, 320–321, 326, 330; expansion 51, 58, 278; government 41; history 33, 38–39, 41; oppression 41; rule 33, 35; *see also* anti-colonial; pre-colonial; postcolonial
colonial law 38, 40
colonial symbols 33, 39
colonialism 15, 17, 33–35, 40, 58, 248, 253, 310
coloniality 33
colonies 33–34, 36–41
colonization 320
colour 57–58, 89, 294, 297, 299, 320; people of 59; skin 49
commercial arbitration 3, 166–167, 171–173
commercial law 170, 173
Commission for Racial Equality (CRE) 88–89
common law 23, 38, 41, 67, 126–127, 135, 167, 171, 174, 179, 234, 261, 265–267, 273, 310, 336
Commonwealth 25, 251, 260
communication 22, 75, 105, 110–115, 117–120, 156–157, 163, 220
community leaders *see* leaders
competence 17, 24, 26, 115, 239, 247
complexity xiv, xvi, 26, 115, 160–162, 181, 183, 216, 221, 252, 265, 275, 341
confidentiality 21, 24, 26, 143, 171
conflict 2, 4, 12, 22, 27–28, 47, 53–54, 113, 115, 135, 163, 179–180, 183, 215–225, 265, 267, 270, 275–276, 278, 281, 296, 303–307, 321, 323–324, 326, 333, 335, 339, 341; identity 205; of interest 22; legal 110, 115; military 28; obligation 2, 20, 23; prevention 219; social 118, 217; war 144; *see also* conflict resolution; conflict-solving; post-conflict
conflict resolution 1, 3, 18, 170, 215–219, 221–222, 224–225, 270, 301–302, 305–306
conflict-solving 114–115
consent 26, 64, 182, 203, 221, 270–272, 332, 335; informed 21, 26, 28, 143, 203, 207
constitutional law 258
constructivist 48
contextualization xiv, 78
controversy 137, 159, 224, 276–277, 279, 281, 283–284, 316; *see also* ecological controversy
Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 330–331
cooperation 134, 152, 215, 221
Costa Rica 302
counterinsurgency 221–222
country experts 66, 141–142, 144, 146–148, 231, 233, 236–237, 239, 242
Country of Origin Information (COI) 17, 142, 237
country of origin 66, 142, 145, 148–149, 235
Cour Nationale du Droit d'Asile (CNDA) 237–238, 241
creativity 3, 17, 115, 167
credibility 22–23, 66, 75, 80, 142, 144, 147, 242
cremation 90–91
crimes 13, 79, 93, 125–126, 128–129, 134, 136–137, 139, 154–155, 157, 180, 182–186, 223, 291, 301–303, 305; against humanity 180, 182–183; hate 48; sexual 183; war 180; *see also* culturally motivated crimes; culturally oriented crimes
criminal courts 6, 75, 78, 82, 231, 241, 302, 304; *see also* International Criminal Court

criminal law 13, 17–18, 73–74, 78, 83, 88, 125, 127, 129, 161, 235–236, 240, 311, 316, 323, 325; *see also* international criminal law
criminalization xv, 38, 124, 311, 319, 322, 325
crisis xv, 23, 276, 320, 324
cult: evil 290–291, 298
cultural and natural heritage 205–206
cultural arguments 1, 3, 6, 13, 93, 137, 191, 240, 257, 280, 298
cultural background 4, 6, 13, 17, 93–95, 113, 119, 135, 171, 238, 272, 298, 302
cultural beliefs *see* belief
cultural brokers 88, 136
cultural defence xv, 2, 4–6, 11–13, 18, 75, 93–94, 135, 137, 184–186, 244, 252, 301–302, 306
cultural diversity 12–13, 104, 113, 190–191, 195, 197, 242, 302, 305, 307, 341–342
cultural expert xv, 1, 3, 5, 12–15, 21–23, 25, 33, 36–37, 40–41, 56, 66, 76, 81, 83, 87, 95–96, 136, 139, 151–153, 160, 177–179, 184–186, 188–189, 191, 196–198, 216, 219–225, 233, 234–237, 239–241, 257, 262, 265–268, 270–273, 275–278, 283–285, 306, 315–316, 326–327, 340–341
cultural heritage 104, 191, 205–206, 211, 245, 252
cultural intermediation 237–238, 240
cultural knowledge 4, 14, 18, 23, 54, 81, 100, 153, 177, 221–222, 245–247, 249, 290, 314
cultural mediation 136, 224, 306
cultural mediators 17, 148, 233, 239
cultural norms 197, 252, 267, 293, 312, 315–316
cultural practices 56, 59, 73, 83, 88–96, 100, 185, 190, 197, 206, 219, 223, 254, 297, 303, 321, 324–327, 329
cultural test 17, 240, 242
cultural traditions 76, 89, 189, 246, 253
culturally motivated crimes 12, 302
culturally oriented crimes xv, 2, 11–12, 18
culture xiv–xv, 3, 5–6, 11, 13, 16–18, 23, 25–28, 36–38, 52–54, 56, 59, 62–63, 66, 75, 81, 88–89, 93, 95, 101, 104, 107, 120, 135–136, 138–139, 142, 149, 151, 156–157, 166–167, 170, 172–173, 178, 181, 183–185, 189–191, 195–197, 202, 206, 210, 215–216, 218–221, 223–225, 235, 238–239, 241, 244, 248, 253, 261, 267–268, 272, 275–276, 281, 283, 288–290, 292–297, 299, 302–306, 309–315, 319–320, 325, 339–340; interpretations of 4; legal 126, 172; local 144, 221, 322; minority 73, 75; participatory 111, 114, 116; right to 6; *see also* law and culture
custody of children 14, 88, 333–334
custom 37, 49, 167, 170–171, 190, 202, 207, 211, 247, 267, 269–270, 272, 295, 302, 304, 305, 310, 312, 322, 325, 332; ancestral 304–305; local 183, 315; religious 310; social 89; traditional 26, 247; *see also* Indigenous customs; law and custom
customary financial transactions 14
customary law 15, 126, 184, 189, 203, 244, 252–253, 265–273, 302–305
customary practice 167, 235, 253, 272, 311–312, 315, 327, 329, 334
cutting 74, 88, 280, 310; female genital 73
Cyprus 233

daastar 88
data 21, 24–27, 81, 103, 124, 246, 252–253, 256, 262, 283–284; empirical 248; field 23; qualitative 233, 247
decision-making xiv–xv, 12, 20, 22, 28, 30, 48, 79, 133–134, 138, 195–196, 202–203, 207, 209–211, 221, 241, 285, 290
decolonial 12, 15, 33, 36, 39, 342
decoloniality 2, 13–14, 32–33
decolonization 2, 32–38, 40–41
defendants 6, 24, 75, 90, 117, 125–127, 135, 138–139, 152–154, 157, 183, 245, 251, 268–269, 304, 332
dehumanization 49–50
Delta state 80–81
democratic inclusivity *see* inclusivity
Denmark 233
deontological 2, 277, 281, 284; codes 21
deontologies 23, 29
deportation 14, 80
descent 48, 249; Asian 50; European colonizers 33
determinism 36
dialogue 24, 41, 95, 154, 197, 217, 241
diamond 167, 171, 174; arbitration 173; industry 170–171; trade 170–171, 174; traders 171
diaspora 33; Chinese 53; Eritrean 147
differences 22–23, 48–52, 87, 115, 117, 133, 137–138, 170, 179, 188, 197, 209, 217–219, 254, 263, 294, 320, 322, 325, 340; cultural 87–88, 135, 138, 218,

220, 247, 281, 322, 341; genetic 50; language 135; phenotypic 48; political 341; religious 86–87; social 192
dignity 21–22, 63, 68, 117, 182, 190, 218, 271–272, 335
diplomacy 216–217, 297
discrimination 12, 26, 38, 49–50, 64, 81, 89, 94, 96, 167, 169–170, 174, 235, 267, 285, 293, 297, 324–325, 330–331, 341; Asian 50; gender-based 323; racial 235; sex 64–65; *see also* anti-discrimination; non-discrimination
disparities 106, 216
dispute 11, 14, 22–23, 54, 78, 91, 94, 112, 135, 137, 149, 166–169, 171–174, 191, 198, 236, 246, 249, 258, 261, 270, 334, 336, 340; commercial 168; legal 112, 116; marital 336; *see also* dispute resolution
dispute resolution xv, 1, 6, 12, 14, 16, 18, 107, 136–137, 149, 169–172, 174, 191, 307, 333
diversity xiv, 4, 50, 52–57, 59, 69–70, 86, 94, 96, 102, 106, 241, 251, 253, 271, 276, 283, 298, 305, 320–322, 326, 340–341; gender 3; religious 95, 219, 321; *see also* biodiversity; cultural diversity
divination 127
divorce 14, 78, 88, 235, 268, 313, 323–324, 329–335; revocation of 331–332, 334–336
"do no harm" 13, 17, 221, 238
doctors 22, 124–125, 127, 221, 291, 294; witch 125–126, 129, 179
domestic abuse *see* abuse
domestic violence *see* violence
dominant culture 12, 59
domination 99–100
dowry 288, 293–295, 297
Dravidian 314
Dutch 24; colonial period 53, 330; law 265

"Eastern" cultures 310
Eastern Pacific 282
ecological 280, 282; claims 276–277, 280, 285; practices 276–278, 281, 284; traditions 275–276, 284; *see also* ecological controversies
ecological controversies 275–276, 278, 282–283
ecologies 284, 276; *see also* Indigenous ecologies
economic migrants *see* migrant
economics 6, 49, 114
economy 39, 100, 113, 115, 288, 322
Ecuador 280
education 36, 47, 51, 56, 63, 99–101, 103–104, 107, 115, 135, 139, 159–160, 192, 209, 291–295, 297, 299
educators 114, 154
elders 125, 136, 154, 178, 223, 250, 332–333; church 56; community 135–136, 305, 332; indigenous 137
employee 14, 25, 169, 174
employer 14, 21, 25–27, 67, 169, 193
Endorois 207–208
England 15, 40; and Wales 62, 64–66, 70
English 105, 124, 258; common law 126, 261; language 172, 314; law 168–169, 265
entry permits 14
environment 34, 51, 68, 156, 202, 205–206, 208, 276, 283, 285, 326; domestic 163; family 190; geographic 102; legal 110, 113, 174; natural 113; social 34, 155, 171; working 70
environmental: assessment 283; evaluation 283; organizations 283; *see also* anthropology
equality 3, 13–14, 59, 64–65, 68, 88, 168, 192, 197, 271–272, 320, 323, 329, 331, 341
Eritrea 144–147; -Ethiopia border 144, 147
Eritrean: diaspora 147; ethnicity 145, 147; independence 147; national 144, 147; nationality 146–147; origin 146; *see also* Eritrean Liberation Front
Eritrean Liberation Front 147
Eritreans 144–147
Estonia 118
Estonian: courts 118
ethical xv–xvi, 1, 4, 6, 11–13, 16–18, 20–22, 24, 26–27, 29–30, 37, 119, 123, 151, 153, 172, 190, 215–216, 219, 221–222, 224–225, 238, 245, 281, 284–285, 306, 339; codes 21, 26, 29, 119, 143; dilemmas 2, 22, 25, 37, 220, 277; positioning 3, 6, 13, 151, 241; principles 1–2, 11, 15, 17, 20, 29
ethics 2, 5, 13, 20–22, 27–29, 37, 116, 119, 156, 223, 250; of cultural expertise 2, 13, 20, 153, 241
Ethiopia 144–147; *see also* Eritrea
ethnic 53, 86, 89, 115, 144–146, 169, 295, 297, 320, 322, 325, 340; culture 156; cultural identity 67; group 54, 89, 170, 223, 295, 305, 322; discrimination 235; diversity 95; minorities 33, 39–40, 86,

94, 134, 190, 234; origins 53, 89, 294; studies 47, 58
ethnicity 48, 54, 59, 87, 147, 149, 174, 234, 289, 296, 299
ethnocentric 79, 179, 303–304
ethnocentrism 5
ethnographic: accounts 26, 290; data 284; evidence 279, 326; inquiries 245; interviews 142, 289–290, 305; investigation 28; materials 249; overview 242; picture 36; research 21; testimonies 280; translators 310
ethnography 5, 26, 135, 219–220, 224
ethnopsychological: assessments 237; expertise 17, 240
ethnopsychologists 233, 238
ethnopsychology 241
ethnopsychiatrist 233, 238
Euro-American: setting 184
Euro-centric 40, 166, 275, 310; *see also* non-Eurocentric
Europe xv, 2–4, 14, 16, 23, 33, 35, 39–40, 67–68, 73, 75, 82, 179, 190, 192, 231, 233–235, 239, 242
European 16, 17, 23, 33–35, 38–41, 51, 63, 74, 106, 117, 146, 152, 193–194, 197, 205, *232*, 242, 282, 314; colonial expansion 51, 58; colonialism 248; colonizers 33–34; descent 33
European Asylum Support Office (EASO) 239
European Convention on Human Rights (ECHR) 62, 68, 90–91, 117–118, 192
European Court of Human Rights (ECtHR) 38, 80, 117–118, 163, 188, 192–194, 196–197
Evangelical 87
exclusion xv, 49–51, 57, 267, 340, 342
exclusivity 342
expert knowledge xiv–xv, 1, 5–6, 103, 137, 147, 192, 305
expert opinion 17, 23, 38, 119–120, 195–196, 234, 236, 244, 246, 248, 251, 253, 281
expert report 37, 142, 147, 149, 160, 162, 196, 236, 238, 251, 305
expert testimonies 5–6, 160–162, 164, 186, 196, 284
expert witnesses 5, 14–16, 18, 22–24, 37, 52, 95, 160–164, 178–180, 182, 184, 189, 194–197, 244, 254, 256–257, 259–260, 262–263, 279, 281, 283–284, 289
exploitation 49, 217, 280
extradition 14
extreme speech *see* speech
extremism 48, 160, 162, 191

faith 92, 172, 278, 296
Falun Gong (FLG) 288, 290–291, 297–298
family 55, 63–64, 76–80, 88–89, 92–94, 100–101, 129, 144, 149, 152–157, 182, 190, 192, 231, 238, 250, 268–269, 272, 288, 293–297, 314, 325, 330, 333–335; members 93, 126–128, 137, 157, 238, 251, 333; relationship 64; reunions 14, 235; *see also* family courts; family law
family courts 76, 313, 325
family law 18, 77, 83, 88, 236, 255, 323, 330
fatwas 313
Female Genital Mutilation FGM/C 2, 73–83, 190
Filipinos 50, 295
Finland 191, 233
First Nations 6, 12–14, 16, 33, 37, 40, 102–103
flexibility 167, 233, 266, 315, 334
foreigners 51, 53, 238
France 16, 54, 63, 88, 94, 126, 151–152, 154–155, 192–193, 197, 231, 233, 234–235, 237–242, 292
Free, Prior and Informed Consent (FPIC) 203–204, 207–208, 210–211
freedom 38, 63, 91, 94, 96, 167, 190, 297; of choice 171–172; to manifest 194; of opinion 192; religious 76, 92, 192–193, 279, 296; of thought 117; *see also* freedom of expression; *see also* freedom of speech
freedom of expression 96, 117, 120
freedom of speech 116
French 16, 34, 63, 67, 102, 126, 151–152, 154, 237–238, 241, 323

gadang 333
gay 64, 66–67, 292–293, 297
Gdańsk 115–116, 119
gender 3, 13, 24, 26, 62–65, 69, 78–80, 94, 135, 138–139, 149, 152, 170, 182, 235, 247, 271, 293–294, 303, 306, 323, 325, 329, 331; dysphoria 65; reassignment 64–65, 69; recognition 63–65; rights 63, 87, 302, 329; *see also* identity
genetic 50–51
Geneva Conventions 182–183
genital modification 74
genocide 40, 183; Rwandan 183
geography 49, 189, 191, 196–197

geopolitical scientists 152, 238
Georgia 48
Germany 233, 234
Ghana 135
ghanima 155
ghettoization 86
Gikuyu 74
globalization 206
god 126, 311–312
governance 6, 15, 95, 100, 223, 320
Great Rift Valley 207–208
Greece 16, 233, 234
Greek 314
Guatemala 302

Hachijo 104
hadiths 156
Hasidic 167, 170, 174
hate crimes 48
hate speech 111, 113–116, 118–120
hatred 48, 57, 94, 159
headscarf 94, 188, 191–194
health 77, 91, 99–103, 106–107, 146, 180, 272, 290–291, 298; mental 102, 152, 180; physical 98–99, 103, 106
hegemony 33
heritage 4, 15, 24, 53, 104, 201–206, 208–211, 314; colonial 15; Indigenous 211; natural 201–202, 205–206; world 204–211; *see also* Aboriginal; cultural heritage
Hezbollah 152
hijab 193–194
Himachal Pradesh 311–312, 316
Hindi 314
Hindmarsh Island 24
Hindu 90–91, 294–295, 299, 311–312; law 310; religion 91
Hinduism 87, 91, 96
historians 40, 49, 142, 149, 152, 160–163, 238, 256–263, 275, 284, 314–316
history 3, 5, 16, 18, 26, 29, 33–34, 38, 40–41, 47–48, 50, 52, 58, 64, 89, 99, 104–105, 144, 149, 152, 154, 160–161, 195, 197, 202, 220, 238, 248, 256–258, 260–263, 279, 283, 294, 310–311, 314–315, 320, 327, 339
"history wars" 261, 263
Hokkaido 100
Holocaust 161
homophobia 293
homophobic 63
homosexual 67, 288, 292–293, 298
homosexuality 33, 38, 64–65, 292–293, 298
Hong Kong 135
honour 56, 117, 135, 154, 218, 235
honour killing 235, 319, 323–325
Horn of Africa *see* Africa
hukum yang hidup 331
human rights 1–4, 6, 13, 18, 36, 38–39, 64, 68, 73, 80, 90, 101, 117–118, 144, 163, 188–195, 197–198, 207–208, 211, 222, 235, 265, 267, 270–273, 275, 280, 297–298, 302–303, 329, 335
human rights law 6, 38, 189, 235; *see also* international human rights law
Human Terrain System (HTS) 16, 27–28, 221–222, 224
humanities 115, 127, 263
humanity 35–36, 180, 182–183, 201, 204, 211, 218, 223
Hungarian 118
Hungary 63
hunting 188, 190, 244; ritual 276, 281; whale 282
Hutus 183

identity 6, 34, 37–38, 52–53, 59, 104, 155, 162, 166, 194, 204–205, 219, 281, 310, 314, 324–326; cultural 67, 173, 195–196, 279, 283, 302, 326; gender 38, 63, 65–68; national 312, 320; racial 5, 52, 90; sexual 67; *see also* Indigenous
ideology 152–157; radical 154; religious 153; terrorist 151, 153–156; violent 156
Imam 233
immigrant 40, 50, 53, 59, 99, 116, 294; communities 116; groups 54; population 47
immigration 52–53, 66, 70–71, 86–87, 144, 147, 231, 236–224, 242, 340; judges 141–142, 149, 236–237, 240, 242; lawyer 6, 149, 238, 240; policies 57, 238; rights 18; *see also* immigration courts; *see also* immigration law
immigration courts 88, 95, 145, 236, 241
immigration law 14, 66, 142, 147, 235, 239
impartial 149, 168, 260, 279
impartiality 83, 133, 135, 277
imperialism 34
imperialists 33, 314
imprisonment 126–127, 154, 303; *see also* prison
inclusion 51, 56, 69, 178, 196–197, 241, 285
inclusivity 241; democratic inclusivity xvi; multi-level 4; systematic 7, 13; systemic 342
independence 15, 26, 80–81, 147, 164, 241, 245, 314, 321, 330; of

anthropologists 17; of experts 4, 13, 143, 160, 231, 238
independent expert 17, 151, 236, 238–239, 241
India 38, 41, 90, 170, 288, 309–312, 314–316
Indian 38, 293–295, 311–312, 314; *see also* Asian Indian; Mashpee Indians; Tamil Indian
Indian Penal Code (IPC) 38
indigeneity 106
Indigenous 99, 106–107, 191, 195, 197, 201–203, 206–211, 244, 246–250, 258, 261, 276–278, 280–281–282, 284, 291, 302–303, 305; descendants 245; elders 137; identities 277, 280; groups 40, 107, 195, 249–251; jurisprudence 38; knowledge 103, 211; land 27, 189, 195–196, 244, 248–249, 251; minorities 100; participation 191; societies 26, 33; sovereignty politics 36; voice 35, 203; ways of life 189; inequality 25, 36–37, 81, 101, 135, 217, 320, 340–341
Indigenous Australia 245, 254
Indigenous Australians 101, 258, 262
Indigenous communities 33–34, 98–100, 103, 107, 136, 137, 188–189, 195–196, 210, 275–277, 281–282, 284–285, 303–304
Indigenous culture 253, 304–305, 312
Indigenous customs 301–304, 307
Indigenous ecologies 275–276, 284–285
Indigenous expert 191, 206, 209
Indigenous expertise 25, 201–206, 208–212
Indigenous languages 3, 98–104, 106–107
Indigenous law 246, 251, 304–305
Indigenous people 4, 6, 13–14, 59, 98–100, 102–104, 106–107, 134, 137, 189–191, 194–196, 201–212, 235, 244–245, 248–251, 253, 261–262, 278–281, 302–303, 305, 307
Indigenous rights 3, 14, 18, 98, 107, 188, 191, 194–195, 253, 280–282, 305
Indonesia 4, 52–53, 56–57, 289, 295–297, 329–336
Indonesian 52–53, 295–296, 329, 332
Indonesians 53, 288, 295; *see also* Chinese Indonesians
inequalities 12, 14, 24–25, 32, 36–37, 39–41, 81, 99, 101, 106, 135, 217, 320, 340–341
infibulation 74
informed consent *see* consent
inheritance 88, 267, 323
inheritance law 235
inhumane treatment 288
injustice xv, 55, 216, 270, 333
innate 56–57
insurance 14
integration 86–87, 98, 219, 268–270, 326, 329, 333
integrity 20, 75, 303
Inter-American Commission on Human Rights (IACommHR) 194–196, 280
Inter-American Court of Human Rights (IACtHR) 188–189, 194–197, 275, 280, 303
intercultural: law 16; tolerance 104, 107; understanding 306; *see also* mediation; mediator
interculturalism 12
interdisciplinarity 5, 159
interdisciplinary xv, 5–6, 158–160, 163, 177, 215, 306, 327
interlocutors 21, 221, 246, 309, 315–316
intermarriage 37
intermediaries 279, 284, 310
intermediation 275; *see also* cultural intermediation
International Centre for the Study of Preservation and Restoration of Cultural Property (ICCROM) 204–205
international commercial arbitration 166–167, 172
international commercial law 170
International Commercial Mediation Rules (ICMR) 173
International Council on Monuments and Sites (ICOMOS) 204–205
International Covenant on Civil and Political Rights (ICCPR) 190, 193, 304, 330–331
International Criminal Court (ICC) 6, 177, 180, 184–185, 222–223
international criminal law 3, 177, 179–181, 222
International Criminal Tribunal for Rwanda (ICTR) 177, 179, 183–186
International criminal tribunals (ICTs) 177–179, 184–185
international human rights 3, 6, 189–191, 198, 302, 330, 335
international human rights law 18, 38, 188–191, 197, 208, 329
international humanitarian law 181, 183–184
international law 4, 6, 118, 141, 179, 184, 190, 201–204, 341–342

international protection 1, 23, 66, 237, 239–240
International Union for the Conservation of Nature (IUCN) 204–205
International Whaling Commission (IWC) 282–283
interpretation 2, 4, 6, 13, 23–24, 26, 28, 34, 91–92, 94–95, 113–114, 136, 152–153, 155–156, 159, 169, 191, 235, 248, 256–259, 263, 280, 296–297, 302, 304, 310, 313, 322, 324–325, 334–335, 339
intolerance 68
Inuit 102
investigation 17, 28, 152–154, 180, 237, 244, 246, 252, 254, 304; criminal 78; ethnographic 28; police 127, 129; terrorism 3, 151, 238–239
investigative journalism *see* journalism
Iraq 23, 27–28, 66, 152, 215–216, 221
Iraqi Syrian 152
Iraqis 221
ISIS 152–153
Islam 87, 152–153, 155, 185, 288, 295–297, 299, 312–314, 320, 330–331
Islamic: countries 296; culture 296; groups 296; headscarf 194; jurisprudence 299; jurists 296, 310; norms 312; personal status 325; reconciliation 331; religiosity 313; scholars 310; social governance 320; society 296; state 321; teaching 331; University 335; values 295
Islamic courts 4, 329–336
Islamic law 190, 313, 316, 329–330, 334–336
Islamism 152
Islamist groups 152
Ismaili 168–169
Israel 106
Israeli 106
Italian 239, 242, 292
Italy 117, 156, 224, 231, 233, 235, 239–242

Jakarta 52
Japan 16, 99–100, 104, 170, 172–174, 222
Japan Commercial Arbitration Association (JCAA) 173
Japanese 16, 50, 104–105, 172–174, 222
Japanese Americans 50
Jewish 92, 153–154, 170–171, 174
"Jim Crow" systems 49
journalism 3, 116, 119, 124, 127; investigative 3, 123–124, 127
Judaism 96
judges 17–18, 23–24, 26, 62–63, 66–67, 69–70, 76, 86, 89, 91–95, 115, 123, 125, 127–129, 135–139, 141–143, 146, 148–149, 152–154, 156, 161, 163, 167, 169, 171, 178–179, 184, 186, 194–196, 210, 236–240, 242, 245, 256–263, 267–270, 272, 284–285, 297, 301–307, 309–310, 313, 316, 325–327, 329–336
judicial activism *see* activism
judiciary 3, 22–23, 62, 65–66, 68–70, 83, 124, 126, 128, 134, 141, 157, 164, 194, 231, 241–242, 260, 268, 280, 314, 324, 327, 330
justice xv–xvi, 3–4, 6, 67, 81, 88, 106, 110, 124, 128, 134–135, 137–138, 157, 160, 169, 222–224, 241, 261, 266, 294, 303, 306, 311, 319, 325, 330–331, 341; colonial 15; court of 193, 302, 304; criminal 136–137, 322; gender 329; international 185; juvenile 17; local 225; procedural 133, 135–136; restorative 217; social xiv, xvi, 36, 106, 250, 312; substantive 133; system 4, 83, 88, 127, 134, 223, 241; transitional 217, 222–224
justice system *see* justice

kafalah 190
Kakadu National Park 208, 210
Kannada 315
kara 90
kehillah 171
Kenya 15, 38, 41, 207–208
Kenyan 34, 207
kesalingan 334–335
khul' 330
khula 313
knowledge: anthropological 16–17, 28, 240; claims xiv; historical 26; local 33, 216, 224; special xv, 12, 14–15, 148, 202, 298, 319–320; specialised knowledge 178, 191, 259, 268; specialist knowledge 23, 268, 340; specific 26, 94; *see also* cultural knowledge
Koran 295–296
Korean 280, 291
Korean Chinese 288, 290
Koreans 50
Koreatown 291, 298
Kurds 152, 154
Kurdish 153–154; *see also* Turkish-Kurdish
Kurdish Workers Party 152

labour law 14, 323
Lake Bogoria 207–208
Lake Elementaita 207
Lake Nakuru 207
land 25, 27, 34, 51, 101, 188, 189, 208–209, 244–245, 248–254, 258, 279–281, 303–304; ancestral 37, 100, 196, 207, 261, 275, 280, 284; claims 103; rights 25, 41, 195–196, 247–248, 250, 280; titles 16, 26; traditional 248, 250, 254, 258, 276; *see also* Indigenous land
land titles *see* land
languages: ancestral 98–107; Indigenous 3, 98–102, 104, 106–107; majority 98, 100; minority 234; sciences of 3; *see also* Aboriginal
Latin 314
Latin America *see* America
Latino 54, 56
Latinx Americans 58
law and culture xv, 2, 11–12, 18, 148, 309
law and custom 247, 249, 251–252
law-making 98, 202, 319, 322, 324
lawyers 3, 6–7, 16, 21–23, 26, 86, 88, 93–95, 114, 136, 139, 141–145, 147–149, 167–168, 172, 174, 179, 184, 195, 235–236, 238, 240, 242, 245, 247, 252, 258–260, 285, 289, 291, 293, 296, 298, 301–302, 306–307, 309, 339
leaders 39, 161, 178, 180, 195–196, 219, 223, 279, 304, 314, 326; civic 53, 56; communist 53; community 233; military 221, 223; political 50; religious 155, 233, 322, 332; traditional 268, 271; *see also* Acholi
Lebanese 321
Lebanon 152, 319, 321, 326–327
legacy 48–49, 106, 253, 310, 319–321, 323, 326
Legal Aid Agency (LAA) 236
legal assistance *see* assistance
legal disputes *see* dispute
legal expert 125, 196, 316
legal language 324, 326
legal pluralism 12, 123, 191, 198, 310, 321
legal practice 17, 320, 324–326
legal proceedings 22, 38, 75, 86, 112, 141, 239, 309, 323, 341
legal process 17–18, 25, 141, 245, 324
legal professionals 2, 18, 59, 74, 87, 123, 129, 177, 223, 234, 239, 310
legal professions 1, 5, 17, 95, 113, 115, 233, 234, 237, 239–241
legal system 4, 12, 14, 24, 38, 62, 71, 74–75, 125, 129, 133–137, 149, 156, 172, 203–204, 211, 234, 241, 262, 265, 267, 275–276, 284–285, 297, 309–310, 313, 315, 319–321, 323, 326–327, 330, 341–342
legitimacy xv, 134, 136, 139, 155, 220, 284, 309, 313, 321, 326, 330, 332, 335, 342
lesbian 64, 126, 292
Lewiston 219–220, 224
lex mercatoria 167
LGBTQIA+ 3, 38, 62–71, 126
liberty 38, 192, 201
linguistic minorities *see* minorities
linguistics 106, 115, 184, 197
literature 62, 89, 102, 136, 155, 219, 250–251, 310
litigants 4, 7, 17, 133–138, 149, 160, 170, 178, 234, 257–258, 267, 272–273, 330
litigation 16, 48, 68, 117, 137, 172–173, 188, 256, 262–263, 265, 267–268, 270, 272–273, 290, 302, 327
Little Saigon 53–54
"living law" 331, 335
lobolo 268
local practices 327, 329–332, 334–336
Lockhart River 250
lonco 304
Lord's Resistance Army (LRA) 179–181, 185, 223
Los Angeles 52–53, 58, 291, 295–296

magic 124, 127
Maine 219
majority 55, 92, 99, 100–101, 107, 168, 170, 208, 220, 223, 260, 261, 295, 297; groups 12; language 98, 100; norms 179; populations 91; societies 202
Makah 275, 281–284
Malay Archipelago 289
Malayalam 315
Malaysia 38, 288–289, 294–297
Malaysian 293, 295
Malaysian Chinese 54
malón 303–304
Malta 233
mamak-nini 333
Mandla 88–90, 94
Mapuche 301, 303–305
marginalization 248
marginalized 59, 330; groups 115; populations 248
marital disputes *see* dispute

marriage 14, 50, 57, 64, 149, 182, 185, 235, 268–272, 293, 297, 313, 323–325, 330, 332–334; arranged 182, 186; customary 268, 271–272; forced 182, 185–16; inter- 37; law of 334–335; polygamous 335–336; polygynous 271; same-sex 63–64; traditional 179, 181–182; *see also* child
martyrdom 155
Mashpee Indians 37
maslahah 336
mato oput 223–224
matrimonial reconciliation 329
maulvis 310, 313
media 3, 15, 63, 75, 79, 87, 110–120, 153, 158–164, 283, 340
medialization 111
mediation 16–17, 53–56, 172–173, 217, 239, 277, 279, 285, 331, 333, 335–336; commercial 173; elderly 136; intercultural 241; judicial 333; traditional 333–334; tribal 128; *see also* cultural mediation
mediation-arbitration (med-arb) 172
mediatisation 110–113
mediator 88, 172–173, 218, 238, 324, 333; intercultural 238; local 310; *see also* cultural mediators
medicine 49, 128, 196–197, 340
membership 51–52, 251, 290, 294
memory 33, 89; collective 33; historical 189
methodology 23–24, 26, 28, 40, 123–124, 195, 261–262
Métis 102
Mexico 135
Middle East xv, 4, 67, 147, 319–321; *see also* Arab
Michif 102
migrant 53, 87–88, 99, 224, 239–240, 297, 302; economic 143
migration xiv, 14, 16, 53, 106, 113, 144, 219, 288–289
migration law 143
"militarization of anthropology" *see* anthropology
military 16–17, 21, 27–28, 51, 180, 221–222, 225, 296–297
Minangkabau 333
minorities 13–14, 35, 55, 57, 86–87, 96, 101–102, 104, 107, 158, 190, 248, 322, 324; claims 12; communities 134, 136; cultures 73, 75, 190, 268; gender 293; group 12–13, 18, 103, 137; linguistic 107, 190, 234; litigants 135–136; members 137, 139, 190, 297; population 59, 91; religious 94, 324; rights 35, 207; status 134; *see also* ethnic minorities; Indigenous minorities
miscommunications 3, 7, 23
misinformation 116, 120
misunderstandings 27, 172, 221
modern 33–35, 50, 111, 122, 135, 138, 209, 276, 297, 312, 314; *see also* pre-modern; post-modern
"modern societies" 189
modernisation 249
modernity 32–35, 37, 189
Mongolian 50
moral 20, 32–33, 37, 41, 58, 87, 91, 145, 153, 155, 157, 169, 290, 322
morality 22, 38, 63, 292, 303
mubaadalah 334
muftis 310
mulatto 50
multicultural 86; awareness 99; Europe 2–3; jurisprudence 6; negotiations 22; societies 74, 83, 88, 94–95, 115
multiculturalism 12, 86–87, 341
multi-ethnic 86, 295, 297
multilingualism 37
multi-religious 295, 297
Muslim 50, 67, 77–79, 94, 152, 155, 168, 193, 289, 294–297, 299, 312–313, 329, 335–336; *see also* Muslim law; non-Muslims
Muslim law 310, 330–333
Myanmar 38

nagurs 50
narratives 23, 33, 37, 74, 160, 290
national law 4, 302–304
nationalist 35
nationality 52–53, 66, 89, 145–147, 149, 166, 168, 290, 299, 323; Eritrean 145–147; Ethiopian 144–147
native: dispute 16; fauna 251; language 233, 238–239; species 251; title 5, 25–26, 245, 248–249, 251–253, 258, 261, 263, 284; *see also* Native American
Native American: Church 279; communities 275, 282; representatives 278; reservations 277; rights 279; *see also* Native American Peyotists
Native American Peyotists 278–279
Native Americans 41, 58
native language *see* native
native title *see* native
natural 34–35, 50, 79, 113, 190, 196, 201–202, 204–206, 235, 266, 276, 280; *see also* heritage

natural sites 205–206, 276
nature xiv–xv, 2, 5, 35, 38, 57, 68, 87, 90, 93, 115, 117, 129, 141, 147, 149, 154, 163, 166–167, 191, 202, 204–206, 235, 246–247, 249–252, 266–267, 277, 281, 284, 304–305, 310, 314, 325, 342
Nazi 162
Nazism 68
Neah Bay 282
negotiation 22, 25, 78–79, 95, 202, 217, 245, 251, 253, 280, 324
"negro" 50
New Zealand 136
Netherlands 18, 135
neutrality 2, 13–14, 17–18, 24, 36, 56, 117, 133–135, 139, 184, 193, 238, 241, 267
New South Wales 251
Ngarrindjeri 24
Nicaragua 195, 280–281
Nicaraguan 280
Nigeria 80–81, 135
Nigerian 80, 82n2
niqab 94
non-Aboriginal 101, 252
non-Aboriginal Australians 101
non-Aboriginal Canadians 103
non-academic 5
non-binary people 63–64
non-discrimination 193, 197
non-Eurocentric 284
non-European 32, 205
non-humans 276
non-Japanese 172
non-Muslims 295
non-recognition 57
non-responsible 119–120
non-Western 81, 206
normative 135, 266, 271, 304, 310, 312, 319, 321–322, 324–326
norms 33, 56, 106–107, 134–135, 169–170, 179, 195, 247, 265, 297, 311–312; constitutional 309; customary 310–311, 316; human rights 197; legal xiv; religious 316; sexual 38; sociocultural 310; *see also* cultural norms; *see also* Islamic
Northern Territory 249
Nueva Imperial 304–305

oath 22, 27, 29
objective 2, 36, 39, 111–112, 119, 142–143, 146–147, 157, 233, 259–260, 306
objectivity xvi, 22–23, 27, 93, 261
observation 23, 55, 66, 179, 260, 262, 283, 295, 336; participant 25, 142, 247, 254
Occident 34
Odiya 315
offence 12, 63, 88, 93, 125–127, 217, 235; criminal 64, 125, 127–128, 311; homicide 301; sexual 64
Ojibwe 102, 284
Okinawan 104–105
Olympic Peninsula 282
ombudspersons 233
one-child policy 292
Opération Oiseau Bleu 16
opinion 18, 23–24, 76–77, 110, 112–113, 115, 117, 120, 125, 134, 143, 192, 194–196, 236, 246–247, 251–253, 259, 267, 271, 281, 301, 323; anthropological 251–252; expert 17, 23, 38, 76, 119–120, 195–196, 234, 236, 246, 248, 251, 253, 259, 268, 281; legal 313; political 52, 290; professional 116, 236; public 112
oppression 14, 36, 38, 40; colonial 41; patriarchal 79
oral testimony 93, 146
Orange County Human Relations Council (OCHRC) 53–55
Orient 34
origin 34, 54, 89, 154, 296; Asian 53; Chinese 54; Eritrean 146; colonial 38; country of 17, 57, 66, 142, 145, 148–149, 235, 237–238; cultural 53; ethnic 89, 294; historical 38; Indian 293; Jewish 174; Kurdish 153; national 89, *289*; Vietnamese 53
outsiders 51, 53–54, 171, 223, 272
ownership 26–27, 49–50, 182, 189
Oxford 39–40

Pakistan 135, 309, 312–313, 315–316
pan-Arab 321
pandits 310
Paraguay 188–189, 195–196, 280
Paraguayan 195–196
Paris 152, 155, 238
participant observation *see* observation
participation 21, 81, 117, 120, 137, 156, 190–191, 195, 204, 208–212, 268, 277, 342; expert xv, 161, 339
partnership 47, 54, 56, 64, 334–335
peacebuilding 216–218, 225
penal law 15
perception 3–4, 34, 51, 77, 112–113, 119, 133–134, 136, 138, 161, 172, 218, 231, 233, 240–241, 277, 292, 316, 321; *see also* self-perceptions
perpetrator 78–79, 155, 157, 182, 305

persecution 52, 58–59, 66, 142, 144–145, 147–149, 289, 292, 294, 296–297
Peru 302
Pewenche 301, 303–304
Peyote 41, 275, 277–278; ceremony *277*, 277–278
Peyotism 278
phenotypic 48
philosophy 35, 275, 290
plaintiff 125, 268–269, 332
pluralism: procedural 331; religious 117; *see also* legal
Poland 135, 233
policy xiv, 25, 30, 39, 52, 55, 57, 70, 87, 103, 153, 193, 203–204, 210, 220, 238, 241–242, 276, 288, 291, 293, 296–297, 299, 341; action 295, 297; colonial 15; decisions 25; education 36, 99; government 15, 17, 143, 241, 291, 340; guidelines 106; welfare 22; *see also* immigration; one-child policy; public policy
policymakers 21, 311–312
Polish 23, 63, 115–117
political science 115
political scientist 162
politics 6, 27, 34, 36, 63, 89, 113–114, 149, 204, 211, 242, 247, 249–250, 309, 314
polygamous 235, 335–336
polygamy 329, 331–332, 335–336
Portugal 233, 234
positionality 11
positioning 1–3, 5–6, 13, 151, 172, 185
postcolonial xv, 32, 34, 40–41, 309–310, 320–321
post-conflict 217, 222–224
post-modern 35
postmodernism 21
post-racial 56
post-structuralism 34
poverty xiv, 99–100, 102, 297
power xv, 5, 22, 34, 36–37, 41, 49, 51, 104, 107, 119, 124–125, 138–139, 143, 149, 152, 159, 167, 173, 180–182, 194, 223–224, 248, 267, 294, 313, 319, 340–341; colonial 321; disparities 216; dynamics 137, 186; imbalance 7, 21, 24, 26; inequalities 24–25, 101; legislative 83; magical 126; political 218; relationships 6, 13, 25, 242; spiritual 180–181
practices xiv, 1, 5, 22, 25, 33, 53, 57–58, 73–77, 79–81, 86–88, 90, 92, 94–96, 99–100, 124–125, 127, 135–137, 139, 142, 146–147, 155–156, 160, 163, 167, 171–172, 174, 185, 190, 202, 208–209, 211, 215, 217, 220, 234–235, 245–247, 249, 252–253, 262, 268, 276, 278, 280–283, 290–291, 295–296, 303, 312, 315, 320–323, 325–326, 333, 339–341; ancestral 303; ecological 275–278, 281, 284; legal 17, 320, 324–326; mystical 126; religious 94, 297, 321; social 2, 189, 266–268, 303, 320, 322, 324–325; sociocultural xiv; traditional 334; whaling 282–283; *see also* "best practice"; cultural practices; customary practices; local practices; Sikh
practitioners xiv–xv, 114, 124, 167–168, 172, 202, 216–219, 225, 241, 245, 247, 288, 291, 340
praxis 32, 35–36, 41
pre-colonial 34–35, 271
pre-modern 35
prejudice 81, 100, 112–113, 219, 279, 310; cultural 80
prevention 219
priest-diviners 128
priests 22
prison 23, 28, 55, 124–125, 127, 134, 144–145, 153, 155, 291, 303; sentence 78–79, 93, 162; *see also* imprisonment
privacy 22, 64, 111, 117, 120, 143, 272; *see also* protection
pro bono 142, 240, 294
problem-solving 13, 137, 217
procedural justice *see* justice
prodeo 330
progress 32, 98, 206
Project Camelot 16
Prophet 156
propriety 38
prosecutor 79, 124–126, 127, 137, 152–153, 238; public 17, 24, 151, 153
protection 1, 6, 21, 40–41, 63–64, 68–69, 80–81, 91, 94, 117, 142, 144, 146, 190, 205, 208, 211, 234–235, 238, 251, 284, 289–290, 303, 323, 325, 335; asylum 52, 289–291, 297; child 63; constitutional 279; of culture 190; equality 64; family 63; of heritage 201, 204, 206; international 1, 66, 237, 239–240; judicial 281; legal 33, 276, 279, 284, 312; privacy 69; for refugees 146, 147, 298; of rights 68, 73, 91, 188, 192, 195, 207, 275, 299; secure 142–143, 147–149; for women 80, 327, 331–332, 335
psychiatrists 66, 93
psychiatry 241

psychoactive: plants 276, 311; properties 278
psychologist 66, 93, 54
psychology 6, 116, 191, 197, 241
"public figure" 116–117, 120, 161–162, 261
public policy 87, 170, 266, 292, 314–316
punishment xiv, 93, 117, 125, 299

qazis 310, 313
quaiwu 292
quan xin 291

race 2–3, 5, 39, 47–59, 88–89, 134, 235, 290, 295
racial group 50, 88–90, 94
racial profiling 47, 55–56, 134
"racial" purity 50
racialisation 2, 47, 51–54, 57, 59
racism 2, 47–49, 51–52, 54–58, 100, 116, 219; anti- 217; black 40; counter 59; systemic 48; white 34
radicalisation 86, 153
rationality 32, 279, 284–285
recognition 3, 27, 58, 62–65, 107, 135, 156, 162, 179, 204, 206, 209, 220, 241, 250, 266, 277, 279–281, 283, 291, 302–303, 305, 310, 315, 325, 330–331; *see also* non-recognition
reconciliation 106, 217, 222–224, 313, 329–331, 333, 335
reflexivity 21
refoulement 147
refugee 23, 47, 52–54, 56, 68, 86–87, 141–143, 146–147, 215–216, 219–220, 235–236; Convention 141, 143, 146–147, 149, 290; status 23, 66, 68, 81; *see also* protection; refugee laws
refugee laws 3, 141
reification of cultures 13, 18
relationship 5–6, 13–14, 18, 21, 23, 25, 36, 40, 48, 51, 63–64, 67, 87, 93, 100, 151, 156, 160, 166–167, 169, 190, 197, 202, 211, 217, 219, 221, 242, 245, 247–248, 250–251, 253, 267, 270, 276, 279, 281, 288–290, 292, 306, 309, 311, 313–314, 322, 333, 342
relativism: cultural 191, 197
religion 52, 59, 77, 87–89, 91–92, 113, 117, 149, 152–153, 157, 168, 170, 190, 192–194, 196, 219, 235, 272, 278, 288–290, 295–297, 299, 312, 316, 340; Catholic 296; Hindu 91; Muslim 168; Sikh 88
religious law 94, 167
religious leaders *see* leaders
remuneration 234, 239
repatriation 36, 40
reputation 20–21, 161, 234, 236, 291
researchers 21–22, 28, 74, 127, 151, 221, 245–248, 250, 253
residence permits 235
resilience 101, 106, 324
respect 4, 21, 23, 28, 63, 66, 68, 94, 117, 120, 133–136, 138–139, 146, 162, 170, 190, 202, 210, 246, 249, 252, 259, 271, 280, 303–304, 307
responsibility 20–21, 32, 36, 75, 99, 112, 114, 118–120, 155, 184, 249, 266, 268, 301–302, 326
responsible 69, 93, 118, 120, 127, 142, 145, 183, 196, 240; culturally xiv
restorative justice *see* justice
revitalization 99–100, 103–107
Revolutionary United Front (RUF) 181
Rhodes Must Fall 41
rights xv–xvi, 1, 6–7, 14, 16, 21–23, 25, 27, 38–39, 49–50, 57–58, 62–64, 75, 79, 88, 90–92, 94, 96, 100, 104, 106–107, 117, 142–143, 146, 161–162, 170, 189–193, 195–197, 203–204, 207, 211, 238, 247, 249–252, 267–268, 270–273, 279, 281–282, 284, 288–289, 297–299, 302–303, 306, 319–320, 323–324, 326, 332, 334–335; animal 283; ascertainment 2, 11–12, 14; civil 54, 64; cultural 35–36, 41, 190–191, 195, 325; of First Nations 37; human 1–4, 6, 13, 18, 36, 38–39, 64, 68, 73, 80–81, 90, 101, 117–118, 144, 163, 188–195, 197–198, 208, 211, 222, 235, 265, 267, 270–273, 275, 280, 297, 302–303, 329–330, 335; migrant 302; personal 112, 116–117, 120, 323; political 100, 158, 261, 304, 331; religious 192–193, 277, 279; title 25, 251–252; traditional 248, 251; of women 83, 313, 319, 322–323, 327, 329–332, 334–336; *see also* gender; Indigenous; land; minorities
ritual 88, 223, 270, 276, 281; *see also* hunting
Roman Catholic church 63
ruju' 331–332
Rwanda 177, 183–184
Rwandan 183, 185; witnesses 185–186; *see also* genocide
Ryukyuan 99, 104

sacrifice 152, 155, 276
safety 22, 91–92, 222, 291

Salafism 24
same-sex: civil partnership 64; intimacy 292; marriage 63–64; relationships 67
Samis 191
sangomas 128
Sanskrit 314–315
Saudi Arabia 144, 147
Sawhoyamaxa 188–189, 196
scholars xiv–xv, 6, 18, 32, 51, 57–58, 98, 110, 114, 136, 138, 148, 168, 179, 218, 252, 259, 263, 275, 298, 310, 312–315, 339
security 67, 145, 222, 235; economic 297; national 27
self-conscious 89
self-definition 63
self-determination 106, 203–204, 207, 211, 277
self-perceptions 34
self-rule 32–33
semiology 115
sex 38, 63–65, 67–68, 292, 294; *see also* same-sex
sexual orientation 38, 66–67, 292–293, 299
sexuality 2, 13, 34, 38, 62–64, 66, 69, 235, 292, 303
Shanghai 289, 292–293
Sharia 323; court 310; law 295, 313
Shia 168
Shiite 152, 155
Shiva 311–312
Sierra Leone 74, 177, 179, 181–182, 186
Sierra Leonean 124, 182; army 181; Civil War 179, 181–182; government 181; society 182, 185
Sikh 88–90, 94; beliefs 90; practices 89; religion 88; tradition 90; turbans 94, 96
Sikhism 87
Singapore 38
skills 1, 4, 20, 27, 94, 110, 113–115, 139, 184, 220, 231, 233, 239, 250, 257, 259, 331
slave 39, 48–49, 58
slavery 33, 40, 48–49, 182
Slovak 161–162
Slovakia 159–162
Slovenia 135
social change xvi, 331
social context 4
social experts 324
social group 13–14, 52, 62, 75, 178, 184, 234–235, 238, 246, 290, 294, 301, 329
social justice *see* justice
social life 75, 339
social practices *see* practices
social sciences 1, 6, 15, 22, 34, 115, 127, 156, 159, 161, 163, 225, 237, 244–245, 276, 306, 309
social scientists 2, 7, 11–13, 16, 21, 27, 48, 51, 53, 56, 59, 142, 151, 178, 221, 234, 237, 239, 253, 339
social workers 1, 87, 115
Society for Applied Anthropologists 21
sociocultural xiv, 99, 102, 106, 197, 310
socio-legal studies 3
sociolinguists 233
sociology 6, 115, 191, 197
sodomy law 38, 41
Somali 78–79, 219–220
Somalia 74, 78–79, 219
"sorcerer" 124
sorcery 93, 123–125
South Africa 38–39, 41, 135, 265–269, 273
South African 40, 269; Constitution 273; courts 265–267, 272; law 265–266; Suppression of Witchcraft Act 128
South Asia 4, 298, 309–310
South Asian 309, 315
South Korea 288, 291
Southeast Asians 50
sovereignty 26, 33–34, 36, 101, 202–203, 209, 249, 283
Spain 233, 278
Special Court for Sierra Leone (SCSL) 177, 179, 181, 183–184, 186
specialist knowledge *see* knowledge
specialised knowledge *see* knowledge
speech 101, 116, 128–129, 153, 155, 157–159, 164, 235, 261; extreme 3, 158–160, 162–164; free 159, 161; hate 111, 113–116, 118–120; provocative 24
spirits 179–181, 185, 270
spiritual 101, 180–181, 185, 196, 206, 249, 254, 280, 282, 295, 312
spiritualism 179–181
Sri Lanka 38
stereotype 75–77, 79–81, 83, 113, 143, 172, 303
stigma 38, 322
stigmatisation 13, 18, 293
succah 92
Sudan 147, 181
suicide 102–103, 310
sukinshippu 105
Sumatra 295
supernatural 93, 185
Suriname 280
Swati custom 269; law 269; marriage 268
Sweden 78, 80, 233
Swedish 78–79

symbols 39, 41, 193, 290; colonial 33, 39, 41; neo-Nazi 162; political 221; religious 193
Syria 23, 152, 319, 321–323, 326–327
Syrian 152, 323

Taba commune 183
talak 330, 332
Tamil 315
Tamil Indian 288, 294
Tanzania 38, 123, 125–126, 128–129
Tanzanian 126
technical expert xiv
Telugu 315
territory 25, 80, 90, 189, 195, 207, 278–281; ancestral 188, 196; Northern 249; traditional 278
terror 27
terrorism 3, 24, 151–152, 153, 155–156, 234, 237–238
terrorism investigation *see* investigation
terrorist 151–152, 154–157; acts 152–154, 157; attacks 151; group 152, 157; organisation 152; *see also* ideology
testimony xiv, 127–129, 143–144, 160, 163, 179–186, 195, 267, 269, 281, 284; anthropological 281; ethnographic 280; oral 93, 146; written 196, 277; *see also* expert testimonies
Thailand 74
theoretical xv, 1, 3–6, 12, 14, 17, 33–34, 47–48, 51–53, 62–63, 74, 247, 290, 326
third-party 26, 192, 194, 217
Third World Liberation Front 58
tolerance 104, 107
Torres Strait Islanders 101–102
torture 80, 126, 144, 154–155, 222
totalitarianism 68
Traditional Aboriginal Owners 208–209
traditional beliefs *see* belief
traditional communities 178, 265–268
traditional leaders *see* leaders
traditions 32–33, 35, 53, 126, 170–171, 174, 190, 202, 206–207, 223, 248, 276, 282, 311, 313, 315, 329; cultural 76, 89–90, 189, 246, 253; ecological 275–276; legal 23, 167, 179, 279; linguistic 314; literary 314–315; oral 272, 284; religious 92
training 5, 23, 54–56, 59, 65, 92, 142–143, 159–160, 163, 205, 220–221, 237–239, 241, 259, 263, 282, 292, 326, 335, 340
transgender 40, 63, 68–69, 292
transitional justice *see* justice
translators 17, 185, 233, 310
transparency 21, 263
transsexualism 65
treatment 3, 65, 68, 133–136, 138–139, 143, 159, 238, 284, 293, 295, 330, 333, 335; equal 66–67, 135, 178; ill- 80, 146
trial 6, 24, 79, 93, 96, 112, 123–124, 128, 135, 155–157, 159, 161–164, 177, 179–183, 185–186, 222, 236, 240, 242, 246, 258–259, 262–263, 270, 302–304
tribal 37, 128, 194, 203, 234, 269, 278, 283, 302–305, 320, 325
tribe 24, 53, 275, 282–283
Trinidad and Tobago 38, 135
truth xiv, 23, 149, 157, 163, 183–184, 222–223, 236, 302; cultural xiv; legal 301–302, 309, 315
Truth and Reconciliation Commission (TRC) 223
Tsonga 270–272
turban 88–90, 96
Turkish 153
Turkish-Kurdish 154
Tutsis 183
typification 73–75, 77–79, 81–83

Uganda 179–180, 185, 215–216, 222–224
Ugandan 180, 224
ukumekeza 268–269
'ulama 336
ulemas 313
UN 52, 56, 66, 103, 137, 147, 189–194, 201, 203–204, 207, 210, 212, 290, 311
UN Convention on Refugees (Refugee Convention) 52, 56, 141, 144, 146–147, 149, 290
UN Human Rights Committee 189
UN Human Rights Council 191
UN Special Rapporteur on the Rights of Indigenous People 203
understanding 4–5, 16, 47–48, 50, 52, 54, 56, 58, 74–75, 91–92, 95, 98, 106, 112–113, 119, 124, 133–139, 152, 156–157, 162, 182–184, 195, 198, 204–206, 208, 211, 217, 219–222, 225, 231, 245, 247–248, 253, 263, 285, 288, 290, 298, 301, 305–306, 309, 320, 322, 327, 335, 341
UNESCO 98, 124, 190, 201, 204–206, 208, 210
UNHCR Guideline on International Protection 66
United Arab Emirates 321, 325
United Kingdom 5, 16, 38–39, 41, 62–71, 76, 87–92, 94, 96, 141–142, 145,

147–148, 158, 160, 168–169, 192, 231, 233, 235–237, 239–242
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 203, 206, 208, 210–211
United States 4, 6, 16, 27–28, 38–39, 41, 47–50, 52, 54, 57, 87, 92, 106, 134, 136, 141–142, 144–145, 147, 216–217, 219, 221–222, 277–278, 282, 284, 288–289, 291–296
universalism 197
universality 184
unwritten laws 265
utu 223

value xv, 4–6, 13, 20, 25, 27, 49–50, 89, 100, 107, 117, 119, 133, 139, 156, 159, 161–162, 164, 170, 174, 178, 184, 197, 201–202, 204–206, 209, 240–241, 247, 265, 267, 269, 271, 276, 297–298, 302–304, 310, 313, 320–321, 329, 335; cultural xvi, 103, 297, 303, 311, 342; democratic 194; Islamic 295; religious 223; spiritual 196, 282
Vedas 311
veil 191–194, 197
victims 55, 58, 75, 80–81, 125, 137, 180, 182, 224, 252, 288, 293
Vietnam 53–54, 222
Vietnamese 53–54, 56, 222, 295; *see also* Chinese
Vietnamese American community 52
violation 26, 39, 75, 80, 167, 172–174, 181–183, 189, 192–193, 196, 207–208, 280, 292
violence XV, 26, 48, 112, 116, 126, 128, 144, 154–156, 159, 181, 216–219, 221–223, 252, 296, 324; against albinos 126; against women 75; domestic 88, 154, 157, 293, 331; sexual xiv, 182–183, 323; structural 216–217, 220, 224
voices 4, 7, 12, 14, 35, 56, 117, 133–139, 162, 186, 203, 210, 218, 224, 341
vulnerable 161, 262; groups 13, 143, 234; interlocutors 21; litigants 134, 137; members 272; persons 125

war 27, 144–147, 152, 179–182, 185–186, 215, 221–222, 237, 260–261, 263, 278–279, 314, 322–323; civil 179, 181–182, 322; global 27
Warsaw 116
Washington State 282
wealth 36, 50, 57, 128, 283, 314
welfare 22, 25, 77, 207, 291, 305
wellbeing 98–107, 116, 202, 291
West 32–33, 203, 206, 297
western 94, 136, 180, 212, 278, 289, 297, 303, 310, 314; anti- 33; Australia 26, 251; countries 79; courts 79; cultures 136; epistemology 275; ideas 34, 313; law 184; legislation 74; non- 81, 206; perspectives 205–206; rules 265, 272; self-perceptions 34; societies 87, 96; traditions 35
white 50, 219; Americans 49; anti- 33; collar jobs 100; Elder 250; fears 49; men 39, 55; non- 58; people 54; person 50; racism 34; settlement 26; supremacy 48, 56; woman 54, 56
witch 15, 124–129; hunters 128; *see also* doctor
witchcraft xiv, 93, 123–129, 180
witchcraft trials 124, 128
witness 22–24, 49, 71, 75, 93, 127, 129, 134, 167, 181–182, 184–186, 192, 194–195, 197, 263, 267, 269, 273; anthropological 90; *see also* expert witness
world heritage *see* heritage
World Health Organization (WHO) 65, 73–74, 77
World Heritage Committee (WHC) 201, 204–210
World Heritage Indigenous Peoples Council of Experts (WHIPCOE) 209, 211
world heritage law 204
World Heritage List 201, 204–205, 207–208, 210
written report 141–142, 149, 182, 236, 258

Xákmok Kásek 188–189, 196
xenophobic 87, 116
xie jiao 290

Yakye Axa 188–189, 195–196, 280
Yiddish 170
Yogyakarta 334
Yogyakarta Principles 38

Zimbabwe 92–93