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Cultural Expertise, Law, and Rights A Comprehensive Guide. Introduction

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► **To cite this version:**

Livia Holden. Cultural Expertise, Law, and Rights A Comprehensive Guide. Introduction. Livia Holden. Cultural Expertise, Law, and Rights: A Comprehensive Guide, Routledge, pp.1 - 8, 2023, 9781032498607. 10.4324/9781003167075-1 . hal-04216216

HAL Id: hal-04216216

<https://hal.science/hal-04216216v1>

Submitted on 23 Sep 2023

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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

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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 to account 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 inter-professional 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.

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